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PROGRESS OF THE LAW, 1918-19

THIS is the first of a series of articles, written by professors in the Harvard Law School, in which it is intended to point out the most notable decisions, books, articles, and statutes during the past year which affect or explain the law in the topic under discussion. These articles are not intended to be collections of all authorities on the subject, but simply of such authorities, coming under the notice of the author, as seem to him to mark some progress in the law. The next paper in the series will appear in the December number.

THE CONFLICT OF LAWS

THE NATURE, ORIGIN, AND EXTENT OF LAW

I. An interesting decision throwing light upon the origin of law is *Panama Railroad Co. v. Bosse*.¹ This was an action brought in the District Court of the Canal Zone, and eventually brought by appeal to the Supreme Court of the United States. The question of law involved was whether under the law of the Canal Zone in 1916 a master was liable for his servant's negligent tort. A presidential proclamation in 1904 kept in force "the laws of the land, with which the inhabitants are familiar," until altered or annulled by the Commission. In 1912, by presidential proclamation, all the lands within the limits of the Canal Zone were declared necessary for the construction and operation of the canal, and in 1916 there were no inhabitants except employees of the company and persons licensed to do business there.

¹ 249 U. S. 41, 39 Sup. Ct. Rep. 211 (1919).

The court held, on these facts, that while the Civil Code of Colombia was in force in the Zone, the interpretation of it must be governed by common-law principles; following decisions to that effect in the Zone, beginning with *Kung Ching Chong v. Wing Chong*.² Mr. Justice Holmes observed that

"it is not necessary to dwell upon the drift toward the common-law doctrine noticeable in some civil-law jurisdictions at least, or to consider how far we should go if the language of the Civil Code were clearer than it is. It is enough that the language is not necessarily inconsistent with the common-law rule."

The court here is bowing to the inevitable. The experience of the Zone is that of New York, where the earlier Dutch law was overwhelmed by the English invasion; of Louisiana, where the French law gave way before an American settlement; and of California, New Mexico, and Texas, where the Spanish law yielded. Nothing but a considerable and continuing body of inhabitants, as in Quebec and in South Africa, has been able to maintain an older system of law against a large immigration of English or Americans. The Code may remain; the vaster body of unwritten law tends almost irresistibly toward the common law.

II. Whose law is administered in the consular courts in the "Treaty Ports" of China or any country of "the Capitulations," so called? This question has exercised the English and American courts for many years. In *Tootal's Trusts*,³ Chitty, J., said (or was supposed to have said — as a matter of fact his expressed opinion was quite the opposite), that not Chinese but English law applied to an Englishman doing business in Shanghai. This view was expressed neatly and tersely by Warrington, L. J., in *Casdagli v. Casdagli*, in the Court of Appeal:⁴

"I am of opinion that the Consular Court in Egypt is one of the King's Courts, that its jurisdiction is derived from the King and not from the ruler of Egypt, and that the law administered therein is strictly the law of England, and is not to be regarded as a branch of the law of Egypt."

The opposite view has been vigorously expressed in America by Judge Spear in *Mather v. Cunningham*:⁵

² 2 Can. Zone Sup. Ct. 25, 30 (1910).

³ 23 Ch. D. 532 (1883).

⁴ [1918] P. 89, 103.

⁵ 105 Me. 326, 338, 74 Atl 809 (1909).

"Whatever laws may have been extended by Congress to the Province of Shanghai are operative, not upon American soil, but upon the territory of the Chinese Empire. How do these laws reach there? By treaty, permission of the Emperor. . . . The source of the law was the Emperor."

The same view had been expressed by Professor Huberich in an article in the *LAW QUARTERLY REVIEW*.⁶ This view was taken, in the Court of Appeal in the case of *Casdagli v. Casdagli*,⁷ by Scrutton, L. J., in his dissenting opinion:

"Can it make any difference whether the sovereign of the domicil administers the law directly or allows another sovereign by grant to exercise part of his sovereignty by administering such law as he pleases in Courts which the sovereign of the domicil allows to exist in his territory? The law appears to be still the law of the domicil."

The House of Lords has now adopted the view of the American courts and of the Lord Justice Scrutton.⁸ The view of the court was expressed most neatly by Lord Finlay, L. C.:

"In Egypt it is part of the law of the governing community or supreme power, — in other words, it is part of the law of Egypt that English residents are governed by English law."

The acceptance by the House of Lords of the doctrine that the law administered in the consular courts is so administered because it is part of the territorial law of the sovereign, means its universal acceptance. Thus a source of difficulty in establishing the domicil of persons residing in the treaty ports is removed.

DOMICIL

I. The case of *Casdagli v. Casdagli*,⁹ just cited on another point, is equally important as settling a disputed question in the law of domicil. English courts for more than a century had been almost denying the possibility of an Englishman becoming domiciled in China, Egypt, or any country of so different a civilization. In *Maltass v. Maltass*¹⁰ Dr. Lushington evidently doubted the possibility of a British subject becoming domiciled in Turkey, though

⁶ 24 L. QUART. REV. 440, 444.

⁷ [1918] P. 89, 110.

⁸ *Casdagli v. Casdagli*, [1919] A. C. 145.

⁹ *Ibid.*

¹⁰ 1 Rob. Eccl. 67 (1844).

subjects of other European countries have been found to have a domicile in Constantinople.¹¹ In *Tootal's Trusts*,¹² Chitty, J., said that "every presumption" was against an Englishman acquiring a domicile in Shanghai. He was also of opinion that a Chinese domicile in Shanghai carried with it the imposition of the native Chinese law as the domiciliary law: that there is no such thing as an "Anglo-Chinese" domicile. This doctrine was approved by the Privy Council in *Abd-ul-Nessih v. Farra*,¹³ where the country in question was Egypt. Meanwhile the American courts had been taking the opposite view; finding domicile in a treaty port on the same evidence that would have fixed a domicile anywhere. Judge Wilfley in the American Consular Court for China found an American to have died domiciled in Shanghai,¹⁴ disapproving *Tootal's Trusts*. This decision was followed by the Supreme Judicial Court of Maine in *Mather v. Cunningham*,¹⁵ and is now adopted by the House of Lords.

The doctrine has been the subject of much comment. Professor Huberich's article has already been referred to. The decision of the Court of Appeal in *Casdagli v. Casdagli* was adversely criticized by Professor Dickinson in a judicious article in the MICHIGAN LAW REVIEW.¹⁶ The decision of the House of Lords has met with much comment, favorable in general,¹⁷ but in at least one case rather adverse.¹⁸

II. Three decisions during the past year have involved the right of an emancipated minor to acquire a new domicile. In *Delaware, L. & W. R. R. v. Petrowsky*¹⁹ the plaintiff's father lived in Pennsylvania, where the plaintiff was employed in a mine; the plaintiff having been injured in the mine, the father said to him, "I cannot support you any longer, so you can go wherever you like." The plaintiff then went to live in New York, and brought this action in the federal court as a citizen of that state. The court held that

¹¹ *Nugent v. Vetzera*, L. R. 2 Eq. 704 (1866).

¹² 23 Ch. D. 532 (1883).

¹³ 13 A. C. 431 (1888).

¹⁴ *In re Allen*, 1 Am. J. Int. L. 1029.

¹⁵ 105 Me. 326, 74 Atl. 809 (1909).

¹⁶ 17 MICH. L. REV. 437.

¹⁷ 32 HARV. L. REV. 432; 17 MICH. L. REV. 694; 28 YALE L. J. 810.

¹⁸ 19 COL. L. REV. 243.

¹⁹ 250 Fed. 554 (1918).

an emancipated son cannot as such acquire a new domicile.²⁰ In *Gulf C. & S. F. Ry. v. Lemons*²¹ the plaintiff minor's father "had given him permission to go and make a living for himself," and he went elsewhere and joined with his brother in carrying on business. This court also held that an emancipated child could not acquire a domicile of choice for himself.

On the other hand, another federal court in *Bjornquist v. Boston & A. R. R.*²² took the opposite view of the power of an emancipated minor. The plaintiff, while his father was domiciled in Massachusetts, was injured, as was alleged, by the fault of the defendant. His parents died, and he went to live with his aunt in Maine; he then, still a minor, brought suit in the federal court in Maine as a citizen of that state. The court held that the doctrine of natural guardianship²³ had never been extended to the case of an aunt, but that the circumstances were tantamount to an emancipation, and that an emancipated infant who has attained years of discretion may acquire a new domicile for himself.²⁴

These decisions must have the unfortunate effect of confusing the law, which had previously seemed clear upon the point. The decisions had heretofore been unanimous to the effect that an emancipated infant may change his domicile, if he has arrived at years of discretion.²⁵ In view of this authority, it may be hoped that the two decisions first cited will not be followed.

TAXATION

During the year under discussion the author has already published two articles on the subject: "The Jurisdiction to Tax,"²⁶ and "The Situs of Things."²⁷

²⁰ See this case commented on in 4 CORNELL L. QUART. 62.

²¹ 206 S. W. (Texas) 75 (1918).

²² 250 Fed. 929 (1918).

²³ See *Lamar v. Micou*, 114 U. S. 218, 5 Sup. Ct. Rep. 857 (1885).

²⁴ See this case commented on, 32 HARV. L. REV. 175.

²⁵ *Woolridge v. McKenna*, 8 Fed. 650 (1881) (*semble*); *Lewis v. Missouri, K. & T. Ry.*, 82 Kan. 351, 108 Pac. 95 (1910); *Lubec v. Eastport*, 3 Me. 220 (1824) (though under a later statute he cannot acquire a pauper settlement while a minor: *Thomaston v. Greenbush*, 106 Me. 242, 76 Atl. 690 (1909)); *Russell v. State*, 62 Neb. 512, 87 N. W. 344 (1901); *Sherburne v. Hartland*, 37 Vt. 528 (1865); *South Burlington v. Cambridge*, 77 Vt. 289, 59 Atl. 1013 (1905) (*semble*); *Rex v. Everton*, 1 East, 526 (1801).

²⁶ 32 HARV. L. REV. 587.

²⁷ 28 YALE L. J. 525.

I. The nature of a tax, as a revenue duty to the crown rather than an ordinary debt, has been squarely brought in issue during the year, and the proper conclusion drawn, — that the state which imposes a tax cannot bring suit in another state to recover the amount of it.²⁸

II. The taxation of interstate rolling stock of railroads or car companies has always been a matter of difficulty. Early attempts to tax all cars which happened to be within the state on taxing day failed, because each car so taxed in transit was only temporarily within the state and therefore not subject to taxation.²⁹ But the device of taxing some average number of cars, or taxing the cars employed within the state during the year at some fair valuation, soon grew up, and was finally upheld by the Supreme Court of the United States in the case of *Pullman's Car Co. v. Pennsylvania*.³⁰ There the fair valuation was reached by taxing that proportion of the value of all property of the company employed in its business which the mileage of the cars within the state bore to the whole mileage. This method of taxing a fair proportion of the property of such a corporation, based on a reasonable proportion, has been universally followed.

This method was employed by Georgia to estimate that proper proportion of total valuation of the cars of the Union Tank Line which was subject to assessment in Georgia. It was found that the mileage used in Georgia formed between two and three per cent of the total mileage, and that proportion of the total value of the cars, which came to about two hundred and ninety-one thousand dollars, was assessed. The company claimed that the average number of cars at all times within the state was fifty-seven, valued at about forty-seven thousand dollars. The Supreme Court of the United States held the assessment illegal, on the ground that the appraisal was made "according to an arbitrary method which produced results wholly unreasonable," and that it therefore would deprive the company of property without due process of law.³¹ Justices Pitney, Brandeis, and Clarke dissented. In reaching their

²⁸ *Colorado v. Harbeck*, 106 N. Y. Misc. 319, 175 N. Y. Supp. 685 (1919).

²⁹ *Pacific R. R. v. Cass County*, 53 Mo. 17 (1873). See *Hays v. Pacific M. S. S. Co.*, 17 How. (U. S.) 596 (1854).

³⁰ 141 U. S. 18, 11 Sup. Ct. Rep. 876 (1891).

³¹ *Union Tank Line v. Wright*, 39 Sup. Ct. Rep. 276 (1919).

result, the court overruled what they were pleased to call a *dictum* in the Pullman case, in which the court approved as reasonable the method of taxation there adopted.

It is a serious thing to overthrow a method of taxation approved for so many years by the courts, and to establish a new theory as law. The view of the majority in this case appeared to be that no statutory method of assessing the tax could be valid unless it led to a valuation of property at pretty nearly what the court regarded as its true value. The rule adopted here, the court said, had no necessary relation to the true value. This is certainly too strong a statement. The alternative method suggested, that of taking the average number of cars within the state at their value, has two objections: the assessors would be absolutely dependent for their facts upon the company to be assessed, as the minority point out, since the keeping of records of the cars by the railroad is the only practicable method of finding this average; and that important element of value, the use of the cars as part of a going concern, would be omitted. To assess according to proportion of car mileage would be perhaps the fairest method, but it would be open to the former objection.

It is clear that in a case of this sort the court does not put itself in the place of the assessors, and place its own value upon the property; it has to declare only whether the method of assessment prescribed by statute was a reasonable one. It is submitted that in view of the certainty, publicity, and simplicity of this method, and of its having been approved by the court in 1891 and practiced for twenty-eight years, the court might in 1919 have found it still reasonable.

The result of the case is, apparently, that in assessing the local value of property passing between the states the local authorities will be restricted to the one method which yields a theoretically exact result.³²

III. In the case of a trustee of intangible personal property, the situs of the property is held to be the domicile of the trustee.³³ The case of a guardian is different; for the ward, not the guardian, is

³² Comments on this decision may be found in 19 COL. L. REV. 334; 28 YALE L. J. 802.

³³ *Lowry v. Los Angeles*, 27 Cal. App. 307, 175 Pac. 702 (1918); *Davis v. Macy*, 124 Mass. 193 (1878); *Matter of Newcomb*, 71 App. Div. 606, 76 N. Y. Supp. 222 (1902); *affd.* 172 N. Y. 608, 64 N. E. 1123 (1902); 32 HARV. L. REV. 619.

owner of the property. Decisions are conflicting as to whether the property shall be taxed at the domicil of the guardian, the domicil of the ward, or the place of appointment.³⁴ Since a guardian of the property may be appointed in every state where tangible property is found, it should be clear that such property continues taxable in its own state; but intangible personal property, which is ordinarily taxable only at the domicil of the owner, would seem to be properly taxable at the ward's domicil.

In *Taylor v. Commonwealth*³⁵ promissory notes belonging to a ward were taxed as intangible property at his domicil, though the guardian was a nonresident of the state. This was put upon the ground that the notes were intangible; but it is clear that promissory notes are now regarded as tangible for the purpose of taxation.³⁶ In this case the notes were as a matter of fact held at the ward's domicil, being in the hands of the guardian's attorney at that place. The decision is therefore entirely in accordance with the general principles of taxation.

IV. The right of a state to levy an income tax is not yet settled by authority, and any decision upon the point is therefore of interest. In *Shaffer v. Howard*³⁷ such a tax was levied in Oklahoma on income from an oil-well there situated, received by the owner of the lease in Illinois.³⁸ In *Maguire v. Tax Commissioner*³⁹ it was held that Massachusetts might tax income received by a resident from securities held in trust for her by a Pennsylvania trustee and not taxable in that state. The state statute expressly exempted income from property which had been taxed elsewhere. In *Williams v. Singer*⁴⁰ England was not allowed to tax the income from foreign securities held by English trustees, where the income was paid directly to the foreign beneficiaries, not going through the hands of the trustees. On the other hand, where the securities were in the hands of a local agent, who collected the income and forwarded it to the foreign owner, the Supreme Court of the United States allowed the tax.⁴¹

³⁴ 32 HARV. L. REV. 622.

³⁵ 98 S. E. (Va.) 5 (1919).

³⁶ *Austin v. Great Southern L. I. Co.* 211 S. W. (Texas Civ. App.) 482 (1919).

³⁷ 250 Fed. 873 (1918).

³⁸ Comment on this case in 32 HARV. L. REV. 168.

³⁹ 230 Mass. 503, 120 N. E. 162 (1918).

⁴⁰ [1918] 2 K. B. 749.

⁴¹ *De Ganay v. Lederer*, 39 Sup. Ct. Rep. 524 (1919).

JURISDICTION OF COURTS

I. A British vessel and a Norwegian vessel collided in an Algerian harbor, and the master of the British vessel brought action in the Algerian court for damages, and obtained, according to the French law there prevailing, a "protective seizure." The action was not *in rem*; the seizure was like an attachment, and was dissolved upon giving a bond. The Norwegian vessel having come into a Maine port, it was libeled by the owner of the English vessel in the District Court. The court held that the pendency of the French action did not affect its jurisdiction, and that the "general maritime law of the United States" gave a lien in the case which the court might enforce.⁴²

It has been held by the Supreme Court of the United States that the law applicable to a collision in territorial waters is the local law, not the "general maritime law" of the forum.⁴³ The intimation that the United States court could apply its idea of maritime law to the transaction, as against the local law, is therefore rather English⁴⁴ than American. But though the reason given by the court is not in accordance with our own precedents, the decision itself seems sound. The jurisdiction to act is unquestioned; a cause of action was no doubt created by the law of the place of collision; and if it pleases our courts, giving a remedy according to the foral procedure for a foreign cause of action, to apply to the cause of action its accustomed name of "maritime lien," no one can complain. If indeed the vessel had been sold since the collision it might have been necessary to revise the nomenclature.

II. The subject of the "jurisdiction over foreign corporation or individual doing business within a state" has received much attention during the past year. A brilliant book by Gerard Carl Henderson, Esq.,⁴⁵ brought the matter to the attention of lawyers; and in a recent article⁴⁶ Professor Scott has re-examined the subject. There seem to be three theories upon which a personal action

⁴² The Kongsli, 252 Fed. 267 (1918); comment in 32 HARV. L. REV. 574.

⁴³ Smith v. Condry, 1 How. (U. S.) 28 (1843).

⁴⁴ The Halley, L. R. 2 P. C. 193 (1868).

⁴⁵ THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW.

⁴⁶ "Jurisdiction over Nonresidents doing Business within a State," 32 HARV. L. REV. 871.

against a foreign corporation or an absent individual who has done business within a state may be rested.

First: The theory that such a corporation or individual is *found* where his agent regularly and in the course of business acts for him. This was the earliest theory developed to account for actions against a foreign corporation, and has several times been accepted by judges of the Supreme Court of the United States. That it is still active is shown by several late decisions based upon it.⁴⁷

Second: That a foreign corporation may be allowed by statute to do business within the state only if it consents to be sued, and the doing business is the expression of such consent. This is therefore an instance of jurisdiction by consent. This consent has in course of time come pretty near to being fictitious; it is said to be *presumed*; but in theory the consent of the corporation is by the prevailing view today regarded as the basis of jurisdiction.⁴⁸

Third: A theory has lately been suggested by Judge Learned Hand,⁴⁹ which may be formulated as follows: By causing a particular act to be done within a state, the corporation submits the act to the provisions of the state law with respect to liabilities growing out of the act. One such liability may (if so provided by statute) be the obligation to submit all litigation growing out of the act to the courts of the state.⁵⁰

There can be no doubt that the first theory is contrary to the principles of law, and in particular to the doctrine that a corporation, being a mere creature of law, cannot exist, as such, outside the state of charter. If indeed we follow Mr. Henderson in his desire to assimilate our corporation to the European "Society," and allow it to stand in justice as a natural associated person, irrespective of incorporation, the difficulty would disappear (though no one has yet reckoned up the other difficulties which might be created); but until we are allowed to deal with a partnership as an existing entity, it seems that the benefits of this theory are barred to us. The second theory, that of consent to jurisdiction expressed

⁴⁷ *Golden v. Connersville Wheel Co.*, 252 Fed. 904 (1918); *Empire Fuel Co. v. Lyons*, 257 Fed. 890 (1919).

⁴⁸ *Flinn v. Western M. L. Assoc.*, 171 N. W. (Ia.) 711 (1919); *Citizens' Nat. Bank v. Consolidated Glass Co.*, 97 S. E. (W. Va.) 689 (1919).

⁴⁹ *Smolik v. Philadelphia & R. C. Co.*, 222 Fed. 148 (1915).

⁵⁰ These theories are expounded by Henderson, *op. cit.*, 77-100; Scott, *op. cit.*, 879-884.

by action, must still be regarded as the orthodox theory, though many late decisions are no doubt difficult to reconcile with it. Judge Hand's theory of forced submission to jurisdiction may ultimately prevail; but hitherto the jurisdiction of a court over foreigners has been jealously guarded, and it has been expressly held that the fact that an act has been done within a state does not give that state jurisdiction to render a judgment against the absent doer of the act.⁵¹

III. This being the confused state of the authorities as to corporations, what is the power of a state to exercise jurisdiction over an absent individual who has carried on business within the state? On this point there seems to be no difference of opinion in the decisions. The matter has been authoritatively settled by the Supreme Court of the United States in *Flexner v. Farson*.⁵² In that case it appeared that a partnership containing Illinois partners was doing business in Kentucky through a resident partner. A Kentucky statute authorized service against absent partners who had done business in the state, by serving on the resident agent. A suit had been brought against the partnership in Kentucky, service made as directed in the statute, and judgment rendered. Suit was brought on the judgment in Illinois and the courts in that state refused to recognize the judgment. On appeal to the Supreme Court of the United States the court upheld the Illinois action.⁵³ The decisions allowing action against foreign corporations were urged as authorities; but Mr. Justice Holmes said:

"The consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. . . . The State had no power to exclude the defendants, and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void."

This decision is criticized, and an attempt made to limit its operation, by Professor Scott,⁵⁴ who appears to accept Judge Hand's theory of jurisdiction over corporations. And indeed upon that

⁵¹ *Sirdar Gurdayal Singh v. Rajah of Faridkote*, [1894] A. C. 670.

⁵² 248 U. S. 289, 39 Sup. Ct. Rep. 97 (1919).

⁵³ A similar decision was reached in *Knox v. Wagner*, 209 S. W. (Tenn.) 638 (1919).

⁵⁴ *Op. cit.* 884-891.

theory there can be no just basis for a distinction between corporations and individuals doing business within the state. It seems that the only theory upon which a distinction may be made is the theory of consent, upon which Mr. Justice Holmes' opinion is based.⁵⁵

IV. The subject of "Jurisdiction to Annul a Marriage" has been illuminated by an article by Professor Herbert F. Goodrich.⁵⁶ He finds an irreconcilable conflict in the decisions, both English and American, and makes the interesting suggestion that "nullity of marriage" be abolished, and that all actions to free parties from a marriage, actual or alleged, be actions for divorce.

Theoretically, the law that created the marriage should alone have power to declare effectively and *in rem* that it never existed. Practically the courts are confused in the matter. In *Bays v. Bays*,⁵⁷ where New York parties had been married in Pennsylvania, the court avoided the difficulty:

"The plaintiff has resorted to the courts of this state to determine his rights, and I shall hold that under the laws of this state he has contracted a valid marriage."

V. The jurisdiction to grant judicial separation is quite distinct from jurisdiction either to divorce or to annul. That residence of the applicant is enough, domicil not being necessary, was held in *Armytage v. Armytage*,⁵⁸ where also custody of children was awarded. In that case the respondent also resided in England, though his domicil was abroad. The decision was followed in *Anghinelli v. Anghinelli*.⁵⁹ In this case it was objected that only the domiciliary court could affect a man's status; but the court replied that a judicial separation does not affect the marital status in any way.

In *Wilder v. Wilder*⁶⁰ the court took jurisdiction of a suit for judicial separation and custody of the children though the respond-

⁵⁵ It is true that Professor Scott points out that while an individual may not be excluded from the state, his actions within the state can be regulated by the state; and that there is no essential difference in this respect between a corporation and an individual. This is true; but it seems important only upon Judge Hand's theory.

⁵⁶ 32 HARV. L. REV. 806.

⁵⁷ 105 N. Y. Misc. 492, 174 N. Y. Supp. 212 (1918).

⁵⁸ [1898] P. 178.

⁵⁹ [1918] P. 247.

⁶⁰ 106 Atl. (Vt.) 562 (1919).

ent was a nonresident not served with process. This decision seems a sound one. The court should certainly not hesitate to protect a wife against marital aggression simply because it cannot reach the husband. Yet one is led to ask, What is the nature of the jurisdiction? It cannot be *in rem*, because it does not affect the marital status; if process against the husband is unnecessary, it cannot be *in personam*. It is submitted that the jurisdiction is not judicial at all; that the court is in such a case exercising an executive function, that of protecting the woman and preserving her from a breach of the peace. In this aspect the jurisdiction is the same as the jurisdiction of Chancery to adjudge a person insane and appoint a guardian; an exercise of executive power delegated by the king for the protection of his subjects. A court exercising this jurisdiction may appoint a guardian for a nonresident insane person.⁶¹

STATUS

I. The question whether marriage could take place when the parties were not in the presence of one another became a very important one during the late war. There were many American soldiers in France who desired to marry women they had left behind in America. The government received various opinions from eminent counsel. One example of such marriage, marriage by proxy, was legal in the Middle Ages; it had been expressly abolished in France, but never in England or America. Professor Lorenzen, in a learned and convincing article,⁶² argued in favor of its possibility under American law. During the year was decided a case of alleged marriage, where the man in Minnesota framed a written agreement that the parties should thenceforth be married, and mailed it to the woman in Missouri, who signed the agreement and mailed it back. Neither state required any particular form or ceremony for marriage. The court held that the parties were married in Missouri, where the contract was completed by acceptance.⁶³

This decision seems eminently sound. In most states neither a particular ceremony nor the declaration of clergyman or magistrate is needed to create a marriage. If such ceremony is required,

⁶¹ Bliss v. Bliss, 104 Atl. (Md.) 467 (1918).

⁶² 32 HARV. L. REV. 473.

⁶³ Great Northern Ry. v. Johnson, 254 Fed. 683 (1918); for comment see 32 HARV. L. REV. 848.

of course an absent party cannot be married — unless, indeed, he is represented by a proxy. But if no required ceremony demands the presence of both parties, there is no reason for supposing that the medieval doctrine permitting marriage between absent parties does not still prevail.

II. A confusion between a status and the legal incidents of a status is common, and two recent cases seem to illustrate it.

In *Coldingham Parish Council v. Smith* ⁶⁴ the father of a Scotch adult lived in England; the son became a pauper. The Scotch poor law makes the parent of an adult pauper liable for his support, but he is not so liable under the English law. The court held that the English father was not bound to support the Scotch pauper, on the ground that "the liability of a father to maintain his son must be determined by the law of the father's domicile."

In *Paquin v. Westervelt* ⁶⁵ a husband domiciled in Connecticut was sued by an English corporation for necessities supplied in London to the wife. The Connecticut law made the husband liable for all goods furnished for the support of any member of his family. The court held this husband liable. The line of argument was that the relation of the parties created a status; that one of the incidents of the status is this obligation of the husband; that if the law did not apply to the transaction in London it would "shift the incidents of the marriage status according to the accident of locality, while the parties all the time remained residents of this state."

These cases seem to the author to be correctly decided, but quite on the wrong ground. Both are cases of alimentation, the Connecticut case being an obligation to support recognized by the common law, the English case a statutory obligation. It is submitted that such an obligation is based upon a local policy looking to the support of helpless persons, and must be created by the law of the place where the support is needed, that is, the place where the dependent resides for the time being. It is not true, in our law, that the domiciliary law creates both status and incidents of the status; the law of the domicile creates the static right, but the enjoyment of this right depends upon the law of the place where the party to the status desires to enjoy it.⁶⁶ Upon this principle

⁶⁴ [1918] 2 K. B. 90.

⁶⁵ 106 Atl. (Conn.) 766 (1919).

⁶⁶ Polydore v. Prince, Ware (U. S.) 402 (1837). See this matter discussed more at large in my TREATISE ON THE CONFLICT OF LAWS, Part I, 182, 183.

the law of Scotland and of England in the English and Connecticut cases would create the rights respectively. Such a right as that to recover against the husband for goods sold to the wife is a common-law right, and would be regarded in Connecticut as an ordinary compensatory cause of action; suit would therefore be allowed upon it, though the right arose in England. In the English case, however, the statutory obligation of alimentation is not enforceable outside the state that creates it; just as enforcement in another state is refused in the case of a filiation order in bastardy,⁶⁷ or of an order, under the French statute, that a father-in-law contribute to the support of his son-in-law.⁶⁸ Furthermore, the English father not being subject to the jurisdiction of the Scotch law, it could not extratorially impose an obligation upon him.⁶⁹ For both reasons the English court was right in refusing recovery.

PROPERTY

I. In *Willys-Overland Co. v. Chapman*⁷⁰ it appeared that the claimant company had leased an automobile in California; the lease called for periodic payments and provided that if all terms were performed the lessee could buy the car for five dollars at the expiration of the lease. The court properly held this to be in fact a conditional sale. No record of the sale was made, but the law of California did not require a record. The lessee took the car to Texas and there sold it for value without notice. The court held that since the lease had not been recorded under the Texan law the sale in Texas passed an indefeasible title. The court agreed that the generally accepted doctrine was otherwise, but found the law of Texas to be settled in this way.⁷¹

In *Willys-Overland Co. v. Evans*⁷² an automobile was purchased in Missouri, and a chattel mortgage taken back and recorded, then the car was taken to a garage in Kansas for repairs. The workman claimed a lien under the Kansan law, and this claim was allowed. The court did not deny the binding effect of the chattel mortgage,

⁶⁷ *Graham v. Monsergh*, 22 Vt. 543 (1850).

⁶⁸ *De Brimont v. Penniman*, 10 Blatch. (U. S.) 436 (1873).

⁶⁹ *Rose v. Himely*, 4 Cranch (U. S.) 241, 279, per Marshall, C. J.

⁷⁰ 206 S. W. (Texas Civ. App.) 978 (1918).

⁷¹ See to the same effect *Chambers v. Consolidated Garage Co.*, 210 S. W. (Texas Civ. App.) 565 (1919).

⁷² 180 Pac. (Kan.) 235 (1919).

but held that under the law of Kansas the lien had priority over all other interests in the car.

This is a neat example of the settled principles involved. The car when brought into Kansas came with its title preserved as it had been in Missouri; Kansas did not and should not attempt to alter the title. But when an interest-affecting act, like work on the car, happened in Kansas, the law of Kansas had power to affect the title in any way thereby, and thus to create a new legal interest in the car.

II. The question, what law determines the valid exercise of a power, is one of great difficulty, on which the authorities are not in accord. Especially the question whether a will disposing of the residue shall be taken as an exercise of a power to appoint by will has led to much discussion. In *Sewall v. Wilmer*⁷³ the Massachusetts court held that the question is one of interpreting the intention of the donor, and is therefore to be governed by the legal meaning of the term at his domicil. The case has been severely criticized,⁷⁴ but it has been often followed.⁷⁵ In a recent case the Supreme Court of Rhode Island has applied it to interesting facts.⁷⁶ A power to appoint by will was created by a settlement made while the settlor was domiciled in Massachusetts; he afterwards became domiciled in Rhode Island. The donee made a will in which he did not mention the power; but the will contained a residuary clause which according to the Massachusetts law constituted an appointment. The court held that an appointment had been made.

In an English case, *In re Lewal's Settlement Trusts*,⁷⁷ the same result was reached. In an English settlement a power to appoint by will was given to a Frenchwoman. The woman died married, and under age, leaving a will by which her husband was made universal legatee. By the French law she was incapable, because of her youth, of passing by will more than one half her estate. The court held that as to the half which she could pass the appointment was governed by the English act, which provided that a residuary

⁷³ 132 Mass. 131 (1882).

⁷⁴ STORY, CONFLICT OF LAWS, 8 ed., 552; Professor Gray also criticized the case in his lectures on Powers.

⁷⁵ *Lane v. Lane*, 4 Pennw. (Del.) 368, 55 Atl. 184 (1903). *In re New York L. & T. Co.*, 209 N. Y. 585, 103 N. E. 315 (1913); *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530 (1892); *Farnum v. Pennsylvania Co.*, 87 N. J. Eq. 108, 99 Atl. 145 (1916).

⁷⁶ *Harlow v. Duryea*, 107 Atl. (R. I.) 98 (1919). ⁷⁷ [1918] 2 Ch. 391.

clause should be an exercise of the power of appointment; as to the other half, the power remained unexercised. Peterson, J., said that the statutory provision

"amounted to a provision that every general power of appointment by will should be read as a power to appoint by a will which referred to the power or to the property subject to the power, or disposed of the personal estate of the appointer in general words."

In other words, it is a question of interpreting the word "appoint" according to the meaning it has at the settlor's domicile. The English authority has been quite unsettled on this point. This decision seems likely to bring it into accord with the Massachusetts doctrine.

III. A question of the interpretation of an ordinary written instrument is a very difficult one. In *Curtis v. Curtis*⁷⁸ a trust settlement had provided for payment to the beneficiary of such part of the income as the trustees should think proper should be paid to the beneficiary; and at her death the remainder should pass to the settlors. The question was, whether that part of the income which had not been paid over belonged to the beneficiary or to the settlors. One of the settlors was domiciled in New Jersey at the time of the settlement, the other in New York. The court said that if both had been domiciled in New Jersey the law of that state must have furnished the rule for the interpretation; but as one was from New York, the further facts that the situs of the property, the residence of the beneficiary, and the residence of the eventual trustees were all in New York, caused the New York law to prevail in the interpretation.⁷⁹

IV. Mention must be made of a notable article by Professor Barbour on "The Extra-Territorial Effect of the Equitable Decree."⁸⁰

INHERITANCE

I. Whether a will calls for election between its provisions and the general law of inheritance is a question that can be solved in at least three ways. In *Staigg v. Atkinson*⁸¹ it was treated as probably a question involving the meaning of the will, to be settled therefore according to the law of the testator's domicile at the time he made the will. Two recent cases have adopted respectively the other two

⁷⁸ 184 N. Y. App. Div. 274, 173 N. Y. Supp. 103 (1918).

⁷⁹ Comment on this case may be found in 32 HARV. L. REV. 729.

⁸⁰ 17 MICH. L. REV. 527.

⁸¹ 144 Mass. 564, 12 N. E. 354 (1887).

solutions. *In re Ogilvie*⁸² involved a devise of Paraguayan land to charity by an English testatrix. By the Paraguayan law only one-fifth could be devised away from her next of kin, who had been otherwise provided for in the will. The court said that by the settled English law the next of kin were put to their election; the land was theirs unless they declined to take it, but if they did not, English law would refuse to give effect to the provisions of the will.

In *Perry v. Wilson*⁸³ the question was whether the widow of an Oklahoma man, who had made her a legatee in his will, could claim dower in Kentucky land; the Oklahoma law did not put her to her election, the Kentucky law did. It was urged that the question was one of the intention of the testator; but the court held her bound to elect under the Kentucky law. It is "only by virtue of the laws of this state," the court said,

"that a widow of an owner of land in this state, who dies a citizen and resident of another state, is entitled to dower in such lands; and, under such circumstances, she should only have dower in lands situated in this state, under the terms and conditions prescribed by the laws of this state."

This confusion of authority is caused by the fact, clearly brought out in these cases, that either the law of the land or of the legacy may withhold its property, irrespective of the provisions of the other law; or in both states the matter may be left to the intention of the testator. We must therefore look for a continuance of such apparent contradiction in the cases.

II. Doctrines of equitable conversion frequently complicate the question, what law governs a legacy. *In re Lyne's Settlement Trusts*⁸⁴ presented such a difficulty. An Englishwoman while in France made a holograph will, valid in France, and therefore by Lord Kingsdown's Act valid in England as to personalty, though not as to land. In this will she disposed of her reversion after her father's death in a marriage settlement of personal property in the hands of English trustees. By the settlement the trustees had full right to invest in land, and had power to sell such land at discretion, subject to the consent of the father during his life. It was held that the disposition was a valid one; that the entire trust must be treated

⁸² [1918] 1 Ch. 492.

⁸³ 183 Ky. 155, 208 S. W. 776 (1919).

⁸⁴ [1919] 1 Ch. 80.

as personalty, though the land while in the hands of the trustees was immovable.

In *Norris v. Loyd*⁸⁵ the will of a Californian had devised Iowa land to his executor, to sell it and divide the proceeds between his children. At the request of the children, the executor conveyed the land to them. A California court held this reconversion invalid, and decreed a disposition of the land as personalty. The Iowa court, however, neglecting the California decision on the authority of the case of *Clarke v. Clarke*, held that the land remained such until and unless sold, and made a decree according to the law of Iowa.

Both decisions seem sound. The validity and effect of the will in the Iowa case depend upon the subject of its operation, which here was land; while in the English case the subject of the legacy was the entire estate, a movable estate in its creation, and not some particular investment which formed part of it, and it was therefore properly held to fall within the provisions of Lord Kingsdown's Act.

THE ADMINISTRATION OF ASSETS

I. In *Campbell v. Tousey*⁸⁶ the old Supreme Court of New York held that action could be brought in New York against a foreign executor who was found there. Though opposed to the great weight of authority, this doctrine has been embodied in the Code of Civil Procedure.⁸⁷ Relying upon this provision, certain creditors of one Gates, deceased, brought in New York a suit against a foreign executor to reach assets of the estate in New York, there being no administrator in that state. The suit was first brought in a federal court, and was dismissed by Judge Learned Hand for lack of jurisdiction, notwithstanding the Code.⁸⁸ The creditors thereupon instituted a similar suit in the state courts. In the Supreme Court, Special Term, Judge Bijur allowed the bill to lie,⁸⁹ and this judgment was affirmed in the Appellate Division.⁹⁰ The principal argument against the jurisdiction appears to have been the difficulty of enforcing any judgment that might be rendered for the plaintiff.

⁸⁵ 168 N. W. (Ia.) 556 (1918).

⁸⁶ 7 Cow. (N. Y.) 64 (1827).

⁸⁷ N. Y. Co. Civ. Proc. § 1836a.

⁸⁸ *Thorburn v. Gates*, 225 Fed. 613 (1915); 230 Fed. 922 (1916).

⁸⁹ *Thorburn v. Gates*, 103 N. Y. Misc. 292, 171 N. Y. Supp. 198 (1918).

⁹⁰ *Thorburn v. Gates*, 184 N. Y. App. Div. 443, 171 N. Y. Supp. 568 (1918).

It is submitted that the view usually held is based upon a much more fundamental reason than mere expedience. The court in this case is attempting to impose an obligation owed by the deceased upon another person, his executor. Such an imposition could be made only by a sovereign having power over the executor; and then only in connection with some act done under the sovereign's jurisdiction, since an arbitrary imposition of obligation would be impossible in our system of government. By taking upon him the administration of the estate in Pennsylvania, the executor undertook the obligation there imposed, which was to pay out of the estate there taken; an obligation for which he is responsible to the probate court of that state, the Orphan's Court, by which his nomination was confirmed. The law of New York is powerless to impose an obligation to pay in New York, for he has taken no estate in New York; it has no right to allow suit on the Pennsylvania obligation, since that obligation is to pay debts proved in Pennsylvania.

On one ground, however, New York might allow relief in this case. If there are assets in New York belonging to the deceased, the natural way of administering them is by the appointment of an administrator there. If, however, the Code of Procedure provides another way of reaching [them, based on jurisdiction of them *in rem*, the proceeding is legal provided reasonable steps are taken to protect the interests of all concerned. The service of process on a foreign executor might be a reasonable method to secure these interests; though a personal judgment against the foreign executor would be impossible. It is to be noted, however, that goods brought into the state by the foreign executor could not be so reached, since they have become his own property; he holds them subject to the courts of his own state, but is not accountable for them to the courts of New York.⁹¹

II. In *Ames v. Citizens Bank* ⁹² a resident of New Mexico died, and his administrator, there appointed, found there a certificate of deposit for a certain amount in a Kansas bank. He came to Kansas and demanded payment; an administrator appointed in Kansas also claimed the money. The court held that payment

⁹¹ *Currie v. Bircham*, 1 Dow. & Ry. 35 (1822).

⁹² 181 Pac. (Kan.) 564 (1919).

should be made to the New Mexican administrator. There was no indebtedness of the estate in Kansas.

The syllabus, prepared by the court, lays stress on the fact that the New Mexican administration was the principal one, and the Kansan only ancillary. The opinion, however, proceeds chiefly on the ground that the certificate of deposit is a specialty, and therefore assets where found. It is submitted that in writing the opinion the judge was Philip sober.

III. The subject of the widow's allowance has proved a puzzling one whenever an interstate application of the law is in question. In *O'Hara v. O'Hara*⁹³ the widow at the time of the husband's death was domiciled in the state, but she had since become non-resident. The court held that the right to the allowance vested at the moment of her husband's death, and allowed recovery. In *re Lavenberg's Estate*⁹⁴ presented a case where the widow was nonresident at the husband's death; the spouses were not separated, but lived apart for his business convenience. The court granted the allowance. In this case, however, it seems clear that the wife's domicil was with her husband; and as between the two the allowance should be based upon domicil. A *dictum* in the case that the statute confers a right, no matter what the domicil of the widow, seems questionable. It is usually held that the allowance is "a humane and beneficent public policy" to keep the widow and family from want;⁹⁵ and this policy concerns the domicil alone.

CONTRACTS

I. In *Kuhnhold v. Compagnie Générale Transatlantique*⁹⁶ there was a provision in a bill of lading on a shipment from France that all litigation arising out of the execution of the bill of lading should be adjudged according to the French law and in a designated French court which, the bill declared, was accepted by the parties. The court held that this agreement did not oust the American courts.

This case may perhaps be distinguished from a case like *Hamlyn v. Talisker Distillery*,⁹⁷ where the provision was that no action

⁹³ 182 Ky. 260, 206 S. W. 462 (1918).

⁹⁴ 177 Pac. (Wash.) 328 (1918).

⁹⁵ *Smith v. Howard*, 86 Me. 203, 29 Atl. 1008 (1894).

⁹⁶ 251 Fed. 387 (1918).

⁹⁷ [1894] A. C. 202.

should be brought for any dispute arising upon the contract until it had been submitted to arbitration in a certain way. It might be taken that the submission to arbitration is a term of performance rather than a regulation of remedy, and that there was no breach of contract until the arbitration was refused or the award unperformed. The case of *Mittenthal v. Mascagni*,⁹⁸ however, is on all fours with the recent case; and it was there held that the American courts were ousted of jurisdiction. In view of the paucity of authorities such a conflict of decision leaves the law most uncertain.

II. Professor Lorenzen has published during the year a remarkably full and thorough study of "The Conflict of Laws Relating to Bills and Notes."⁹⁹ In this book the author examines the rules for solving conflicts in this topic in almost every civilized country. While the scope of his work does not call for new discoveries or inventions, the careful statement of so many rules of so many laws is of wonderful assistance to the student, and is indispensable for a lawyer who is handling European or Spanish-American commercial paper.

TORTS

Most of the new law in torts concerns in some way the Workmen's Compensation Act. The earlier tendency in these cases was to hold the act territorial, applying to all accidents within the state and to none outside.¹⁰⁰ This view still gains new adherents.¹⁰¹ But the view that the provisions of the act enter into the contract of hiring, and, no matter where the accident takes place, the workman may recover in the state where the contract was made, is gaining ground and seems on the whole likely to prevail.¹⁰² Whatever the interpretation in this respect, it is clear that, in view of the special procedure called for in the cases, suit can be brought only in the courts of the state whose statute creates the right.¹⁰³

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⁹⁸ 183 Mass. 19, 66 N. E. 425 (1903).

⁹⁹ New Haven: Yale University Press, 1919. For a review of this work see 32 HARV. L. REV. 983. ¹⁰⁰ *In re Gould*, 215 Mass. 480, 102 N. E. 693 (1913).

¹⁰¹ *Union B. & C. Co. v. Industrial Commission*, 287 Ill. 396, 122 N. E. 609 (1919).

¹⁰² *Pierce v. Bekins V. & S. Co.*, 172 N. W. (Ia.) 191 (1919); *State v. District Court*, 140 Minn. 427, 168 N. W. 177 (1918).

¹⁰³ *Martin v. Kennecott Copper Corp.*, 252 Fed. 207 (1918); *Thompson v. Foundation Co.* (N. Y. App. Div.) 177 N. Y. Supp. 58 (1919).

THE INTERNATIONAL FLYING CONVENTION AND THE FREEDOM OF THE AIR

"The use of the sea and air is common to all."—QUEEN ELIZABETH

FOR the following text of the draft of the International Flying Convention as adopted by the Peace Conference we are indebted to the English journal *Flight* of July 24, 1919, the official text not having been published in the United States.¹

DRAFT OF INTERNATIONAL FLYING CONVENTION

The Air Ministry [of Great Britain and Ireland] on Tuesday [July 22, 1919] issued the text of the Convention relating to International Air Navigation [Cmd] agreed upon by the sub-commission dealing with aerial navigation at the Peace Conference.

The Convention has been agreed to by all the representatives, subject to certain reservations. The Convention has not been formally approved by the Supreme Council of the Peace Conference. It has, however, been agreed that it should be issued for the information of the public of the Allied and Associated States.

The following is the English text of the document, which is in English and French, both languages having equal validity:—

CHAPTER I. — GENERAL PRINCIPLES

ARTICLE 1. — The contracting States recognise that every State has complete and exclusive sovereignty in the air space above its territory and territorial waters.

ARTICLE 2. — Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory and territorial waters as well as above the territories and territorial waters of its Colonies to the aircraft of the other contracting States, provided that the conditions established in this Convention are observed.

All regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.

ARTICLE 3. — Each contracting State has the right, for military reasons or in the interest of public safety, to prohibit the aircraft of the other contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States, from flying over certain areas of its territory.

¹ Since this article was written the text both in French and English has been published as Senate Document No. 91, 66th Congress, 1st Session.

If it makes use of this right, it shall publish and notify beforehand to the other contracting States the location and extent of the prohibited areas.

ARTICLE 4. — Every aircraft which finds itself above a prohibited area shall, as soon as aware of the fact, give the signal of distress provided in Paragraph 17 of Annex D and land outside the prohibited area as near to it as possible and as soon as possible at one of the aerodromes of the State unlawfully flown over.

CHAPTER II. — NATIONALITY OF AIRCRAFT

ARTICLE 5. — No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State.

ARTICLE 6. — An aircraft possesses the nationality of the State on the register of which it is entered, in accordance with the provisions of Section I (c) of Annex A.

ARTICLE 7. — An aircraft shall not be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State.

An incorporated company cannot be the registered owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered, and unless the president or chairman of the company and at least two-thirds of the directors possess the same nationality, and unless the company fulfils all other conditions which may be prescribed by the laws of each State.

ARTICLE 8. — An aircraft cannot be validly registered in more than one State.

ARTICLE 9. — The contracting States shall every month exchange among themselves and transmit to the International Commission for Air Navigation copies of registrations and of cancellations of registration which shall have been entered on their official registers during the preceding month.

ARTICLE 10. — All aircraft engaged in international navigation shall bear their nationality and registration marks as well as the name and residence of the owner in accordance with Annex A.

CHAPTER III. — CERTIFICATES OF AIRWORTHINESS AND COMPETENCY

ARTICLE 11. — Every aircraft engaged in international navigation shall, in accordance with Annex B, be provided with a certificate of airworthiness issued or rendered valid by the State whose nationality it possesses.

ARTICLE 12. — The commanding officer, pilots, engineers, and other members of the operating crew of every aircraft shall, in accordance with Annex E, be provided with certificates of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses.

ARTICLE 13. — Certificates of airworthiness and of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses, in accordance with the regulations established by Annex B and Annex E and hereafter by the International Commission for Air Navigation, shall be recognised as valid by the other States.

Each State has the right to refuse to recognise for the purpose of flights within the limits of and above its own territory certificates of competency and licences granted to one of its nationals by another contracting State.

ARTICLE 14. — No wireless apparatus shall be carried without a special licence issued by the State whose nationality the aircraft possesses. Such ap-

paratus shall not be used except by members of the crew provided with a special licence for the purpose.

Every aircraft used in public transport and capable of carrying ten or more persons shall be equipped with sending and receiving wireless apparatus when the methods of employing such apparatus shall have been determined by the International Commission for Air Navigation.

This Commission may later extend the obligation of carrying wireless apparatus to all other classes of aircraft in the conditions and according to the methods which it may determine.

CHAPTER IV. — ADMISSION TO AIR NAVIGATION ABOVE FOREIGN TERRITORY

ARTICLE 15. — Every aircraft of a contracting State has the right to cross another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of signals provided in Annex D.

Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it notified to all the contracting States.

The establishment of international airways shall be subject to the consent of the States flown over.

ARTICLE 16. — Each contracting State shall have the right to reserve to its national aircraft the carriage of persons and goods for hire between two points on its own territory.

ARTICLE 17. — If a contracting State establishes restrictions of the kind permitted by Article 16, its aircraft may be subjected to the same restrictions in any other contracting State, even though the latter State does not itself impose these restrictions on other foreign aircraft.

Restrictions and reservations provided in Article 16 shall be immediately published, and shall be communicated to the International Commission for Air Navigation which shall notify them to the States interested.

ARTICLE 18. — The passage or transit of any aircraft with or without landing over or through the territory of any contracting State, including stoppages reasonably necessary for the purpose of such transit, shall not entail any seizure or detention of the aircraft by or on behalf of such State or any person therein, on the ground that the constitution or mechanism of the aircraft is an infringement of any patent, design, or model, duly granted or registered in such State. Every claim for an infringement of this kind shall be duly made in the country of origin of the aircraft.

CHAPTER V. — RULES TO BE OBSERVED ON DEPARTURE, ON LANDING, AND WHEN UNDER WAY

ARTICLE 19. — Every aircraft engaged in international navigation shall be provided: —

- (a) With a certificate of registration in accordance with Annex A.
- (b) With a certificate of airworthiness in accordance with Annex B.

(c) With certificates and licences of the commanding officer, pilots, and crew in accordance with Annex E.

(d) If it carries passengers, with a list of their names.

(e) If it carries freight, with bills of lading and manifest.

(f) With log books in accordance with Annex C.

(g) If equipped with wireless, with the special licence prescribed by Article 14.

ARTICLE 20. — The log books shall be kept for two years after the last entry.

ARTICLE 21. — Upon the departure of an aircraft, the authorities of the country shall have, in all cases, the right to visit the aircraft and to verify all the documents with which it must be provided.

ARTICLE 22. — Upon the landing of an aircraft, the authorities of the country shall have, in all cases, the right to visit the aircraft and to verify all the documents with which it must be provided.

ARTICLE 23. — All persons on board an aircraft shall conform to the laws and regulations of the State visited.

In case of flight made without landing, from frontier to frontier, all persons on board shall conform to the laws and regulations of the country flown over, the purpose of which is to ensure that the passage is innocent.

Legal relations between persons on board an aircraft in flight are governed by the law of the nationality of the aircraft.

In case of crime or misdemeanor committed by one person against another on board an aircraft in flight the jurisdiction of the State flown over applies only in case the crime or misdemeanor is committed against a national of such State and is followed by a landing during the same journey upon its territory.

The State flown over has jurisdiction: —

(1) With regard to every breach of its laws for the public safety and its military and fiscal laws;

(2) In case of a breach of its regulations concerning air navigation.

ARTICLE 24. — Aircraft of the contracting States shall be entitled to the same measures of assistance for landing, particularly in case of distress, as national aircraft.

With regard to the salvage of aircraft wrecked at sea the regulations of the several contracting States as to the salvage of ships will apply so far as practicable.

ARTICLE 25. — Every aerodrome in a contracting State, which upon payment of charges is open to public use by its national aircraft, shall likewise be open to the aircraft of all the other contracting States.

In every such aerodrome there shall be a single tariff of charges for landing and length of stay applicable alike to national and foreign aircraft.

ARTICLE 26. — Each contracting State undertakes to adopt measures to ensure that every aircraft flying above the limits of its territory, and that every aircraft under its flag, wherever it may be, shall comply with the regulations contained in Annex D of the present Convention. It will punish all persons who do not obey these regulations.

CHAPTER VI. — PROHIBITED TRANSPORT

ARTICLE 27. — The carriage by aircraft of explosives and of arms and munitions of war is forbidden in international navigation. No foreign aircraft

shall be permitted to carry such articles between any two points in the same contracting State.

ARTICLE 28. — Each State may prohibit or regulate the carriage or use of photographic apparatus. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to all the other contracting States.

ARTICLE 29. — As a measure of public safety, the carriage of objects other than those mentioned in Articles 27 and 28 may be subjected to restrictions by each contracting State. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to all the other contracting States.

ARTICLE 30. — All restrictions mentioned in Article 29 shall be applied equally to national and foreign aircraft.

CHAPTER VII. — STATE AIRCRAFT

ARTICLE 31. — The following are deemed to be State aircraft: — (a) Military aircraft. (b) Aircraft exclusively employed in State service, such as posts, customs, police. Every other aircraft is a private aircraft. All State aircraft other than military, customs, and police aircraft shall be treated as private aircraft, and as such shall be subject to all the provisions of the present Convention.

ARTICLE 32. — Every aircraft commanded by a person in military service detailed for the purpose is deemed to be a military aircraft.

ARTICLE 33. — Neither the flight of a military aircraft of a contracting State over the territory of another nor its landing upon such territory shall be permitted without special authorization.

In case of such authorization the military aircraft shall enjoy in the absence of special stipulation the privileges of extritoriality which are customarily accorded to foreign ships of war.

A military aircraft which is forced to land or which is required or compelled to land shall, by reason thereof, acquire no right to extritoriality.

ARTICLE 34. — Agreements between State and State will determine in what cases police and customs aircraft can be authorized to cross the frontier. They shall in no case be entitled to the privileges of extritoriality.

CHAPTER VIII. — INTERNATIONAL COMMISSION FOR AIR NAVIGATION

ARTICLE 35. — There shall be instituted, under the name of the International Commission for Air Navigation and as part of the organization of the League of Nations, a permanent Commission composed of: —

Two representatives of each of the following States: The United States of America, France, Italy, and Japan;

One representative of Great Britain and one of each of the British Dominions and of India;

One representative of each of the other contracting States.

Each of the five States first-named (Great Britain, the British Dominions and India counting for this purpose as one State) shall have the least whole number of votes which, when multiplied by five, will give a product exceeding by at least one vote the total number of votes of all the other contracting States. All the States other than the five first-named shall each have one vote.

The International Commission for Air Navigation shall determine the rules of its own procedure and the place of its permanent seat, but it shall be free to meet in such places as it may deem convenient. Its first meeting shall take place at Paris. This meeting shall be convened by the French Government as soon as a majority of the signatory States shall have notified to it their ratification of the present Convention.

The duties of this Commission are: —

(a) To receive proposals from or to make proposals to any of the contracting States for the modification or amendment of the provisions of the present Convention and to notify changes adopted.

(b) To carry out the duties imposed upon it by the present Article and by Articles 9, 13, 14, 15, 17, 28, 29, and 38 of the present Convention.

(c) To amend the provisions of the technical Annexes.

(d) To collect and communicate to the contracting States information of every kind concerning international air navigation.

(e) To collect and communicate to the contracting States all information relating to wireless, meteorology and medical science which may be of interest to air navigation.

(f) To ensure the publication of maps for air navigation in accordance with the provisions of Annex F.

(g) To give its opinion on questions which the States may submit for examination.

Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modification shall have been approved by three fourths of the total possible vote and shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States.

Any proposed modification of the articles of the present Convention shall be examined by the International Commission for Air Navigation, whether it originates with one of the contracting States or with the International Commission for Air Navigation itself. No such modification shall be proposed for option by the contracting States, unless it shall have been approved by at least two-thirds of all the possible votes which could be cast if all the States were present.

All such modifications of the articles of the Convention (not of the provisions of the Annexes) must be formally adopted by the contracting States before they become effective.

The expenses of organisation and operation of the International Commission for Air Navigation shall be borne by the contracting States in proportion to the number of votes at their disposal.

The expenses occasioned by the sending of technical delegations will be borne by their respective States.

CHAPTER IX. — FINAL PROVISIONS

ARTICLE 36. — Each contracting State undertakes to co-operate as far as possible in international measures concerning: —

(a) The collection and dissemination of statistical, current, and special meteorological information, in accordance with the provisions of Annex G.

(b) The publication of standard aeronautical maps, and the establishment

of a uniform system of ground marks for flying, in accordance with the provisions of Annex F.

(c) The use of wireless in air navigation, the establishment of the necessary wireless stations, and the observation of international wireless regulations.

ARTICLE 37. — General provisions relative to customs in connection with international air navigation are the subject of a special agreement contained in Annex H to the present Convention.

Nothing in the present Convention shall be construed as preventing the contracting States from concluding, in conformity with its principles, special protocols as between State and State in respect of customs, police, posts, and other matters of common interest in connection with air navigation.

ARTICLE 38. — In the case of a disagreement of two or more States relating to the interpretation of the present Convention the question in dispute shall be determined by the Permanent Court of International Justice to be established by the League of Nations and until its establishment by arbitration.

If the parties do not agree on the choice of the arbitrators, they shall proceed as follows:

Each of the parties shall name an arbitrator, and the two arbitrators shall meet to name a third. If the arbitrators cannot agree, the parties shall each name a third State, and the Third State so named shall proceed to designate the third arbitrator, by agreement or by each proposing a name and then determining by lot the choice between the two.

In case of the disagreement of two or more contracting States relating to one of the technical regulations annexed to the present Convention, the point in dispute shall be determined by the decision of the International Commission for Air Navigation by a majority of votes.

In case the difference involves the question whether the interpretation of the Convention or that of a regulation is concerned, final decision shall be made by arbitration as provided in the first paragraph of this Article.

ARTICLE 39. — In case of war, the provisions of the present Convention do not affect the freedom of action of the contracting States either as belligerents or as neutrals.

ARTICLE 40. — The provisions of the present Convention are completed by the Annexes A-H, which have the same effect and come into force at the same time as the Convention itself.

ARTICLE 41. — The British Dominions and India are deemed to be States for the purposes of the present Convention. Protectorates, or territories administered by the League of Nations or placed under its control, are, for the purposes of the present Convention, deemed to form part of the Protecting or Mandatory States, both as regards their territory and as regards their nationals.

ARTICLE 42. — The present Convention shall come into force as between any of the contracting States as soon as such States shall have exchanged ratifications, which shall take place within one year. The ratifications shall be deposited in the archives of the Ministry of Foreign Affairs of the French Republic.

ARTICLE 43. — The States which have not taken part in the present war shall be admitted to adhere to the present Convention upon their simple declaration notified to the Ministry of Foreign Affairs of the French Republic, which shall inform the contracting States of such adherence.

ARTICLE 44. — Any State which took part in the present War but which did not take part in the negotiation of this Convention may express its desire to adhere to this Convention and may be admitted to adhere to it, if such a State is a member of the League of Nations, or until January 1st, 1923, by a unanimous vote of the signatory and adhering States or, after January 1st, 1923, by an affirmative vote comprising at least three-fourths of the total possible votes of the signatory and adhering States, the votes of the different States having the same weight as that provided by Article 35 of this Convention for the International Commission for Air Navigation.

The Ministry of Foreign Affairs of the French Republic shall receive requests for adherence to this Convention under the conditions provided by this article, shall communicate them to the contracting States, shall receive the votes of the contracting States, and shall announce the result of the vote.

ARTICLE 45. — The denunciation of the present Convention shall take effect with regard only to the State which shall have given notice of it. Such notice shall not be given before January 1st, 1922 (nineteen hundred and twenty-two), and the denunciation shall not take effect until at least one year after the giving of notice.

Notices under this article shall be given to the Ministry of Foreign Affairs of the French Republic, who shall communicate them to the contracting States.

Adjoined to the Convention are several annexes and appendices dealing with such subjects as the marking and registration of aircraft, with airworthiness, log-books, and rules of the air. These rules follow those of navigation by sea in many respects. For example, the lights to be carried by an aeroplane are a white headlight and a white light aft, with red and green lights for port and starboard. Airships have all those lights doubled, while balloons carry a single light below the car. Heavier-than-air machines give way to balloons and airships. The sea rule also applies to motor-driven aircraft meeting end on — each turns to the right.

Regulations for granting pilots' certificates are dealt with, as are the rules for making international and local maps, the character of ground marks, collection and reporting of meteorological information, and customs.²

At the outset it is obvious that an international convention is a great step forward in the solution of the difficult and baffling problems of aerial navigation. Theorists upon the subject of the sovereignty of the air were in hopeless disagreement when the great war began in 1914. One reason of this was that the practical solutions derived from what were then the two principal theories were in most instances the same. The view that each state was absolutely sovereign over the air space above, especially if tempered by acknowledgment of the right of innocent passage to aircraft of all nations, did not in its actual applications differ much from the view that the air is free to all nations subject to the right of each state to protect itself from

² For the appendices, which are quite technical, see the Senate Document above referred to.

injury from aircraft. Everybody then favored the liberal use of the air by all nations. The choice between theories depended in a measure upon the individual sympathy, whether for imperial dominion and the power of the strong states, or for the largest human freedom and the rights of the weak states. The results of the two theories are not, however, exactly the same, as indeed the draft of the International Flying Convention now discloses. In the nature of things, a treaty cannot be regarded as settling the matter of theory once for all, — first, because sovereign states are free to contract with one another to waive a portion of their air rights; and, secondly, because treaties bind only those nations which are parties to them. Article 39 also reserves to the parties to the Convention freedom of action in case of war, either as belligerents or as neutrals. The latest form of English theory, however, would deny altogether the right of innocent passage originally suggested by Westlake, and recognized by the Institute of International Law.³

In a recent article,⁴ Dr. Hugh H. L. Bellot supports this view of absolute sovereignty of the air space over land and territorial waters free from any right of innocent passage, however restricted, in favor of aircraft of foreign nations. This theory of absolute sovereignty is the one upon which the war was conducted, so the author claims,⁵ and the only one that can expect acceptance by the powers. It cannot fairly be said that the recent usages of war have denied the right of innocent passage in time of peace. It will be observed that this doctrine denies to foreign nations in territorial air space even as much right as they now have in territorial waters, where confessedly the adjacent states have sovereignty. Now that

³ References to the earlier literature of the subject may be found in a previous article on "Sovereignty of the Air," 7 AM. J. INT. LAW, 470 (1913). For a bibliography of the literature before 1913 see WECK, *DEUTSCHES LUFTRECHT*, (1913), viii.

⁴ "The Sovereignty of the Air," 3 INT. LAW NOTES, 133 (December, 1918); the same conclusion, on purely theoretical grounds, is reached by Sr. Ortiza in "La condicion juridica del Espacio Aereo," a thesis for the doctor's degree (Valencia, 1913).

⁵ Professor Rolland puts the case more conservatively in his important article, "Les pratiques de la guerre aérienne dans le conflit de 1914 et le droit des gens," 23 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC*, 497 (1916). Note, however, the text cited, beginning at page 576. The war seems to have left at least as much of the freedom of the air as it has of the freedom of the seas. Mr. J. E. G. Montmorency, in 17 J. SOC. COMP. LEG. (N. S.) 172 (1917), prepares for us a legal theory of the appropriation of parts of the high seas.

the international law upon this subject is in the making, the need is not for a theory that will be acceptable to the strong nations, who can take care of themselves very well, but for one that will be just to all, especially to the weak ones, who can find no other protection than the law. Attention is also called to a valuable article⁶ by Professor H. D. Hazeltine of Cambridge University, written from the same point of view, and discussing the reports of the English Civil Aerial Transport Committee presented to the Air Council (Cd. 9218), which are full of interesting material. Great Britain is sea girt, and her dominions have remarkable access to the ocean. She has had comparatively little reason to support the doctrine of the liberty of the air, but rather to fear it. It would be almost as unreasonable to expect her jurists to think otherwise on this subject as to expect them to champion "the freedom of the seas."

The doctrine of the right of innocent passage of Westlake is the irreducible minimum of the doctrine of the liberty of the air of Fauchille. At the beginning of the present war, the principle of the liberty of the air was in excellent standing. It was supported by many distinguished jurists. It had been accepted by the Institute of International Law and by the various international legal conferences called to consider the subject of aviation.⁷ In every assembly of jurists, aerial liberty had commanded a good working majority. The conduct of the war has indeed recognized the sovereignty of states over the superjacent air space for military purposes. Civil aviation has been forbidden altogether by belligerent states. Neutral states have forbidden belligerent aircraft to fly over their frontiers (a measure indeed necessary also for their own protection against air fights), and have interned the crews and equipage of *military* aircraft violating such orders, following the analogy of the laws of warfare upon land where soldiers of belliger-

⁶ "The Law of Civil Aerial Transport," J. OF COMP. LEG. AND INT. LAW, 3d Series, Vol. I, Part I (April, 1919), 76.

⁷ For example, see "L'accord Franco-Allemand du 26 juillet, 1913, relatif à la navigation aérienne," by Prof. Louis Rolland, 20 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, 697, 708 (1913); "Le vie del mare e dell' aria e il diritto internazionale," 7 REVISTA DI DIRITTO INTERNAZIONALE (2d Series), 153, 177, by Professor Enrico Catellani (Padua), author of IL DIRITTO AEREO (Turin, 1911). As late as 1911 Professor Hans Sperl (Vienna) was able to say that the principle of the complete liberty of aerial passage was not disputed by any one: "La navigation aérienne au point de vue juridique," 11 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, 478, note 2, of the French translation.

ent nations march over the border. But has an end been made to liberty of the air altogether? Is the great ideal of every city a port and every sky a sea to be definitely abandoned?

No theory, and certainly no treaty, which involves an universal surrender of a human right hitherto generally maintained by jurists in all parts of the civilized world should be accepted lightly. Chapter I, Article 1, of the Convention apparently is based upon the English view:

"The contracting States recognise that every State has complete and exclusive sovereignty in the air space above its territory and territorial waters."

Here speaks the experience of the great war. The possibility of the domination of the air space by cannon, or at least of so much of the air space as is practically useful and desirable for aviation, has been demonstrated. The standard of determination for aviation should be, not what is scientifically possible in heights of extreme cold and great atmospheric tenuity, but what is in practice suitable for use in the ordinary affairs of mankind, particularly for commerce. The air space may now fairly be considered as much subject to physical domination, at any rate, as are territorial waters, and there is a similar argument of the need of the adjacent state to exercise powers of protection.

In Article 2 apparently we hear the voice of France:⁸

"Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory and territorial waters . . . to the aircraft of the other contracting States. . . ."

Article 3 provides that a state may, for military reasons or in the interest of public safety, prohibit aircraft of other states from flying over certain areas of its territory, but it must make no discrimina-

⁸ For example, one is referred to the article by Prof. A. Merignhac entitled "*Le domaine aérien privé et public, et les droits de l'aviation en temps de paix et de guerre*" in 21 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC*, 205 (1914). The doctrine of the liberty of the air has been much favored in the French literature of the subject. The Germans, at least before the recent war, generally favored the more imperialistic view of the absolute sovereignty of the underlying state. See Dr. Franz Scholz, "*Die seekriegsrechtliche Bedeutung von Flottenstütz-punkten*," second supplement to 11 *ZEITSCHRIFT FÜR VÖLKERRECHT*, 84, note 1 (Breslau, 1918). But they were already beginning to appreciate the value of air transit over other states. Possibly there will be a reaction from this former theory in the future in Germany in the interest of commerce, especially if Germany is not permitted to sign the Convention.

tion in this respect between its own private (as distinguished from public) aircraft and those of the other contracting parties. On no theory could objection properly be made to this article. The war has proved the necessity of such a provision as this.

Article 5, however, provides that—

“No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State.”

If all nations are contracting states this article is unobjectionable. But some confessedly may be excluded, at least for a term of years, and admitted then only by a three-fourths vote (Article 44). Here is a positive agreement to exclude the aircraft of certain nations from passage at all.

An examination of the globe discloses a number of states which have no maritime boundary, such as the new Austria and new Hungary, Czecho-Slovakia, Poland, Switzerland, Bolivia, Paraguay, not to mention Abyssinia, Afghanistan, and Thibet. Are such countries as these to have no commercial aviation with other nations except as a matter of grace? Not even a “way of necessity”? Or must the winding courses of international rivers, where such rivers exist, be followed to the sea? An air line is supposed to be straight. Can the payment of customs duties be imposed or tolls charged, in case of states which do not happen to be contracting parties to the Convention, for transit of their airships over the air space of other states? Must commercial airships flying from America to Scandinavia avoid passing over Great Britain? Will airships be denied the use of trade winds of the higher air levels? Whatever reduces by prohibition the sum of human rights everywhere is worthy of consideration. Nothing that touches the universal life of humanity is unimportant. If, as every one hopes and many believe, commercial aviation will be an important factor in the future life of nations, states excluded from the Convention have here a very serious ground for objection, and may fairly claim that they are denied the common rights of mankind. Just when a relief had at last been found by human ingenuity for the isolation of the last communities, and a way had been opened to the remotest spots of earth, here is a treaty which undertakes to deny the relief and to close the way, except to signatory nations. Switzerland should have of common right commercial access to the sea and to states

not adjacent by the air, and not be dependent for it upon the consent of other nations. The notion that the adjacent surrounding countries may forbid entirely the innocent passage of Swiss commercial aircraft cannot fairly be based upon the idea that this result is requisite for the safety of these countries, for everybody knows better. Nations not parties to the Convention ought to seek admission to it, and if it is denied, they are entitled to feel that their citizens have less rights than other men and are denied a substantial part of human freedom. Such states ought not to submit without protest. Only military reasons can be sufficient for such an exclusion as this. We must not let "great captains with their guns and drums disturb our judgment" but "for an hour," and expect the "patient, wise, far-seeing" jurist of the future to look at this question in a different way.

In the last paragraph of Article 15 we find:

"The establishment of international airways shall be subject to the consent of the States flown over."

In the same article it is earlier provided that—

"Every aircraft of a contracting State has the right to cross another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place."

The use of aerodromes is guaranteed by Article 25 upon terms of equality which will rejoice advocates of the liberty of the air. Taking the two quotations from Article 15 together, it may be assumed that the air space cannot be closed to through transit altogether, under conditions of peace. No state should have the right to forbid international airways entirely. If Switzerland is a party to the Convention, it should not have the right in times of peace to close every pass through the Alps to the passage of aircraft. This would, to say the least, deny to travelers the possibility of a sublime experience. It might seriously affect legitimate trade and important mails. Undoubtedly a state should have the right to exclude the passage of military aircraft over any areas, and of commercial aircraft over military areas, or populous communities, but not the right to bar the way altogether. High mountains and deserts as well as perilous seas, jungles, and savage communities limit the passage of aircraft. To add artificial and unnecessary legal barriers would be to create international grievances and add a new terror to

isolation. Free traders feel a natural repugnance to this sort of thing. It requires no great ingenuity to conceive of many articles which could be conveniently transported by air, such as the mails, dyes, medicines, instruments, jewels, lace, securities, and many more. The newspapers tell us already of a daily express service between London and Paris at a guaranteed speed of over a hundred miles an hour.

In Article 23 we have an excellent solution of the question of jurisdiction over legal relations. As between persons on board of aircraft, the nationality of the aircraft governs, in case of flight without landing. The analogy of the ship at sea is followed. This article, like Article 18 in regard to infringement of patents, and Article 33 in regard to extritoriality, is not consistent with the theory of absolute sovereignty of the underlying state. Power is given the state beneath to protect its military and fiscal laws, and the public safety, and to regulate air navigation.⁹ By Article 33 military aircraft, only if voluntarily admitted, enjoy the privilege of extritoriality. By Article 34 the privilege is denied to police and customs aircraft, even though *admitted by agreement*.

In Article 35, the control of the International Commission for Air Navigation is definitely committed to Great Britain, the United States, France, Italy, and Japan, although provision is made for representation of each contracting party. We see here that it is a treaty for peace we are considering, and that the negotiators have been concerned with military safety and national punishments as preliminary to the future of a world at peace. Suitable provision is made for amendments to the Convention. Article 38 provides for international arbitration, but Article 39 provides:

"In case of war, the provisions of the present Convention do not affect the freedom of action of the contracting States either as belligerents or as neutrals."

No specific number of states are required to ratify. Liberal provision is made by Articles 43 and 44 for the admission of states to the Convention; nevertheless a state which participated in the present war but not in the negotiation of the Convention, unless a member of the League of Nations, can be admitted only by unani-

⁹ The rules in case of territorial waters will be found analogous. 1 WESTLAKE INTERNATIONAL LAW (1910), 193.

mous vote until January 1, 1923, and after that date only by a three-fourths vote so counted as to give the Entente Powers the control. There is here the possible opportunity for injustice to be done, and these provisions have undoubtedly a military basis.

By Article 45, a state may withdraw from the Convention after January 1, 1922, by giving a year's notice.

It is impossible to examine the recent legal literature of aviation without noticing that the actual development of the art of flying has increased the necessity for police regulation to an extent entirely unexpected, and that the result has been to compel much more general recognition of the right of the state to regulate the entire air space overhead. The recent frightful accident at Chicago, where a burning airship fell through the roof of a bank, doing great injury to life and property by the explosion of gasoline contained in its fuel tanks, emphasizes this necessity of regulation in peace, while the great conflict has made the same necessity very clear in war.¹⁰ More and more limitations have been found necessary to be placed upon the liberty of the air. But the right freely to navigate the air upon commercial errands must not perish from the earth; the air space must not be made a field for national monopoly; peaceful access to the sea and to other nations through the air must be preserved and protected, not surrendered to the will of the strongest. The necessity for international air routes with the necessary aerodromes will become more and more apparent every day.

Of the three theories of the legal status of the air space, one follows the analogy of the high seas, one that of territorial waters, one that of the land. The advocate of each theory will find something in the Convention which is countenanced by his theory; none of the three theories is consistent with the entire Convention. The analogy of the land has been followed most.

In this connection it is interesting to note that the new German Constitution of July 31, 1919, by Article 7, Section 19, confers upon the national government the right of legislation over communication by vehicles propelled by power in the air. Subject to the veto of the national government the separate states may act

¹⁰ "Flying over populous centres has been prohibited since the entry of Marshal Pétain into Metz, when an aviator, flying low over a crowded square where a review was to take place, struck a telegraph wire and fell into a crowd, killing half a dozen persons." *NEW YORK TIMES*, October 13, 1919.

in the absence of national legislation (Article 12). Before the recent war Germany was well advanced in commercial aerial navigation. Great Britain, we know, cherishes great designs for rapid long-distance communication through the air. We will say also of England's ruler,—

"His state
Is kingly; thousands at his bidding speed,
And post o'er land and ocean without rest."

But in this instance civilization will not be served by having any nation "only stand and wait."

After all, the normal state of mankind is peace, not war; and in peaceful times no nation is likely to find the right of flying across other countries more valuable than England.

In spite of all criticism, this Convention would be an important gain to humanity, and its adoption would be a great step in placing international aviation upon a legal basis, and hastening the commercial conquest of the air. The law was made for man, and not man for the law. Even if the Convention plays havoc with excellent juristic theories, we must be prepared to sacrifice logic for the peace of the world, and to accept that which can be made better, rather than stand out for an impossible perfection. If the present Convention is the result of the recent experiences of war, we may reasonably expect victories of peace, no less renowned, to come later. Defects which actual experience indicates to exist will be corrected, and if the Convention has obstructed unnecessarily the aerial domain, doubtless more freedom will come in due time. Indeed, when all nations applying for admission have been admitted, it will be hard to find serious fault with the Convention as it stands, and we may expect all to sound its praises.¹¹

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NEW YORK.

¹¹ According to Press Dispatches from Paris, October 14, 1919, the Convention was signed by the representatives of many countries on the 13th, but representatives of the United States were allowed six months for further consideration. It is stated that the American Patent Office questioned whether under the Convention the United States courts would have jurisdiction if foreign machines carried devices infringing United States patents. Compare Article 18.

THE NATIONAL WAR LABOR BOARD

THE National War Labor Board originated from the apparent need, during the autumn of 1917, of improving the relations between employers and employees during the period, at least, of the war. The cost of living was steadily rising. Strikes were alarmingly on the increase. The labor supply was constantly shifting. As a result there were frequent acute shortages, and the supply of labor was beginning to be affected by the draft. The coal shortage became more threatening, and transportation was congested. The need for ships was imperative. The call for increased production of war material grew more insistent and the public mind was uneasy over the situation. The appearance of the President at the convention of the American Federation of Labor helped to focus thinking on industrial relations as the heart of the problem of production.

After much consideration the Council of National Defense suggested to the Secretary of Labor that he summon a conference board of employers, labor leaders, and representatives of the public to work out, if possible, the fundamental principles and policies to govern relations between capital and labor during the war. The Secretary of Labor adopted the suggestion, and late in January, 1918, requested one of the leading employers' associations, the National Industrial Conference Board, and the American Federation of Labor to appoint representatives. Two representatives of the public were also appointed. The body so created, known as the War Labor Conference Board, met, worked out a set of principles, and recommended the creation of a National War Labor Board "to adjust disputes in fields of production necessary for the effective conduct of the war."

This recommendation was adopted by the Secretary, and the members of the War Labor Conference Board were nominated by him as members of the National War Labor Board. This action was confirmed by President Wilson by a proclamation dated April 8, 1918, approving the nomination of the members of the board by the Secretary of Labor and providing that the powers and principles worked out by the War Labor Conference Board should be exercised, and be followed by the National War Labor Board.

The proclamation insisted upon the necessity of limiting by these means industrial disturbances with a view to the full production of war necessities.¹

It thus appears that the board was not created by statute. It was the result of voluntary agreement of leading representatives of the three great parties in interest,—employers (capital), organized labor, and the public,—expressly sanctioned by the executive arm of the national government with all its ordinary and extraordinary war powers. In operation it was regarded as an arm of the government, both by other governmental departments and by the several parties in industry and by the public. It was financed through the Department of Labor. Its funds were not, however, drawn from the regular appropriation granted that department, but from the special fund which Congress granted the President under the following terms: "For the national security and defense, and for each and every purpose connected therewith, to be expended at the discretion of the President."

As thus constituted the board was made up of five representatives of employers, nominated originally by the National Industrial Conference Board; five representatives of organized labor, nominated originally by the president of the American Federation of Labor; and two representatives of the public, one selected by the employer representatives and one by the labor representatives. These representatives of the public were Hon. William H. Taft and Mr. Frank P. Walsh. These two became, by agreement, joint chairmen of the board. Because of this the board was often referred to as the "Taft-Walsh Board." For each member, including the chairmen, there was an alternate named, who acted in the absence of the regular member. The President on May 7, 1918, named ten persons, any one of whom could be selected by the board to act as umpire in any case upon which it could not agree.

The secretary of the board was its chief executive officer. The organization of his staff developed as the work of the board increased. Besides the necessary machinery for recording, procedure, publicity, information, and accounting, it came to include a department of examination and a department of administration of awards.

¹ For further detail as to the developments leading up to the creation of the board see L. C. Marshall, "The War Labor Program and its Administration," 26 J. OF POL. EC. 425.

As finally developed it was the duty of the staff of the department of examination (the members were called examiners) to conduct and preside over all original hearings on complaint of either party to a case, and to analyze the testimony and evidence so obtained for action by the board. The relation of the examiners to the board was analogous to that of a master of chancery under a court of equity. The Interstate Commerce Commission has also employed examiners whose functions are similar to those of the examiners of the National War Labor Board. The members of the staff in the department of administration of awards (called administrators) were assigned, usually one to each case, to go to the place where a controversy had been settled by the board, and oversee the carrying out of the award or findings of the board and interpret the meaning of such award or findings as applied to specific questions as they might arise. For several months there were also a number of "field investigators." It was their duty to go to the parties in each case, investigate the facts and report them to the board. If the board took jurisdiction the investigators helped the parties to prepare their cases for hearing. This was done simply to aid and accelerate the work of the board. One group of these investigators was responsible to the employer members of the board and dealt only with employers in the field. The other group was responsible to the employee side of the board and dealt only with employees. Usually in the field they worked in pairs, one person for each side. Their organization was not clearly defined. They were discontinued about a month after the signing of the armistice, chiefly for financial reasons.

The important functions, powers, and duties of the board, and its principles and policies as specifically sanctioned by the President's proclamation, were as follows:

"To bring about a settlement, by mediation and conciliation, of every controversy arising between employers and workers in the field of production necessary for the effective conduct of the war.

"To do the same thing in similar controversies in other fields of national activity, delays and obstructions in which may, in the opinion of the National Board, affect detrimentally such production. . . .

"To summon the parties to the controversy for hearing and action by the National Board in case of failure to secure settlement by local mediation and conciliation.

"If the sincere and determined effort of the National Board shall fail to bring about a voluntary settlement and the members of the board shall be unable unanimously to agree upon a decision, then and in that case and only as a last resort an umpire appointed in the manner provided in the next paragraph shall hear and finally decide the controversy under simple rules of procedure prescribed by the National Board.

"The members of the National Board shall choose the umpire by unanimous vote. Failing such choice, the name of the umpire shall be drawn by lot from a list of ten suitable and disinterested persons to be nominated for the purpose by the President of the United States. . . .

"The National Board shall refuse to take cognizance of a controversy between employer and workers in any field of industrial or other activity where there is by agreement or Federal law a means of settlement which has not been invoked. . . .

"The action of the National Board may be invoked, in respect to controversies within its jurisdiction, by the Secretary of Labor or by either side in a controversy or its duly authorized representative. The board, after summary consideration, may refuse further hearing if the case is not of such character or importance as to justify it.

"In the appointment of committees of its own members to act for the board in general or local matters, and in the creation of local committees, the employers and the workers shall be equally represented. . . .

"The board in its mediating and conciliatory action, and the umpire in his consideration of a controversy, shall be governed by the following principles:

PRINCIPLES AND POLICIES TO GOVERN RELATIONS BETWEEN
WORKERS AND EMPLOYERS IN WAR INDUSTRIES FOR THE
DURATION OF THE WAR

There should be no strikes or lockouts during the war

"RIGHT TO ORGANIZE.

"The right of workers to organize in trade-unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.

"The right of employers to organize in associations or groups and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the workers in any manner whatsoever.

"Employers should not discharge workers for membership in trade-unions, nor for legitimate trade-union activities.

"The workers, in the exercise of their right to organize, should not

use coercive measures of any kind to induce persons to join their organizations nor to induce employers to bargain or deal therewith.

"EXISTING CONDITIONS.

"In establishments where the union shop exists the same shall continue, and the union standards as to wages, hours of labor, and other conditions of employment shall be maintained.

"In establishments where union and non-union men and women now work together and the employer meets only with employees or representatives engaged in said establishments, the continuance of such conditions shall not be deemed a grievance. This declaration, however, is not intended in any manner to deny the right or discourage the practice of the formation of labor unions or the joining of the same by the workers in said establishments, as guaranteed in the preceding section, nor to prevent the War Labor Board from urging or any umpire from granting, under the machinery herein provided, improvement of their situation in the matter of wages, hours of labor, or other conditions as shall be found desirable from time to time.

"Established safeguards and regulations for the protection of the health and safety of workers shall not be relaxed.

"WOMEN IN INDUSTRY.

"If it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work and must not be allotted tasks disproportionate to their strength.

"HOURS OF LABOR.

"The basic eight-hour day is recognized as applying in all cases in which existing law requires it. In all other cases the question of hours of labor shall be settled with due regard to governmental necessities and the welfare, health, and proper comfort of the workers.

"MAXIMUM PRODUCTION.

"The maximum production of all war industries should be maintained and methods of work and operation on the part of employers or workers which operate to delay or limit production, or which have a tendency to artificially increase the cost thereof, should be discouraged.

"MOBILIZATION OF LABOR.

"For the purpose of mobilizing the labor supply with a view to its rapid and effective distribution, a permanent list of the numbers of skilled and other workers available in different parts of the country shall be kept on file by the Department of Labor, the information to be constantly furnished —

1. By the trade-unions.

2. By State employment bureaus and Federal agencies of like character.
3. By the managers and operators of industrial establishments throughout the country.

"These agencies shall be given opportunity to aid in the distribution of labor as necessity demands.

"CUSTOM OF LOCALITIES.

"In fixing wages, hours, and conditions of labor, regard should always be had to the labor standards, wage scales, and other conditions prevailing in the localities affected.

"THE LIVING WAGE.

1. The right of all workers, including common laborers, to a living wage is hereby declared.
2. In fixing wages, minimum rates of pay shall be established which will insure the subsistence of the worker and his family in health and reasonable comfort."

A resolution adopted by the board July 31, 1918, was regarded by all parties as having substantially the same force as its original statement of principles. The resolution stated in effect that during the period of the war the employer should not expect unusual profits nor the employee abnormal wages; that each should get enough to enable him to contribute most effectively to the prosecution of the war. The resolution concluded:

"That the board should be careful in its conclusions not to make orders in this interregnum, based on approved views of progress in normal times, which, under war conditions, might seriously impair the present economic structure of our country;

"That the declaration of our principles as to the living wage and an established minimum should be construed in the light of these considerations:

"That for the present the board or its sections should consider and decide each case involving these principles on its particular facts and reserve any definite rule of decision until its judgments have been sufficiently numerous and their operation sufficiently clear to make generalization safe."

The board was clearly intended to act by means of mediation and conciliation. It is interesting to note, however, that the pressure of circumstances was such that almost from the start the board acted in a number of cases as a court of arbitration. Out of the twelve hundred and forty-five separate controversies placed

before the board from the beginning to May 31, 1919, the parties made one hundred and ninety-three joint submissions for arbitration. The remainder, ten hundred and fifty-two, were *ex parte* cases. But even in these *ex parte* cases the board itself did very little mediation or conciliation. The testimony and evidence were received and a decision rendered. The urgencies of war production were such that up to the time of the armistice but few parties refused to carry out the decisions of the board, even in those where only one party to the dispute had invoked the board's aid. Compulsory arbitration was not intended or at any time practiced. For the first few weeks the board itself attempted conciliation, but the pressure of work and perhaps the structure of the board soon made that impossible. Some conciliation was effected by field investigators and examiners, and in a number of cases the work of the administrators, subsequent to a decision by the board, was very largely conciliatory in character.

The board was the court of last resort in all labor disputes for the entire country. Other government departments had created adjustment boards within their own fields, but where these failed to settle disputes reference was sometimes made to the National War Labor Board. The Bridgeport case, the Worthington Pump case, and the New York Harbor dispute, referred to later on, were instances of this sort. A large number of cases were referred to the board by the Department of Labor.

The terms of its creation did not give the board any power for enforcing its decisions. Nevertheless, in practice it was only necessary to invoke the aid of the President, or that of the other departments or war controls of government, to secure the most drastic powers. In the Smith and Wesson case the refusal of the employer to abide by the board's finding ended by a prompt commandeering of the plant by the government. Similarly, when the Bridgeport strikers refused to obey the board the President ordered them back to work under pain of deprivation of employment through the Federal Employment Bureau. They obeyed. Great weight also attached to the board's decrees because of the power of the American Federation of Labor and the National Industrial Conference Board by whom and from whom its members were originally chosen. Awards in cases where there had been joint submission of the parties were enforceable at law, by virtue of the common-law

doctrine of awards, but this fact did not enter into the situation during the war. The national necessity was the compelling force behind every award or finding.

Cases came to the board in various ways. Usually aggrieved employees would write or telegraph to the board asking it to hear and settle the case. About twelve per cent of the complaints brought directly to the board, however, were brought by employers or employers' associations. Often the employees and employer agreed jointly to submit their disputes to the board. Cases originating with employees were generally brought by the unions involved, but two hundred and ninety-six complaints came from employees in works where there were no organized unions. An effort was always made to secure joint submission if possible. Sometimes, after ordinary conciliation had failed, the Secretary of Labor requested the board to take a case.

When a case was brought to the board a preliminary inquiry was made to make sure that the nature of the case gave the board jurisdiction. The complaining party was required to file with the secretary of the board in due form a written statement of the complaints or demands. A copy of this was served on the party defendant with a request for information, and also a request that both parties submit the issue to the board and agree to abide by its decision. Field representatives were then sent out to help the parties prepare for the hearing. The procedure developed with increasing detail and completeness as the work of the board progressed. Sometimes in very important and critical situations much of the detail of procedure was dispensed with in order to secure quick action and keep production going. If jurisdiction did not exist the case would, where possible, be referred to some other body having jurisdiction, or be dismissed. Up to May 31, 1919, some three hundred and fifteen cases had been referred to other agencies for settlement, and three hundred and ninety-one dismissed. Of these dismissals one hundred and fifty-nine were for lack of prosecution by the aggrieved party, ninety-three for lack of jurisdiction, and most of the remainder as a result of voluntary settlement between the parties.

If the board had jurisdiction, one or more examiners would be sent to the place of the dispute to hold public hearings. These hearings were informal. Any evidence was admitted, subject to

common-sense restrictions as to relevancy and time. Frequently the field investigators expedited the gathering and preparation of evidence. Stenographic records of the hearings were kept and on them a summary of the case was prepared for the use of the board. For further expedition in handling cases the board was divided into sections, composed of one employer member and one employee member. The joint chairmen also acted as a section. Very important or complex cases were handled by a double section consisting of two representatives of each side. These sections would consider all the evidence, sometimes discussing the case with the examiner, or even occasionally holding additional hearings themselves on especially perplexing issues. Then they would endeavor, usually with success, to agree upon a decision in the case. If they agreed, the decision was approved by the board at its next meeting, with the right (rarely exercised) of amending the decision. If the section failed to agree, the case went to the full board for settlement. If the board could not unanimously agree as to the decision and it was a case of joint submission, the case was referred to one of the ten umpires nominated by the President. Generally the umpire was chosen by drawing lots. If, however, only one party to the case had submitted to the board, and the section could not agree a majority vote of the board was sufficient to settle its action. In such a case reference was not made to an umpire. If the board divided evenly, the case stood as undecided. Up to March 28, 1919, twenty-five cases had been referred to the umpires. Figures on this point after that date are not available. The board met every two weeks.

If the questions involved in a case were complex or the number of workers affected was large or the case of considerable importance to war production, the award frequently provided that an administrator should be sent to interpret the award, see that it was properly executed, and settle, if possible by conciliation, new questions that might arise under its operation. Where shop committees were provided in the award it was the duty of the administrator to supervise the election of their members. He also kept the board constantly informed of the progress of events in the case.

All street railway cases were decided by the joint chairmen as a section. Many of the cases they heard themselves. One examiner and two administrators devoted their entire time to that group of cases. In all there were one hundred and fifty-six of these cases.

Forty-three were dismissed after hearing or by agreement, and eighteen were referred to the Department of Labor. No less than eighty-nine awards or findings were rendered, affecting over eighty thousand street railway employees.

From the beginning of the board up to May 31, 1919, there were twelve hundred and seventy cases entered on the docket, twenty-five of which were merged with other cases, leaving twelve hundred and forty-five separate controversies. These were disposed of as follows: —

Awards and findings made	462
Dismissed	391
Referred to other agencies	315
Pending	23
Remaining in doubt because of disagreement in board	53
Suspended	1
	<hr/> 1,245

The fifty-three doubtful cases represented actually only three case groups, as one of the case groups involved fifty-one docket numbers. In addition to the four hundred and sixty-two awards and findings there were fifty-eight supplementary decisions, making a total of five hundred and twenty formal awards or findings. The final figures up to the dissolution of the board on August 12, 1919, have not proved available, but would vary only slightly from those given above.

The submission and disposal of cases by months up to May 31 is shown below. Complete figures are not available.

	May June July 1918	Aug.	Sept.	Oct.	Nov.	Dec.	Jan. 1919	Feb.	Mar.	Apr.	May
Cases submitted	246	125	219	151	275	68	87	73	16	5	5
Awards, findings and recommendations	34	4	10	29	41	34	65	53	132	99	19
Dismissed	35	17	34	26	18	43	135	23	16	19	—
Referred to other agencies	46	29	61	41	48	76	11	6	9	2	—

During the first three months the board was working out its own attitude toward its principles and toward the industrial situation of

the country. It was essentially a bi-partisan board, and the opposing economic forces represented in it naturally required time to adjust themselves to working together in the new relationship under war pressure. The members had to come to know one another and to realize the implications of the principles and policies to which they were committed. The date of the first decision of a case was June 12, 1918, and one other case was decided late in June. Six decisions were issued early in July, and then on July 31 decisions in twenty-six cases were announced, five of them being "industrials" and the remainder street-railway cases. In these first few months, especially, the board confined itself chiefly to cases that were most important to war production, such as the Bridgeport machinists, the Bethlehem Steel Company, the General Electric Company, the Western Union Telegraph Company, and Smith and Wesson Company. The street-car cases were mostly in munitions centers and vitally affected war production.

The increase in the number of cases submitted from August to December shows how the importance of the board's work was being felt, and the subsequent numbers of submissions strikingly reveal the effect of the armistice.

Geographically the cases were naturally situated where the war industries were most active, in the middle and northern Atlantic states and in the Middle West. There were a number of cases, however, in the South and some on the western coast. The metal trades furnished most of the cases. By crafts affected, the machinists cases were of course most frequent and involved the largest in number of men. The awards and findings directly affected ten hundred and eighty-four establishments employing over six hundred and sixty-nine thousand people. Certain crafts and industries were almost entirely excluded because they came under other governmental adjustment agencies, and the rules of the board did not give it jurisdiction in such instances. For example, coal miners came under a board in the Fuel Administration, carpenters and steel erectors under a "Cantonment Labor Adjustment Board" in the War Department, harness and saddlery workers and garment workers under other War Department boards, seamen and long-shoremen under a board connected with the Shipping Board, railway workers under the Railway Administration.

Up to the signing of the armistice the power and prestige of the

board were steadily increasing, despite its early slowness in getting under way. As with all the war agencies of the government, it had to devise its machinery, secure and train its administrative personnel, and develop the implications of its policies under severe pressure. The number of cases, their character, and the board's principles, decisions, and administration of decisions, were steadily increasing its control over industrial relations throughout the country. Sanitary standards were beginning to be worked out which would have been effectively enforced through the administrative machinery. The effect of the board's work cannot be measured by the awards alone. In one hundred and thirty-eight recorded instances, and probably also many others, strikes or lockouts were averted or called off as a direct result of the board's intervention. The principles of the board were adopted by other governmental departments, such as the Ordnance Department, in the adjustment of industrial disputes in their jurisdiction. Many cases were settled without recourse to the board, in accordance with its principles or some award or the rulings of an administrator in some case. Instances of this occurred in Washington, D. C., and Philadelphia street-car disputes, wage adjustments in the Lehigh Valley region of Pennsylvania, and elsewhere.

On all these tendencies and on the board itself the signing of the armistice in November had a profound effect. Almost immediately the War Department began to notify manufacturers of cancellation or contemplated cancellation of war contracts. Manufacturers immediately took alarm, discharge of workers commenced, and the whole scene of industry became uncertain and confused. The powers of the board derived from the support of other governmental departments was greatly decreased because the policy of the President was not defined. Before the armistice there had been only two instances of actual refusal to abide by the decision of the board. The drastic settlement of those cases by the President had brought all parties into line. After the armistice, however, many employers who objected to the board's decrees in their cases asserted that the board was created only for the duration of the war and that the armistice had ended the board and the force of its decisions. They proceeded to defy the board with varying degrees of openness. The President requested the board to continue with its work, and after consideration of the situation the board issued

on Dec. 5, 1918, a statement to the effect that thereafter it would act only in cases jointly submitted to it for arbitration, and that all cases then before the board would be handled as they had been in the past. The board also announced then that —

“wherever question arises under awards already rendered as to whether those awards are still in effect on account of the term ‘duration of the war,’ the Secretary be instructed to advise them that those awards are in effect and that the words are interpreted to mean until peace has been proclaimed by the President of the United States.”

Much of the board’s prestige and power was retained and, as indicated in the foregoing figures, cases continued to be submitted for adjudication. Two of these, the New York Harbor case and the Patterson textile case, were very important both in the number of workers affected and in the character of the issues involved. In the President’s cable message to the joint chairmen in regard to the New York Harbor case he stated:

“I am sure that the War and Navy departments, the Shipping Board and Railroad Administration and any other governmental agencies interested in the controversy will use all the power which they possess to make your finding effective, and I also believe that private boat owners will feel constrained by every consideration of patriotism in the present emergency to accept any recommendation which your board may make. Although the National War Labor Board, up to the signing of the armistice, was concerned solely with the prevention of a stoppage of war work and the maintenance of production of materials essential to the conduct of the war, I take this opportunity also of saying that it is my earnest hope that in the present period of industrial transition arising from the war the Board should use all means within its power to stabilize conditions and prevent industrial dislocation and warfare.”

Through the spring, however, the activity and effectiveness of the board gradually declined, partly for lack of funds and partly because of apathy on the part of all parties, — the government, capital, labor, and the public. The compelling need for war production which brought the board into being and maintained it was gone. Group interests shifted to other matters. On June 25, 1919, the board adjourned subject to the wishes of the President. It recommended that its files and records be transferred to the Department of Labor, likewise any further administrative work

in connection with outstanding cases. It declined thereafter to accept any further cases. Cases then pending were to be finished by the joint chairmen or sections of the board. On August 12, 1919, the board met for the last time, and after completing action on all cases pending but one, it formally dissolved.

In order better to understand the meaning of the work of the board it will be helpful at this point to discuss briefly the leading features of some of the important cases which it handled and consider the application and working out of some of its principles.

One of the earliest cases — third on the docket — was that of the *Employees v. Western Union Telegraph Co.* The complaint was that the company discharged employees if they joined the telegraphers' union. The union threatened a strike if this was not discontinued. The extent of its organization was not certain, but the tying up of all the telegraph lines (for the case also involved the Postal Telegraph Company) would have seriously crippled the nation's war effort. The joint chairmen of the board, acting as mediators, proposed that the company should cease from discharging employees for joining the union, that the company recognize and deal with committees of the employees but not with the union, and that the union give up its right to strike and both sides refer all grievances to the board for settlement. The company declined this compromise and offered another, but refused to cease discharging employees because of their union affiliations. The company's compromise was unacceptable to the joint chairmen. The company refused to submit its side of the case to the board. The board could not agree on any action and simply published a statement of the various proposals and a record of their vote on the matter. The company was urged to adopt the plan proposed by the joint chairmen. It flatly refused. President Wilson publicly requested the company to conform to the plan of the joint chairmen, but without success. In the meantime, the telegraphers' union again threatened a strike, and early in July, at the President's request, Congress authorized him to take control of all the telegraph and telephone lines. This he did forthwith, and the adjustment of employees' grievances came under federal control. This case was the first one involving the issue of collective bargaining. Though the issues in the case were never satisfactorily settled, it served as the anvil upon which the board hammered out its actual working

policy in regard to the bargaining relations between employers and employees.

Another interesting early case was *Employees v. Frick Co., etc., of Waynesboro, Pa.*,² decided July 11, 1916. The board in this case took the stand that there should be a minimum wage established not in reference to the economic power of the workers to compel it, but in reference to a determinable standard of living. The workers asked, among other things, a minimum wage of thirty cents an hour, common labor receiving at that time as low as twenty-two cents an hour. The award granted a minimum of forty cents an hour and announced that the board had under consideration the determination of what should actually constitute the living wage in accordance with its principles. Skilled workers were awarded the increase they demanded. This was the first case in which an administrator was appointed. The case included eight establishments employing some three thousand workers. Shop committees were ordered to be created by the award. As such a thing had never existed or been seriously considered there before, the administrator had many problems to solve. His success in securing mutual understandings and good will among all parties was a considerable factor in the establishment of administrators as a regular part of the machinery of the board.

In the case of the *Worthington Pump & Machinery Corporation*,³ decided July 11, 1918, the installation of the basic eight-hour day was the paramount issue. The company was manufacturing parts for submarine destroyers. As the Secretary of the Navy was most urgent that no dispute should be allowed to delay the work and favored the installation of the basic eight-hour day in all plants engaged on navy work, the board granted it in this instance. The award also established a classification and set of ratings for machinists. Later, a section of the board worked out in this case a definition of the qualification for the varying classes of machinists. This classification and set of definitions became of considerable importance subsequently, and formed the basis of administrative rulings in other cases.

The cases which firmly established the position of the board were those of the Smith and Wesson Company, making fire-arms, and the Bridgeport machinists.

² Docket No. 40.

³ Docket No. 14.

In the Smith and Wesson case,⁴ the board declared in its findings that the practice of making contracts between the employer and the individual employees, whereby the employee agreed not to join a union "even if such contracts were lawful when made, is contrary to the principles of the National War Labor Board and should be discontinued for the period of the war." This declaration in effect nullified the decision of the United States Supreme Court made in December, 1917, in the case of *Hitchman Coal & Coke Company v. Mitchell*,⁵ where a union was enjoined from attempting to organize employees who had signed such contracts. The action of the board in the Smith and Wesson case was based on the idea that when representatives of the leading employers of the country agreed to the principles of the board they waived their legal rights under the Hitchman decision, just as in substance the trade union leaders had waived their right to conduct strikes. The Smith and Wesson Company, however, declined to give up its legal right in this respect, and, as it had not originally agreed to abide by the board's findings, it refused to do so. The board reported the situation to President Wilson, who promptly directed the War Department to commandeer the plant. This was done, and the board's findings were put into effect. As regards the individual contracts, this case is an interesting example of how law often lags far behind every-day practice and public opinion.

The case of the Bridgeport Machinists⁶ was one of the most difficult cases in the history of the board, and probably the most important in its effect on relations between all the parties in interest. Bridgeport was one of the leading munitions centers. There the Remington Arms Company was making over nine tenths of the cartridges used by the American forces abroad. Many other companies in that city were engaged in war work. During the spring there had been friction between two companies and their employees. A special board appointed by the Government Ordnance Department adjudicated the issues, awarding a classification of machinists, among other points. The two companies refused to abide by the decision and appealed to the Secretary of War. Neither party had formally consented to abide by the award of the Ordnance Board. The machinist employees threatened a strike unless the award was enforced, whereupon the Secretary of War requested the National

⁴ Docket No. 273.

⁵ 245 U. S. 229 (1917).

⁶ Docket No. 132.

War Labor Board to hear and decide the issues. The workers and employers agreed to abide by the board's decision. Practically all other companies in the city, sixty-six in all, agreed to conform to the award of the War Labor Board, bringing about sixty thousand workers under it. The other leading issue was the matter of the eight-hour day. After prolonged investigation and much consideration the board failed to agree on the points involved, and the case was then sent to one of the ten umpires. Meanwhile feeling was running high at Bridgeport. The workers were suspicious and impatient at the failure of the board to reach a prompt decision. The umpire's award granted the eight-hour day but reversed the Ordnance decision on the matter of classification. Statements and decisions by other governmental agencies had led the machinists to believe that classification was an established governmental policy. On this ground they struck, and refused to abide by the award. President Wilson thereupon wrote to the Bridgeport machinists' union that the government had commandeered the plant of the Smith and Wesson Company, because it refused to abide by an award of the War Labor Board, and "Having exercised a drastic remedy with recalcitrant employers, it is my duty to use means equally well adapted to the end with lawless and faithless employees." He requested them to return to work and abide by the award, and stated that if they refused they would, through the United States Employment Service, be barred from employment in any industry connected with the war and their industrial draft exemptions would be cancelled. He also wrote a letter to the employers insisting that all strikers should be reinstated. This action ended the strike. The board sent an administrator to Bridgeport, who stayed there for several months, supervised the election of shop committees, allayed much of the anger and suspicion, interpreted the award, supervised the payment of back pay granted under the award, and brought about vastly better understanding and good will among all parties.

The President's action in the Smith and Wesson and the Bridgeport cases greatly enhanced the prestige and power of the board among employers, employees, other governmental departments, and the general public. Thereafter its decisions were respected, and, up to the time of the armistice, obeyed, even though reluctantly in some instances.

There were three important cases involving employees of the General Electric Company at its large works in Schenectady, New York; Pittsfield, Massachusetts; and Lynn, Massachusetts. In the Pittsfield case, decided July 31,⁷ the board prohibited the practice of making individual contracts as described in the Smith and Wesson case. The award provided, among other things, a method of electing shop committees in greater detail than had hitherto been specified, determined various points in regard to pay, and directed the appointment of an administrator. The same administrator supervised the situation in all three awards and worked out the shop committee system fully and satisfactorily.

The case of the Bethlehem Steel Company did not involve any peculiar principle, but was important chiefly by reason of the tremendous quantity of guns and shells being manufactured by that company. The complaint was originally made only by the machinists and electrical workers, some ten thousand in all, but the findings of the board also provided that wages and working conditions of other crafts should be adjusted by shop committees to be elected. Thus the award came to cover all the thirty thousand employees in the works. In this case the chief complaint had been about the method of pay. The question of payment of back pay later became important. The administration of this case, and the Bridgeport and the Corn Products cases, lasted longer probably than any others. The Bethlehem case, in fact, was the only case left unfinished at the time of the dissolution of the board.

The street-car cases were in many respects unique. Counsel for the American Electric Railway Association, and for the electric railway employees' union, held a series of joint conferences with the joint chairmen on the general principles involved in all this group of cases. In these conferences the employers' representatives admitted that the condition of the companies' finances was immaterial in determining the question of granting a minimum wage. It was then unofficially announced by the chairmen that in the granting of minimum wage increases the board would not consider whether or not the companies could afford to pay the increase. The payment of a living wage was made a first charge on the business. Nevertheless the joint chairmen formally requested President Wilson to take action toward permitting the street railways to

⁷ Docket No. 19.

increase fares. Being public utility companies they were limited by franchise or otherwise in the amount of fare they could charge, and many of them were in serious financial conditions. As the employees in most of the railway cases were well organized and had obtained recognition by the employers, the question of collective bargaining did not often enter into the cases. The men's demands were chiefly for wage increases. The awards usually granted substantial increases. For this reason there has been an impression that the board's awards are largely responsible for the number of street railways now in the hands of receivers. But from a list of such receiverships, as of April 12, 1919, submitted to the board by one of the street railway companies, it appears that out of the fifty-nine companies then in receiverships (in twenty-seven states) only five had gone into receivers' hands after an award by the board.

In the case of *Molders v. Wheeling Mold and Foundry Co.*,⁸ decided by an umpire, the chief question was whether the eight-hour day should be adopted. The umpire held that the eight-hour day should be adopted. He pointed out, however, in his opinion that there are emergencies likely to occur when for a brief period that limit may be exceeded. He went on to say:

"But the protection of the eight-hour day will amount to nothing if it rests with the employer alone to declare the emergency. The fifty per cent allowed for overtime is too small a penalty in view of great profits that may arise. It is true that what is 'an emergency' can be and has been defined. Still it rests with the employer to declare that the facts place the demand within the definition of an emergency."

He therefore held that, as a protection against overtime "on emergencies," nothing should be held an emergency unless so declared by majority vote of a joint board to consist of two members to be selected by the employer and two by the employees. The provision of this bit of democratic machinery is a significant step.

The case of *Employees v. Manufacturers of Newsprint Paper*,⁹ decided June 27, 1918, is interesting because in it a majority of the manufacturers of newsprint paper voluntarily agreed to abide by the decision of the board and argued their cases as a whole. Thus the decision came to govern substantially that entire industry.

The award in the case of *Employees v. Corn Products Refining*

⁸ Docket No. 37b.

⁹ Docket No. 35.

*Company*¹⁰ contains a very complex and interesting classification and rating of the workers in that industry, based on a prolonged, detailed study of the jobs by two of the board's examiners. The back pay granted under the award to the workers of the four factories of that company amounted in all to over \$950,000. The company paid it all, and wrote to the secretary of the board that the benefits which the company had and expected to receive from the classification alone would exceed the sum expended in back pay. Another interesting feature developed in the administration of the case was an agreement between the management and the newly created shop committee of one of the plants that the management would discharge any worker recommended for discharge by the committee and would not take them back except on recommendation of the shop committee. In this plant there was after the award a brief strike by one group of workers. The management placed the responsibility of handling the situation on the shop committee. The committee responded by offering to negotiate for the group; and when the strikers refused to negotiate, the committee sustained the management and secured an entirely new set of satisfactory workers in place of the strikers.

The case of the Marine Workers Affiliation of the Port of New York,¹¹ was chiefly significant in relation to the board because of the fact that at the request of the President, the Railroad Administration, the Shipping Board, the Navy Department, and the War Department all submitted to the jurisdiction of the board. The private boat owners refused to submit. As this refusal occurred several months after the armistice was signed, the government did not undertake compulsory action against the private owners. The issues were wages and the eight-hour day. The technical questions of operation were highly complex, the parties defendant numerous and inharmonious, the feelings intense and bitter. The final results were probably unsatisfactory to every one.

Perhaps the chief defect of the board was its inability in a number of important instances to reach a prompt decision. This, however, was inevitable because of the bi-partisan make-up of the board and the comparative inexperience of so many of the employers of the country in collective bargaining with unions. Another

¹⁰ Docket No. 130.

¹¹ Docket No. 10; Docket No. 1036.

reason for the delays came from the fact that it was exceedingly difficult to secure a clear understanding of the technique of operation in the wide variety of industries that came before the board. Without such an understanding prompt and wise decisions were very difficult to reach. The members of the board could not be experts in all industries, and it was very difficult to secure examiners or administrators who possessed good judgment, were able to grasp the technical side of the respective industries and at the same time maintain the right attitude toward the opposing parties.

Not even the warmest friends of the board would deny that it had imperfections, and some of them serious.

Nevertheless the board accomplished much real service to American industry. Its principles and investigations and decisions in regard to the minimum wage went far toward establishing that principle as an actuality in this country. The machinery of administering the awards by agents of the board proved important. Previously the labor unions, especially on the railroads, had often objected to arbitration of disputes, because the interpretation and carrying out of the award was in the sole control of the employer. This objection was therefore done away with. The administrators also served as a valuable source of technical and other information for the board, as did the examiners likewise.

But the important accomplishment of the board concerned the bargaining relationships between employers and employees, whether organized or unorganized. The great body of American employers have steadily opposed the recognition of unions and dealing with them on an equal basis, and great industrial areas have remained devoid of union organization.

At first the consensus of opinion among employers seemed to be that the boards' principles simply called for a maintenance of the *status quo* in all matters affecting unions. As interpreted in the decisions, however, it became clear that unions should be permitted to organize even in shops which heretofore had been closed non-union shops. The unions were not to strike to compel recognition in any shop where they had previously not been recognized, but the board would direct the employer to recognize and deal with shop or departmental committees which might or might not be controlled by unions. Several awards specified the method of electing such committees. In October the joint chairmen outlined a plan

of election of shop committees as a guide for administrators and others in supervising such elections.

These committees were in the awards assigned various duties, such as working out classifications, wage scales, discharges, sanitary conditions, hours, holidays, piece-work rates, establishment of an apprentice system, and matters not settled in the award.

The board held that where a shop had been unionized before the establishment of the board the shop should continue unionized.¹² Also that where an employer had recognized some unions and had not recognized others, or where some of the employers who came within an award had organized the employees in their plants into unions and other such employers had not done so, the employers should continue to negotiate with union committees to the same extent as theretofore, although they were not obliged to further organize the workers in their plants.¹³

Employers were forbidden to discriminate against workers because of membership in unions or for legitimate trade-union activities.¹⁴ In several cases where employees had been discharged for such reasons the board ordered their reinstatement with compensation for all they had lost by reason of their discharge.¹⁵ The board forbade the blacklisting of union men, and forbade employers to make with their employees individual contracts which deter their employees from joining unions. It held that peaceful participation in a strike should not act as a bar to re-employment. In one instance it referred to the War Department evidence that employers had missed the selective draft law in order to punish union men. The board held that it is not sufficient for the employer to countenance a "company union;" and that the employer may not compel the men to join a beneficial organization conducted by it, but the employees must be allowed to become members of any legitimate labor organization without interference on the part of the company.¹⁶

¹² Gem Metal Products Corp., Docket No. 591.

¹³ St. Louis Coffin Co., Docket No. 258; Philadelphia Machinists, Docket No. 400.

¹⁴ Waynesboro Cases, Docket No. 40; N. Y. Consolidated R. R., Docket No. 283.

¹⁵ General Electric Co., Lynn, Docket No. 231; National Car Coupler Co., Docket No. 328; Savannah Electric Co., Docket No. 748.

¹⁶ For further interesting points and decisions see the excellent summary and digest of awards of the National War Labor Board prepared for the board by Mr. Robert P. Reeder.

Usually the board did not compel an employer to contract with a union or to deal with a representative of the employees who was not himself an employee unless the employer had been so doing before the submission of the controversy to the board.¹⁷ But in one case where for several years the company had dealt with a business agent of the union and then ceased and refused to meet with him, he not being an employee, the umpire held that such refusal may constitute a grievance.¹⁸

Altogether the establishment of collective bargaining was directed, with or without shop committees, in two hundred and twenty-six cases. Shop committees were thus put into successful operation in a sufficient number of instances to give them a great impetus in all American industry. The question now will be whether unions will desire to take over and control the shop committees and whether they have sufficiently extended their strength to do so. It will also be very interesting to observe the effect of this shop-committee idea on the development of union structure. It may possibly be a factor tending to change the structure from craft to industrial form. In so far as it assisted an existing decentralizing tendency among the unions, it may affect union tactics as well as structure.

The board surely achieved its most pressing task, the stabilization and adjustment of industrial relationships in such a way as to maintain and increase the war production of the nation. Further than that, it did much to educate employers and employees and the public in regard to some of the fundamental aspects of industrial relationships. Its influence for improvement of industrial relations during the war was immense. Following its example, perhaps similar arbitration boards will be set up for certain industries, or in states or other areas. In any event, the impetus of its work will be far reaching in all American industry.

It is natural to compare the National War Labor Board with the Australian Court of Conciliation described by Mr. Justice Henry B. Higgins in his two masterly articles on "A New Province for Law and Order" published in this REVIEW.¹⁹

The War Labor Board was a hurried improvisation created by

¹⁷ *St. Joseph Lead Co.*, Docket No. 16; *Commonwealth Steel Co.*, Docket No. 472; *Dayton St. Ry. Co.*, Docket No. 150.

¹⁸ *Niles-Bement-Pond Co.*, Docket No. 339.

¹⁹ 29 HARV. L. REV. 13, and 32 HARV. L. REV. 189.

executive proclamation under stress of war. The Court of Conciliation was created by statute in consequence of a constitutional provision. The board lived slightly over one year, while the Court of Conciliation is now fourteen years old and Mr. Justice Higgins has presided over it for twelve years. The board was large and bipartisan; the court is made up of only one man. As a result, the Australian court has developed a consistent body of principles and has had the support and understanding of a large portion of the community. Both of these were impossible to the War Labor Board.

To help maintain production for the sake of war, by conciliation and arbitration of labor disputes, is a far different thing from so helping to maintain production for the citizen consumer. In the latter process a far sounder balance of ideas and forces and a much finer and broader conception of human group relationships is possible. This appears quite clearly in Mr. Justice Higgins' articles. The questioning of some of our fundamental industrial assumptions which one sees in his second article are characteristic results of the stress of war. Such questionings do not appear in the decisions of the War Labor Board, because it was far more devoted to maintaining rigidly the *status quo*.

Yet it seems quite possible that this questioning spirit, similarly felt in this country, is one of the reasons for the discontinuance of the War Labor Board. Aside from their apathy, the parties concerned perhaps instinctively felt that there is little use in trying to lay down law in industry while the fundamental assumptions lying behind law are being reconsidered. As Mr. Justice Oliver Wendell Holmes, in his address on Law and the Court, before the Harvard Law School Association, so finely stated: "As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field." The principles to govern a truce may be set forth under any conditions which make a truce possible, but the existence and growth of law in industry, in the sense which Mr. Justice Higgins uses the term, implies the maintenance of the *status quo* in respect to the major premises of the social order.

Whether or not the *status quo* in fundamental social and economic

relationships is to be maintained in America is an interesting subject for speculation. But in any event such considerations as the foregoing must now be taken into account in any thinking about arbitration in labor disputes, for truly, as General Smuts has said, "humanity has struck its tents and once more is on the march."

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SPECIFIC PERFORMANCE IN CONNECTION
WITH RECEIVERSHIPS

INTRODUCTORY STATEMENT

IN discussing the specific performance of contracts in connection with receiverships it should be noted at the outset that no action for specific performance, or any other action or suit, can be brought against a receiver without the permission of the appointing court or without the authorization of an enabling statute. However, if the third party to a receivership proceeding has what would be a claim for specific performance had not receivership proceedings taken place, and makes a proper presentation of his case to the court appointing the receiver, he may be allowed to press his claim by intervention proceedings or be allowed to sue the receiver for such relief as the situation may require.

Whether such third party shall have the remedy of specific performance or a remedy analogous to specific performance, or whether he simply has a claim for breach of contract, usually depends on the question whether or not the party claiming specific performance of a contract has a lien, charge, equitable or other interest in the receivership property which puts him in a different or better position than other claimants or creditors. The determination of these questions may be complicated by questions of notice and the effect of registry laws.

We must further bear in mind that a lien or charge is, in strictness, neither a *jus in re* nor a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. The existence of a lien presupposes the property to be in some other person.¹

The holder of an equity or equitable title in property, on the other hand, has an ownership without the full legal title. An equitable title or interest is a property right and may be such an interest in real estate as will pass to one's heirs, and not pass as

¹ *Brace v. Duchess of Marlborough*, 2 P. Wms. 491 (1728); *Ex parte John S. Foster*, 2 Story (U. S.), 131, 147 (1842); Fed. Cas., No. 4960.

personalty to the executor or administrator.² The holder of a lien or charge may have a right to have property in the hands of a receiver sold or otherwise disposed of to satisfy the lienholder's claim, but such a lienholder has not a right of specific performance either against the original owner of the property or against the receiver of such property. The owner of an equitable title or interest in property may have a right of specific performance against the owner of the legal title to such property, and may have a right analogous to specific performance against a receiver of such property.

For the purposes of this article we shall take up:

I. Cases of receivers after judgment to carry the judgment into effect.

II. Receivers after judgment under creditor's bills and by way of equitable execution, as the term is used in England; and receivers in supplementary proceedings and in aid of execution proceedings, as the terms are used in the United States. Such receivers may, by statute, be invested with title.

III. Equitable receivers, who take possession and care for property, but who are not invested with the title to the property.

IV. Receivers in bankruptcy, whose title to property depends upon the uses and rules of equity and also upon the bankruptcy statutes.

V. Liquidators or receivers after dissolution of a corporation, who, by the statutes of England and most of our states, are invested with title to the property of the dissolved corporation.

VI. Specific performance of contracts entered into by the receivers themselves, either as individuals or as officers of the court.

I. RECEIVERS AFTER JUDGMENT TO CARRY THE JUDGMENT INTO EFFECT

Formerly chancery courts enforced their own decrees mainly by writs of sequestration. By such a writ of sequestration the property of the defendant was held by the sequestrator under the order of the court until the defendant performed the decree. To-day receivers are frequently appointed to accomplish what the defendant is ordered to do but refuses. The powers of such receivers are broader than were the powers of sequestrators, and the powers of

² See matter discussed in this article, note 15.

the court in appointing receivers are broader than they were under the old writs of sequestration. The statutes in many states provide for the appointment of such receivers.³ The execution of a conveyance by such a receiver, or the satisfaction of an instrument by such a receiver, are common exercises of such powers.⁴

The right of specific performance in such cases accrues against the defendant and not against the receiver. The court applies the remedy on proper presentation of the case by the plaintiff and uses the receiver as the means to an end. Such appointments of receivers to perform specific acts present and suggest few intricate legal problems. When in other cases a receiver has been appointed for one reason or another and a third party claims specific performance against the receiver, then some intricate legal problems arise.

II. RECEIVERS AFTER JUDGMENT UNDER CREDITORS' BILLS AND BY WAY OF EQUITABLE EXECUTION

After a party has secured a judgment and is unable to satisfy that judgment by execution at law, he may come into a court of equity either for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent sale of defendant's property on execution,⁵ or he may ask the aid of a court of equity to obtain satisfaction of his judgment out of the equitable property of the defendant.⁶ In either case, a receiver is frequently appointed to accomplish this end for the judgment creditor.

Such receivers are known as receivers under creditor's bills in America, receivers by way of equitable execution in England, and under some state statutes they are called receivers under supplementary proceedings and receivers in proceedings in aid of execution. In all the above cases such receivers are governed by the usages and rules of equity, as in the case of equitable receivers,⁷ except, however, as the statutes may change or en-

³ NEW YORK CIVIL CODE, § 713 (2); OHIO GEN. CODE, § 11,894 (3); CALIFORNIA CODE OF CIV. PROC., § 564 (3).

⁴ Scadden Flat G. M. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440 (1898).

⁵ Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710, 715 (1884); Rice Co. v. McJohn, 244 Ill. 264, 270, 91 N. E. 448 (1910).

⁶ See references in note 5, *supra*.

⁷ See Title III, this article.

large such usages and rules. Such statutes may vest title in the receiver.⁸

Such property goes into the hands of the receiver burdened with all liens, charges, and equitable interests properly attached thereto or existing therein.

In such receiverships the same criterion must hold as holds in ordinary equitable receiverships,⁹ namely, has the party demanding specific performance any lien, charge, or equitable interest in or against the property in the hands of the receiver, and furthermore, has such receiver the mere possession of the property, or has he been vested by statute or assignment with title.¹⁰

III. EQUITABLE RECEIVERS

An equitable receiver is appointed by a court of equity or a court having statutory power to appoint such receiver. General statutes may authorize equitable or other courts to appoint such receivers. Such statutes are found in many states, and are little more than codifications of the ordinary uses of rules of equity authorizing the appointment of such receivers, and governing the conduct of the receivers after appointment. Unless the statute specifically invests such receivers with title,¹¹ such receivers do not have the full absolute title to the property which comes into their hands. They have, however, possession of such property, and, as one of the English courts puts it, they are the caretakers and the defendants are the owners.¹² Such equitable receivers must be distinguished from liquidators, as they are termed in England, or receivers after dissolution of corporations, as they are termed by the statutes of most of our states. After corporations cease to exist, receivers may be by statute vested with the title to the property of such dissolved corporation.¹³ We will consider, with reference to equitable re-

⁸ NEW YORK CIVIL CODE, § 2468.

⁹ See Title III, this article.

¹⁰ See Titles II, IV, and V, this article.

¹¹ Receivers of dissolved corporations are generally vested by statute with title.

¹² BIRDSEYE, CONSOL. LAWS OF NEW YORK ANN., 2054, L. 1909, Ch. 28.

Receivers in supplementary proceedings, NEW YORK CIVIL CODE, § 2468.

Receivers of corporations generally, ARKANSAS, 1904, DIG. OF STAT., chap. 125, § 6348. It is rather unusual for an equitable receiver to be vested with title.

¹³ Paterson v. Gas Light & Coke Co., [1896] 2 Ch. 476.

¹⁴ See Title V, this article.

ceiverships: (a) Contracts concerning land, and (b) Contracts not concerning land.

(a) CONTRACTS CONCERNING LAND

(1) *Rights of Vendee*

When property is placed in the hands of a receiver, we may find that the defendant in the receivership case has made a contract to sell either all or part of his real estate which is in the hands of the receiver. In such a case, what are the rights of the vendee to such a contract? Has the vendee the right to have such contract specifically performed just as if no receivership had taken place? In order to answer this question, it must be first determined what, if any, liens, charges, or equitable interests the vendee has in the property which has been placed in the hands of the receiver by a proper court proceeding. Lord Cranworth, in *Rose v. Watson*,¹⁴ says as follows:

"There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of the purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent."

The doctrine declaring that the vendor becomes a trustee for the purchaser is based upon the doctrine of equitable conversion. This doctrine of equitable conversion, or treating the land as belonging to somebody else before it has been actually transferred to that other person, results from a contract which can be specifically performed,¹⁵

¹⁴ *Rose v. Watson*, 10 H. L. Cas. 672, 683 (1864).

¹⁵ *Edwards v. West*, 7 Ch. D. 858, 862 (1878).

Mr. Langdell in his BRIEF SURVEY OF EQUITY JURISDICTION, page 65, tells us that "Equitable conversion depends upon the intention of the owner of the property, as shown by his making the contract. But this, surely, has nothing to do with the relations between the vendor and the vendee, and consequently nothing to do with the question whether the ownership of the land has passed from the vendor to the vendee. It is a matter entirely between one of the contracting parties and his representatives, and in regard to which the other contracting party neither has any right, nor

so that if there is no specific performance of the contract possible, there is no conversion.¹⁶

If specific performance of the contract is possible, then the

is subject to any duty." This argument of Mr. Langdell does not carry conviction to our minds, for the following reasons:

If the vendor intends his real estate to pass, at his death, to those who would ordinarily receive only personalty, he may make a will to that effect, but in that event the real estate will not, by the doctrine of equitable conversion, be converted into personalty; it will not go to the executor or administrator at all; it will always be real estate though distributed under the will to those who would take as if it were personalty.

If, on the other hand, the vendor intends to convert the real estate into personalty before he dies so that, at his death, this real estate may pass as personalty to his executors and administrators, then we fail to see how this can be accomplished without the vendor conferring some rights as to this conversion on the vendee, and for the following reasons:

If the deceased has actually converted his real estate so that it will pass, at his death, as personalty, some personalty must be in existence at his death. Personal property must take the shape of tangible movable property or *choses* in actions, claims, etc. If money or other tangible property has taken the place of the real estate, then the transaction is closed and the intention of the deceased has been actually put into effect — there has been a conversion, in fact. If, on the other hand, the transaction has not been closed, what can the vendor have in the shape of personal property to leave to his executors and administrators, unless it be a claim against the vendee?

In order to establish a claim against the vendee, or any one else, it is necessary to have his consent, express or implied, or show such relations between the parties as the law will say establishes a claim. A claim cannot be established against the vendee, or anybody else, merely by the intention of the vendor. The relations between vendor and vendee are expressed by the contract, wherefore the rights or claims of the vendor or the personal property rights which he leaves at his death arise out of and are created by the contract. (*Edwards v. West*, 7 Ch. D. 858, 862 (1878).)

If the vendor has a claim against the vendee, he must have parted with something for that claim. Equity will not give the vendor such a claim unless it gives the vendee something equivalent thereto. Equitable rights and remedies have been invented from time to time for the purpose of doing full justice between parties.

If equity should not give the vendee an equitable interest or title in the land until the time fixed for the performance of the contract or the payment of the full price, then the vendor, dying before the completion of his contract, would die leaving an absolute and complete title to the property. Such property would go to the heirs because no conversion had taken place. But Mr. Langdell admits that conversion has taken place as between the vendor and his representatives. If conversion has taken place, and the heirs get only a bare naked legal title, and the executor or administrator get a right to the purchase money, then we must account for the beneficial title in some one. The vendee is the third party in the triangle and the only one to have the beneficial equitable title, which title is alienable, descendable, and devisable in like manner as real estate held by legal title. (*Lewis v. Hawkins*, 23 Wall. (U. S.) 119 (1874).

¹⁶ *Edwards v. West*, 7 Ch. D. 858, 862 (1878); *Haynes v. Haynes*, 1 Dr. & Sm. 426, 432 (1861).

vendee has an equitable estate in the land bargained and sold, at the time the contract is entered into. This proposition is, we believe, supported by reason and by the weight of authority.¹⁷

If specific performance of the contract of sale is not possible and there is no conversion, what interest, if any, in the property has the purchaser?

If the purchaser has paid his full purchase money and has performed his part of the contract, though he cannot have the property, he has a lien for all the money paid, — why? Because the money was advanced upon the faith of the land, the subject of the contract.¹⁸

If, on the other hand, the purchaser has only paid part of the purchase money and has performed his part of the contract, though he cannot have the land, he has a lien *pro tanto* for the money paid, — why? Because the money was advanced upon the faith of the land, the subject of the contract.¹⁹

It has been said that the purchaser not only gets a lien on the land for the amount of purchase money paid, but, in addition, he gets a lien on the land as security for the performance of the vendor's obligation to carry out the contract.²⁰ This proposition we do not believe to be tenable.²¹

¹⁷ *Paine v. Meller*, 6 Ves. 349 (1801); *Edwards v. West*, 7 Ch. D. 858, 862 (1878); *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331, 377 (1855); *Secombe et al. v. Steele*, 20 How. (U. S.) 94, 103 (1857); *Lewis v. Hawkins*, 23 Wall. (U. S.) 119 (1874); *Laughlin v. North Wisconsin Lumber Co.*, 176 Fed. 772 (1910); *Howard v. Linnhaven Orchard Co.*, 228 Fed. 523 (1913).

¹⁸ *Rose v. Watson*, 10 H. L. Cas. 672, 682 (1864).

¹⁹ *Ibid.*

²⁰ See POMEROY'S EQUITY JURISPRUDENCE, § 1263.

²¹ We fail to find adjudicated cases in England or the United States which allow the vendee a lien on the vendor's land as security for the vendor's performing his obligations under the contract (doctrine laid down by POMEROY'S EQUITY JURISPRUDENCE, § 1263), although many cases properly, we think, allow a lien by the vendee for the purchase money paid.

If the vendee is without fault and the vendor is at fault and will not or cannot convey, then the vendee may bring an action in equity for a foreclosure of his lien, *pro tanto*, on the land for the amount paid pursuant to the contract (*Rose v. Watson*, 10 H. L. Cas., 672 (1864); *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937 (1908)). The commencement of such an action is not a rescission of the contract of sale, but an affirmation thereof. (*Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937 (1908); *Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128, 84 N. E. 943 (1908).)

The difficulties in the way of allowing the vendee a lien on the vendor's land as security for the vendor's performing his obligations under the contract (see POMEROY'S EQUITY JURISPRUDENCE, § 1263) seem to us insurmountable.

Since the vendee's lien for the amounts paid pursuant to the contract is implied in

A receiver takes the property subject to any liens, charges, or equitable interests which exist against the same,²² for "Equity will not merely enforce the execution of a trust against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of the trust."²³

If the vendee has paid the full purchase price and done all things agreed by him to be done under the contract of sale to entitle him to a conveyance, and the contract is such a one as can be specifically performed, then he has the full equitable title, and the vendor has the mere naked title in trust for the vendee, the vendor having no beneficial interest therein. A vendee in such a situation, it would seem, should sue the original vendor for specific performance of the contract, making the receiver a codefendant by permission

equity and depends upon the contract, then the vendee loses his lien if he treats the contract as rescinded (*Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128, 84 N. E. 943 (1908)). Even if this lien for the definite amounts paid may be created independent of the contract (*Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128, 84 N. E. 943 (1908), dissenting opinion), it is another thing to ask equity to impress a lien on the vendor's land or real estate as security for the vendor's performing his obligations.

If we are to insist upon a lien on the land as security for the performance of the obligations of the vendor, when does that lien attach? If it attaches when the contract is made, it must attach under the contract, or as resulting from the contract, or implied in equity from the unexpressed understandings of the parties. But by the contract the parties agree to perform and not to break, and how can equity imply an agreement for a lien covering damages or compensation for failure to perform, when, in fact, the parties actually agree to perform? It is a different thing if, in addition to making the contract, the vendee pays part of the purchase price; then equity may well imply a new agreement by the vendor to give the vendee an interest in the land equal to the payment.

Courts of equity do not, we believe, imply a lien as security for indefinite damages, either in favor of a vendor or a vendee of land. See *Brawley v. Catron*, 8 Leigh (Va.), 522 (1837); *Barlow v. Delany*, 36 Fed. 577 (1888). Says Mr. Pomeroy in regard to the vendor's lien: "There must be a certain, ascertained, absolute debt owing for the purchase price; the lien does not exist in behalf of any uncertain, contingent or unliquidated demand." (*POMEROY'S EQUITY JURISPRUDENCE*, § 1251.) We believe the same statement may be made with even greater force with reference to the vendee's lien.

The reason why a vendor and vendee of real estate may frequently be given special consideration by courts of equity is that land or real estate cannot ordinarily be duplicated. If, however, the vendee admits or treats the contract as broken or rescinded, then he admits he cannot enforce a right to the property itself. He may have a claim and lien for amounts paid, but as to damages for breach of the contract, which the courts of equity cannot enforce, why should he be in a better or worse position than any other party to a contract which has been breached by the other side?

²² *Black v. Manhattan Trust Co.*, 213 Fed. 692 (1914).

²³ *Pooley v. Budd*, 14 Beav. 34, 44 (1851).

of the appointing court, because, by the appointment of an equitable receiver, such a vendor, whether a natural person or a corporation, would not lose the power to make a conveyance nor lose the right to sue or be sued.

If the plaintiffs to the receivership suit have no lien, equitable or other interest in such property, then the vendee, by intervention in the receivership suit, may ask that such property be released from the order appointing the receiver. If, however, the plaintiffs in the receivership case claim an interest in this property, by lien or otherwise, the court may refuse to release such property from the order appointing the receiver. In such a case the vendee, first having the equitable title, then having acquired the legal title through his suit for specific performance against the vendor, would hold the legal and beneficial title subject to the claims of the parties to the receivership suit, which claims could be worked out through the intervention proceedings of the vendee or by separate suit against the receiver with the court's permission, or by separate suit by the receiver against the vendee, as the situation might warrant.

It may be that the vendee has paid only part of the purchase money; in such a case, the property is taken by the receiver subject to the lien or equitable interest of the vendee, as indicated above. If the time has arrived for his tendering the balance of the purchase price, the vendee, having a lien and a beneficial interest in the property and a right to the legal title by tendering the purchase price,²⁴ may sue the vendor for specific performance and make the receiver, by permission, a codefendant. In such a situation, it would not be safe for the vendee to pay the balance of the purchase price to the vendor, particularly if the order appointing the receiver ordered the receiver to collect all claims, debts, dues, *choses* in action, etc., outstanding. It would then be the duty of the vendee, upon proper court order, upon receiving a conveyance from the vendor, to pay over the money to the receiver. The court appointing the receiver may or may not release the property, depending upon whether or not the plaintiffs or others claim interests or liens in the same.

Such cases are analogous to the cases wherein a party makes a contract to convey land and dies. The land, by the doctrine of equitable conversion, is considered, at the decease of the vendor,

²⁴ *Reeves v. Kimball*, 40 N. Y. 299, 305 (1869).

as personalty and goes to his executor or administrator. The vendee sues the heirs to recover the legal title, because they have the legal title, and joins the executor or administrator as parties defendants, because they are entitled to receive the money.

If the situation is such that the vendee's contract could not be specifically performed, then the vendee must fall back on his lien for purchase money paid and work out his claim for breach of contract like any other claimant.

(2) *Rights of Vendor*

When an agreement is entered into to convey land, and the property of the vendee is taken into possession by a receiver, under orders of court, what are the rights and remedies of the vendor if he is ready and willing to perform his contract to convey? If the vendee has a right to specific performance of his contract against the vendor, and the contract is mutual, it follows as a corollary that the vendor has a right to specific performance of the contract against the vendee.²⁵ Some cases say the vendee is trustee for the purchase money.²⁶ As against this proposition, it is often said that the vendor may be compensated by a suit in damages for the failure of the vendee to take his property. In answer to this, however, it may be said that such compensation might not be an adequate remedy, that the amount of damage given by a jury might not be the purchase price agreed upon between the parties. In addition to this, the vendor has a right, by contract, to transfer the burdens and liabilities of his property to the vendee.

²⁵ *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 331, 359 (1855); *Old Colony Ry. Corp. v. Evans*, 6 Gray (Mass.), 25 (1856); *Staples v. Mullen*, 196 Mass. 132, 133 (1907), 81 N. E. 877; *Maryland Clay Co. v. Simpers*, 96 Md. 1, 7, 53 Atl. 424 (1902); *Raymond v. San Gabriel Val. Land & W. Co.* 53 Fed. 883 (1893).

²⁶ *Green v. Smith*, 1 Atk. 572 (1738); *Pollexfen v. Moore*, 3 Atk. 272 (1745); *Toft v. Stephenson*, 7 Hare, 1 (1848). Mr. Langdell, in his *BRIEF SURVEY OF EQUITY JURISPRUDENCE*, page 380, tells us that "it is impossible that the purchaser should own the money, either at law or in equity, while it remains in the hands of the purchaser, or that the purchaser should hold any specified money in trust for the seller as such"; that the money is not identified.

If the contract is mutual, we see no reason why the vendor should not have a claim on the purchase money, provided the money or funds have been segregated, set apart and earmarked. Money may be earmarked (*Taylor v. Plumer*, 3 M. & S. 562, 575 (1815); *Ex parte Cooke, re Strachan*, 4 Ch. D. 123, 128 (1876)), and the vendee may have divested himself of the whole beneficial interest in a way which could be unmistakably shown. *Fourth Street Bank v. Yardley*, 165 U. S. 634, 644 (1897).

There are two situations which might present themselves in connection with the rights of vendors in receivership: First, when the vendee has paid the full purchase price. In such a case the vendor, desiring to get rid of his real estate, should sue the vendee for specific performance of the contract, joining the receiver as co-defendant by permission of the appointing court. The vendee, whose property is in the hands of the receiver, whether a natural person or a corporation not yet dissolved, has still the power to sue and be sued and to hold property. The vendor, to protect himself in such case, should ask that the receiver be authorized to receive this property; however, the vendor has not a right to have the property forced on the receiver; if burdensome, the court appointing the receiver may refuse to incorporate it in the receivership property.

A second situation may present itself wherein the vendee, whose property is in the hands of the receiver, has paid but part of the purchase price. In such case, the vendor, if ready and willing to convey, may sue the vendee for specific performance of the contract and by permission join the receiver as codefendant because the vendee, by reason of the appointment of a receiver, has not lost his power to sue or be sued, and the vendee may not be insolvent and may not have parted with all his property. The receiver, by taking over the property of the vendee, cannot be compelled to carry out the contracts of the vendee,²⁷ unless the vendor has an actual equitable interest in certain specified and segregated funds. Funds have not ordinarily the earmarks of real estate, but it is possible to have an equity in funds in the hands of the receiver, if it can be shown that the vendee has given up his absolute ownership of such funds and actually passed a beneficial equitable interest to the vendor.²⁸ If, however, the receiver believes, by carrying out such contracts, he will benefit the estate, he may ask for an order to carry out such contracts, whether or not the vendor has an actual equitable interest in the funds. If the receiver has not sufficient or no money in his possession belonging to the vendee, he cannot carry out such a contract to purchase land without bor-

²⁷ *In re Oak Pits Colliery Co.*, 21 Ch. D. 322, 330 (1882); *Quincy, etc. R. R. Co. v. Humphries*, 145 U. S. 82 (1891).

²⁸ *Re Hallett's Estate*, 13 Ch. D. 696 (1879). See *Hurley v. Atchison, Topeka & Santa Fé Ry.*, 153 Fed. 503 (1907), affirmed in 213 U. S. 126 (1909). See note 26, *supra*.

rowing money, and even if he has sufficient funds in his possession, the parties to the receivership have certain claims against such funds by reason of their being in the receiver's hands, and if the vendee is insolvent, third parties may also have claims to such funds. Therefore a situation would not frequently arise wherein it would be for the benefit of the estate for the receiver to carry out such a contract.

Even though the vendor have no right to specific performance against the receiver in such case, has he lost his right to specific performance, or its equivalent, against the vendee? Suppose he sue the vendee and get judgment for the full amount of the contract price. The judgment in such case would provide that the vendee shall pay the vendor a certain agreed-upon price upon the vendor's conveying to the vendee the property. The vendee cannot pay if he has parted with all his property to the receiver, and the receiver cannot or will not pay, whereupon the vendor will not convey. If the vendor will not convey, he has not a claim against the vendee for the full amount of the unpaid purchase money. The result of this situation is that, although the vendor may theoretically have a right of specific performance against a vendee, practically he has nothing but an unliquidated claim for damages against the vendee for the vendee's failure to perform the contract. This claim for unliquidated damages the vendor may present in the receivership proceedings by intervention proceedings or otherwise.

If the situation is such that the vendor's contract could not be specifically performed, then the vendor must fall back on his lien or security in the property itself, and, by intervention or other proceedings, free his title from any claim upon it the vendee or his receiver may assert, and assert his claim for breach of contract.

(3) *Other Contracts concerning Land*

Besides contracts between vendor and vendee concerning land, we frequently find other contracts concerning land which may be enforced specifically.

Many of these contracts may ordinarily be specifically performed because the subject of the contract is specific real estate, and courts of equity hold that in such cases it frequently happens that there is no adequate remedy at law, and that it is only equitable that the parties be ordered to specifically perform as agreed upon. If such

contracts are considered in connection with receivership proceedings, the crucial test must be, as stated in the above paragraphs concerning contracts between vendor and vendee, namely, what lien, charge, or equitable interest in the property in the hands of a receiver, if any, have parties claiming specific performance of their agreements? An equitable receiver takes property into his possession and into his care subject to liens, charges, and equitable interests of third parties. If third parties to agreements concerning lands have no lien, charge, or equitable interest in the property they must stand as ordinary creditors and present their claim in the receivership proceedings by intervention or otherwise.

(b) CONTRACTS NOT CONCERNING LAND

(1) *Rights of Vendees of Chattels and Securities*

Chattels ordinarily can be duplicated, whereas land cannot. Ordinarily, therefore, courts will not allow specific performance in chattel cases. Where, however, extraordinary conditions present themselves, where it can be shown that damages for breach of contract will not be adequate and complete, and that the chattel or thing to be sold has some peculiar value to the vendee, then the courts are inclined to allow specific performance.²⁹

Cases may present themselves where stock has a particular and peculiar value to the vendee of the contract. Because of this peculiar value and because this particular stock cannot be duplicated or secured in the open market, courts may allow specific performance in such a case.³⁰ The same rule has been applied generally to bills and notes, patents, copyrights, annuities, deeds, bonds, and mortgages.

If a trust or charge of equity has been created covering certain chattels, things, merchandise, or other personal property, then such property goes into the hands of the receiver charged with this trust and subject to this trust, and the vendee may be made whole out of this property.³¹

²⁹ *Pooley v. Budd*, 14 Beav. 34 (1851); *Buxton v. Lister*, 3 Atk. 382 (1746); *Adderley v. Dixon*, 1 Sim. & Stu. 607 (1823); *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Atl. 312 (1890); *Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 646 (1886); *Anderson v. Olsen*, 188 Ill. 502, 59 N. E. 239 (1901); see *Noyes v. Marsh*, 123 Mass. 286 (1877).

³⁰ *Johnson v. Brooks*, 93 N. Y. 337 (1883); *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365 (1879); *Todd v. Taft*, 7 All. (Mass.) 371 (1863).

³¹ *Atchison, Topeka & Santa Fé Ry. Co. v. Hurley*, 153 Fed. 503 (1907), affirmed in 213 U. S. 126 (1909).

If, however, the vendee has no lien, charge, or equitable interest in the property, and the personal property, chattels, stock, etc., have some peculiar value to the vendee, and the purchase price agreed is reasonable and such a price as the personal property could be sold at in the open market, and it could be shown that the exchange of this chattel for the agreed purchase price would be to the best interests of the estate in the hands of the receiver, the vendee may intervene and ask the court to order the receiver to sell the personal property, to receive the purchase price and hold the same for the further orders of the court, and the court may grant such a request. If such personal property has a greater value in the open market than the price agreed upon, and the vendee has no lien, charge or equitable interest upon this property, it would seem that he must come in as ordinary creditors and present his claim for breach of contract. The plaintiff, by having a receiver appointed over this property, has had the same placed in the custody of the court. These proceedings bind the property and hold the same until the final outcome of the suit; and in addition to this, if the defendant is shown to be insolvent, his property will be distributed equitably among his creditors.

(2) *Rights of Vendors of Chattels and Securities*

What are the rights of vendors who have agreed to sell chattels and securities to the vendee, when the vendee's property is put in the hands of a receiver? The reason for giving a vendee a right to specific performance of a contract to sell personal property is because the personal property has a peculiar value and because the remedy at law would not be adequate and complete. It is also stated that rights should be mutual and that, in a case where a vendee has a right to specific performance, the vendor should have the same. This principle may have as much force in the case of personal property, particularly in the case of stock, as it does in the case of real estate; in other words, the owner of stock may be just as anxious to get rid of it and its burdens or liabilities as he would to get rid of real estate and its burdens and liabilities. Therefore, why should a vendor of such personal property not have a right of specific performance against a vendee? Theoretically, he may have such a right; however this may be, a vendor cannot force a receiver to take into his possession property which the court has not ordered

such receiver to take into his possession. The vendor, in such a case, might sue the vendee for specific performance of the contract because the vendee, whether an individual or a corporation, is not civilly dead by reason of the appointment of the receiver over his property. If all the property and money of the vendee has been taken by the receiver, the vendor may not be willing to hand over the personal property, because the vendee cannot pay him the purchase price; in such an event, such a suit by the vendor would be futile. The vendor is therefore relegated to a suit at law for damages against the vendee. After his claim for damages has been liquidated he may present the same to the receiver and share in the distribution of the unsecured assets.

(3) *Personal Service Contracts*

Personal service contracts may be divided into two kinds: first, those in which service is agreed to be performed by the party whose property goes into the hands of the receiver; second, service agreed to be performed by a third party for a party whose property goes into the hands of a receiver.

In the first case, where the taking of the property does not prevent the individual from performing this service, the third party still has a right to sue the defendant but not for specific performance, because courts cannot supervise individuals and make them perform,³² and they cannot enforce agreements strictly personal in their nature, so long as there is no property the right to which is taken away from the person complaining.³³ When such a contract of service covers property which has gone into the hands of a receiver, and a third party complains his property right has been taken away, what are the rights of this third party? The individual whose property is placed in the hands of a receiver cannot perform by reason of the receivership; nevertheless, because of his failure to perform, the party not in default may have a claim for damages against him.³⁴ This claim, when liquidated, may be presented

³² *Kirchner & Co. v. Gruban*, [1909] 1 Ch. 413. See note 33, *infra*.

³³ *In Rigby v. Connol*, 14 Ch. D. 482, 487 (1880).

³⁴ If a receiver is appointed of a corporation this is considered by some courts a *vis major* which prevents recovery for breach of contract. *People v. Globe*, 91 N. Y. 174 (1883); *Malcomson v. Wappoo Mills*, 88 Fed. 680 (1898). Contrary doctrine, *Spader v. Manufacturing Co.*, 47 N. J. Eq. 18, 20 Atl. 387 (1890); *Rosenbaum v. Credit System Co.*, 61 N. J. L. 543, 40 Atl. 591 (1898); *Isaac McLean Sons Co. v. William S. Butler & Co.*, 227 Fed. 325 (1914).

against the assets in the hands of the receiver. Specific performance of the contract, however, cannot be claimed or had against the receiver, because such specific performance would be a form of satisfaction or payment which the receiver cannot be required to make.³⁵ In case, however, the third party has a lien, charge, or equitable interest in the property in the hands of the receiver, even in that case he cannot have specific performance against the receiver, but he may, by intervention proceedings or otherwise, have such property released from the receivership or returned to him, as the case may be, but he has not a right to have the receiver perform the contract.

(4) *Other Contracts not concerning Land*

There may be other contracts not concerning land which are not covered by the three subdivisions above, and contracts which may normally be specifically performed. In case of receivership, the same criterion must hold, namely, has the party demanding specific performance any lien, charge, or equitable interest in property in the hands of the receiver?

IV. RECEIVERS IN BANKRUPTCY

From the moment the petition in bankruptcy is filed, the sovereignty constructively takes possession of the alleged bankrupt's property for equitable distribution among his creditors.³⁶

The English bankruptcy statute provides for an interim receiver, an official receiver, and a trustee in bankruptcy. An interim receiver is appointed at any time after the presentation of the bankruptcy petition and before a receiving order is made. He has the powers of a receiver and manager appointed by the high court of judicature, meaning that he has the powers of a so-called equitable receiver. An official receiver has the powers and duties set out in the bankruptcy act and the trustee is vested with the estate, and the bankrupt is divested of the estate and the title.

The United States Bankruptcy Act provides for the appointment of a receiver, who has much the same powers as the English interim

³⁵ *Express Co. v. Railroad Co.*, 99 U. S. 191 (1878); *Union Trust Co. v. Curtis*, 182 Ind. 61, 105 N. E. 562 (1914); *Brown v. Warner*, 78 Texas, 543, 14 S. W. 1032 (1890).

³⁶ *In re Benedict*, 140 Fed. 55, 59 (1905); *In the Matter of Estate of Joseph Diamond*, 16 Ohio L. Rep. 515 (1918); *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300 (1911).

receiver, namely, the powers of an ordinary equitable receiver, but he cannot sell or dispose of the property unless it is perishable. A sale or other disposal of the property of the bankrupt should ordinarily be accomplished by the trustee. The receiver has no title to the bankrupt's property — is a mere temporary custodian. The trustee in bankruptcy, however, is vested with the property of the bankrupt.

Receivers in bankruptcy and trustees in bankruptcy, under both the American and the English acts, take the property of the bankrupt subject to all liens, charges, and equitable interests properly attaching to the same, except such as attach within a definite time preceding the bankruptcy proceedings, and are thereby void or voidable.³⁷ A third party, therefore, who would be entitled to a specific performance of the contract against the alleged bankrupt, had not bankruptcy proceedings intervened, would still have what would be, in substance, such a claim against the property in the hands of the bankrupt, provided he had against such property a lien, charge, or equitable interest.³⁸ If such third party attempted to work this out by intervention proceedings, or otherwise, in the bankruptcy court during the interim receiver's administration of the estate under the English act, or a receiver's administration under the American act, and a deed of the property were necessary to complete the transaction, a difficult problem would present itself. The alleged bankrupt has been divested of his property by reason of the proceedings in bankruptcy, the receiver has custody of the same, but the title to the property has not yet vested in the trustee. Whatever order the third party might acquire ordering the receiver to hand over the property or releasing the property from the bankruptcy proceedings, an additional deed or acquittance might in safety be secured later from the trustee in bankruptcy, because the title which the trustee in bankruptcy acquires dates back to the time of adjudication.³⁹ A summary proceeding may not

³⁷ *Ex parte* Holthausen, *In re* Scheibler, L. R. 9 Ch. 722 (1874); *Thompson v. Fairbanks*, 196 U. S. 516, 526 (1905); *Yeatman v. Savings Institution*, 95 U. S. 764, 766 (1877).

³⁸ *Harris v. Truman & Co.*, 9 Q. B. D. 264 (1882); *Ex parte* Holthausen, *In re* Scheibler, L. R. 9 Ch. 722 (1874); *Pearce v. Bastable's Trustee*, [1901] 2 Ch. 122; *Ex parte* Rabbidge, 8 Ch. D. 367, 370 (1878); *Thompson v. Fairbanks*, 196 U. S. 516, 526 (1905).

³⁹ English Bankrupt Act, ENG. STAT., [1914] 322, § 53; American Act of Bankruptcy, 30 STAT. AT L. 565, § 70 (1898).

be sufficient to adjudicate rights of the trustee or an adverse claimant; a plenary suit may be necessary.⁴⁰ A trustee in bankruptcy is vested with the property and title of the bankrupt's estate by statute, somewhat as a liquidator or receiver after dissolution of a corporation is vested with the title of the corporation. Having the legal title to the property he may be compelled to convey to one who has contracted to purchase from the bankrupt vendor.⁴¹ The courts have held, however, that specific performance cannot be decreed against the trustee of a bankrupt purchaser,⁴² and correctly we believe, provided it cannot be shown that the vendor had an equitable or legal interest in funds of the purchaser segregated and set apart and earmarked, and that the purchaser had unmistakably divested himself of the whole beneficial interest in said funds.⁴³

V. LIQUIDATORS OR RECEIVERS TO DISSOLVE CORPORATIONS

The distinction between liquidators or receivers to dissolve corporations and ordinary equitable receivers is in the fact that equitable receivers are custodians or caretakers of the property in their hands, whereas liquidators and receivers, after dissolution of corporations, are vested by statute with title to the dissolved corporation and frequently have statutory powers and duties. The same usages and rules of equity which obtain in the case of specific performance being demanded against equitable receivers, or against the property in the hands of equitable receivers, obtain against liquidators or receivers after dissolution of the corporation,⁴⁴ with the above distinction. If a contract is entered into with a corporation and it is dissolved, the corporation cannot perform this contract, neither can it, strictly speaking, according to the old law, as such, be liable for breach of contract to perform, because no corporation any longer exists. Yet the party not in fault may have a right of action against the statutory survivors of the corporation.⁴⁵ Proceedings, therefore, should be instituted against the receiver or liquidator having title to this property. Such a receiver could make any deed necessary

⁴⁰ *Dreyer v. Perkins*, 217 Fed. 889 (1914).

⁴¹ See cases under note 38.

⁴² *Pearce v. Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122, 125.

⁴³ See note 26.

⁴⁴ *In re Oak Pits Colliery Co.*, 21 Ch. D. 322 (1882).

⁴⁵ See *Personal Service Contracts*, this article.

and at the same time turn over or give possession of the property. The statutes in such cases largely control, because they permit the corporation to continue after dissolution for the purpose of being sued and for winding up their business, or may by statute designate the directors as trustees for winding up the business, in which cases it may be necessary to sue the directors to have them make the proper deed, and it may be necessary to intervene in the receivership, and sue the receiver, and have the court appointing the receiver order the receiver to give possession or hand over the property.

VI. SPECIFIC PERFORMANCE OF CONTRACTS ENTERED INTO BY RECEIVERS THEMSELVES

Receivers, particularly those appointed to manage or carry on a business, frequently enter into contracts which are independent of the executory contracts which they find existing when the receivers take hold.

The English courts hold that receivers, in entering into such contracts, do so as individuals and are personally responsible and liable for such contracts, although, if such contracts are properly and legally entered into, the receivers may be indemnified out of the assets of the trust estate.⁴⁶ Our American courts, on the other hand, hold generally that receivers, when they enter into such contracts, are officially liable.⁴⁷

If, under the English rule, a receiver enters into a contract which might ordinarily be specifically performed, it might be enforced against him as well as against another individual, unless such contract involved property which was *in custodia legis*. In the latter event, no order by any court other than the appointing court could disturb the property in the hands of the receiver. If a third party, however, presents claims which are valid and just and growing out of the receiver's contracts, he must depend upon the court's seeing that such obligations of the receiver are scrupulously carried out, so far as the court has funds in its hands.⁴⁸

Such third party, strictly speaking, gets no lien against the property.

⁴⁶ *Burt, Boulton & Hayward v. Bull*, [1895] 1 Q. B. 276.

⁴⁷ *McNulta v. Lochridge*, 141 U. S. 327, 332 (1891).

⁴⁸ *In re London United Breweries, Ltd.*, [1907] 2 Ch. 511.

If, under the American rule, a receiver enters into a contract under his express or implied power, and such a contract does not involve property in the hands of a receiver, the third party to such a contract can only intervene or sue the receiver officially by permission of the appointing court. If the third party gets judgment in another court, this judgment can only be satisfied out of the property in the hands of the receiver by permission of the appointing court.

If such a receiver officially makes a contract involving property in the hands of the receiver, no court can order such property to be specifically handed over to the third party, except the appointing court; therefore the third party's remedy is to intervene or to ask for permission to sue the receiver, and ask for an order authorizing the receiver to turn over the property to such party. The American courts hold that in the case of a contract entered into officially by a receiver, "The Court in a substantial sense makes the contract."⁴⁹ "Judicial repudiation of obligations is not to be sanctioned under any conditions," — therefore, a party to a contract with a receiver must depend upon the honor of the court to carry out such a contract, but he cannot force the court to do so by a proceeding of specific performance of contract, nor can he secure damages from the court for its or the receiver's failure to carry out the contract. A claim growing out of a receiver's operation of the property is not, strictly speaking and in the full meaning of the word, a lien on the property, but may be a preferential debt.⁵⁰

If the receiver, either under the English or American rule, enters into a contract without the authorization of the court, either express or implied, then he must do so as an individual and be liable as an individual.

If a receiver, by order of court, enters into a contract to sell property to a third party, this third party becomes, by his bid, a party or quasi party to the suit and is amenable to the court's orders.⁵¹ If this third party fails to carry out his contract, the receiver may sue him for specific enforcement,⁵² or proceed summarily

⁴⁹ *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 371 (1908).

⁵⁰ *Bank of Commerce v. Central C. & C. Co.*, 115 Fed. 878, 880 (1902).

⁵¹ *Gordon v. Saunders*, 2 McCord Ch. (S. C.) 151, 167 (1827); *Deaderick v. Smith*, 6 Humph. (Tenn.) 138, 146 (1845); *Rice v. Ahlman*, 70 Wash. 12, 126 Pac. 66 (1912); *Majors v. McNeilly*, 7 Heisk. (Tenn.) 294 (1872).

⁵² *Bowne v. Ritter*, 26 N. J. Eq. 456 (1875).

against him for his failure to carry out the contract.⁵³ If, on the other hand, the receiver fails to carry out his contract, what are the third party's rights? In the first place, the sale made by the receiver is subject to confirmation by the court, and the purchaser may make any motion or file any petition necessary to protect his rights; he may also be given the right to appeal or go to a higher court on writ of error.⁵⁴ When a sale is confirmed, the title to personalty so sold becomes vested in the purchaser without formal decree and without any bill of sale or other conveyance by the receiver. In sales of realty, a confirmation of the sale does not vest the title in the purchaser; it only completes the sale. The title must be completed in the purchaser by a formal deed. If the receiver fails or refuses to make a deed or other proper conveyance, the bidder's remedy is to apply for relief to the court appointing the receiver; such a bidder has no right to sue the receiver for specific performance, unless the appointing court should determine that the rights of the parties could not be adequately presented in a summary proceeding, and therefore authorize a suit for specific performance against the receiver.⁵⁵

Ralph E. Clark.

CINCINNATI, OHIO.

⁵³ *Bowne v. Ritter*, 26 N. J. Eq. 456 (1875).

⁵⁴ *Majors v. McNeilly*, 7 Heisk. (Tenn.) 294 (1872).

⁵⁵ *Dreyer v. Perkins*, 217 Fed. 889 (1914).

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THE LAW SCHOOL. — The registration in the School for the last twelve years is shown in the following table. For eleven years the figures are from records dated November 15, but for the current year the figures were made up on October 30. At this time last year the total number of students in the school was 60. At present they number 874. This is the largest enrollment in the history of the school, the largest registration heretofore being 857 during the year 1916-17. The first-year class exceeds by more than one hundred the first-year class of that year.

In the whole school one hundred and fifty-five different colleges are represented.

The following table shows the geographical source from which the twelve successive first-year classes have been drawn:

	Massachusetts		New England outside of Massachusetts		Outside of New England		Total in Class
	Number	Percentage	Number	Percentage	Number	Percentage	
1911	72	29	33	14	137	57	242
1912	78	25	45	14	189	61	312
1913	65	22	32	11	200	67	297
1914	73	25	44	15	172	60	289
1915	59	21	34	12	194	67	287
1916	59	22	23	9	179	69	261
1917	65	23	29	10	194	67	288
1918	81	26	39	12	188	62	308
1919	70	21	26	8	239	71	335
1920	25	26	5	5	66	69	96
1921	6	27	4	18	12	27	22
1922	77	18	51	11	397	71	435

	1909-10	1910-11	1911-12	1912-13	1913-14	1914-15
Res. Grad. . .	—	2	3	6	4	5
Third year . .	187	178	219	176	169	167
Second year . .	191	238	217	186	197	197
First year . . .	311	296	289	287	260	288
Unclassified . .	—	82	76	84	64	68
Specials . . .	70	3	4	5	1	5
	759	799	808	744	695	730

	1915-16	1916-17	1917-18	1918-19	* 1919-19	1919-20
Res. Grad. . .	8	10	5	3	—	8
Third year . .	177	213	73	37	67	154
Second year . .	226	234	87	24	66	219
First year . . .	308	335	96	36	153	437
Unclassified . .	66	64	31	13	21	55
Specials . . .	1	2	0	1	—	1
	786	858	292	114	307	874

* These figures are for the special session which began on February 3, 1919, and ended on August 30, 1919.

In the present first-year class one hundred and twenty-one colleges and universities are represented, as follows:

Harvard, 85; Princeton, 33; Yale, 32; Brown, 17; Dartmouth, 12; Univ. of North Carolina, Williams Coll., 10; Univ. of California, 9; Holy Cross Coll., 7; Cornell, Univ. of Georgia, Leland Stanford Jr., Univ. of Pennsylvania, Washington and Lee Coll., Univ. of Wisconsin, 6; Bowdoin, DePauw Univ., Lafayette Coll., 5; Amherst, Colby, Georgetown Coll. (Ky.), Johns Hopkins, Ohio State, Univ. of Texas, 4; Univ. of Arkansas, Beloit, Boston Coll., Univ. of Chicago, Clark, Columbia, Univ. of Illinois, Univ. of Michigan, Univ. of Virginia, 3; Assumption Coll., Boston Univ., Bucknell, Carleton, Colgate, Fordham, Grinnell, Iowa State Teachers' Coll., Univ. of Iowa, Knox, Lincoln, Univ. of Maine, Univ. of Minnesota, Univ. of Missouri, Univ. of Nevada, Oberlin, Ohio Wesleyan, Univ. of Oklahoma, Univ. of Oregon, Univ. of Paris, Pennsylvania State, Univ. of Pittsburgh, Syracuse, Trinity Coll. (Conn.), Trinity Coll. (N. C.), Tulane, Vanderbilt, Wesleyan (Conn.), West Virginia, 2; Acadia Univ., Alabama Polytechnic Institute, Univ. of Alabama, Butler Coll., Catholic Univ. of America, Centre Coll. (Ky.), Univ. of Cincinnati, City Coll. (N. Y.), Univ. of Colorado, Cornell Coll. (Iowa), Culver-Stockton, Dalhousie, Delaware, Univ. of Denver, Emory Coll., Fairmount, Georgetown Univ., Haverford, Howard, Indiana, Iowa State Coll., Univ. of Kansas, Laval, Lehigh, Macalester, McMaster, Manhattan, Miami, Middlebury, Univ. of Mississippi, Mississippi Coll., Mount St. Mary's, Mount Union, Univ. of Nebraska, Univ. of North Dakota, Univ. of Notre Dame, Otterbein, Pomona, Purdue, Queens, Reed, Richmond, St. Anselm's, St. John's (Md.), St. John's (Ohio), St. Viator's, San Juan de Latran, Univ. of South Carolina, Tufts, Union, Univ. of Utah, Washington Univ., Univ. of Washington, Washington and Jefferson, West Point, West Virginia, Wesleyan Univ., William and Mary, William and Vashti, Wittenberg, 1.

JURISTIC THEORY AND CONSTITUTIONAL LAW — LIABILITY WITHOUT FAULT. — All that need be said as to the theory and constitutionality of the Arizona Workmen's Compensation Acts, involved in *Arizona Copper*

Company v. Hammer,¹ was said some years ago by Professor Wambaugh.² Written just after the decision in *Ives v. South Buffalo R. Company*,³ Professor Wambaugh's views have been amply borne out by the subsequent course of decision. But the dissenting opinions deserve notice from another standpoint.

"Talk of stubborn facts," says Dr. Crothers; "they are but babes beside a stubborn theory." That liability for tort can flow only from culpable conduct is simply a nineteenth-century juristic theory. Its most ardent advocates had to admit many "exceptions," which they explained historically as holdovers from an older idea that he who caused harm must absolutely answer for it. These "exceptions," which are now proving to contain a great deal of living and growing law,⁴ were but recently pronounced gradually disappearing remnants of primitive law. Also the most conspicuous case of liability without fault, the case of the master's liability for the tort of his servant, was superficially reconciled with the theory of no liability without fault by a dogmatic fiction of representation whereby the fault could be made to appear that of the master.⁵ Thus the nineteenth-century philosophy of law that put the free human will in the central place as that upon which everything must turn, gave us a dogmatic reduction of all liability to contract and tort — to liability to perform what one had freely undertaken and liability to answer for harm which he had culpably caused. By "implying" promises in cases of inequitable retention of benefits and in cases of duties annexed by law to relations and callings, by invoking the idea of representation, and by loose use of the term "negligence,"⁶ it was possible to make this will-theory of liability cover the whole law. It is significant of our modes of legal thought that just at the time when this theory has definitely broken down, four judges of our highest court should be thinking of it as something so fundamental in law that no legislature may reasonably infringe upon it. Truly taught law is tough law.⁷

In another respect the dissenting opinions illustrate the importance of juristic theory. "There is," says Mr. Justice McKenna, "menace in the present judgment to all rights, subjecting them unreservedly to conceptions of public policy." No better example could be vouched for Austin's remark that until by careful analysis we have accurately determined the meaning of such terms as "right" and "public policy," "subsequent speculations will be a tissue of uncertain talk."⁸ If legal rights are definitely established by a constitutional provision, assuredly

¹ U. S. Sup. Ct. No. 20, October Term, 1919. For a statement U. S. Sup. Ct., June 9, 1919 (October Term), see RECENT CASES, p. 116.

² "Workmen's Compensation Acts: Their Theory and Their Constitutionality," 25 HARV. L. REV. 129 (1911).

³ 201 N. Y. 271, 94 N. E. 431 (1911).

⁴ See note on *Thayer v. Purnell*, [1918] 2 K. B. 333, in 32 HARV. L. REV. 420.

⁵ See BATY, VICARIOUS LIABILITY, 7.

⁶ E. g., in *Noyes v. Colby*, 30 N. H. 143, where an owner of a cow was held liable for trespass upon land due to its being turned out of the pasture by a third person without his knowledge or consent, the court quotes from Blackstone: "for if by his negligent keeping they stray upon the land of another . . . the owner must answer in damages." Here the result is called negligence, to make it appear that the result flows from culpability.

⁷ ENGLISH LAW AND THE RENAISSANCE, 25.

⁸ 2 JURISPRUDENCE, 4 ed., 1110.

they ought not to be suffered to be infringed on mere considerations of expediency. But it is only the ambiguity of the terms "right" and "public policy" that makes it possible to think of the acts in question in this way. The Fourteenth Amendment does not establish any defined legal rights. Rather it imposes a standard upon legislation — that it shall not be arbitrary and that it shall have a basis in reason. The "rights" of which Mr. Justice McKenna is speaking are not legal rights, but are individual interests which we feel ought to be secured by law, through legal rights or otherwise. Likewise the "public policy" of which he speaks is a mode of referring to social interests which the law ought to or does secure in delimiting individual interests and establishing legal rights. Often in a conflict of individual interests the law turns to "public policy" in this sense to determine the limits of a proper compromise. When the common law in a conflict between the individual interest of the landowner and that of the traveler on the impassable highway resorted to a "policy" expressing a social interest and established a "right of deviation," when in a conflict between the individual interest of the person defamed in his reputation and that of the defamer in speaking freely it resorted to another policy expressing another social interest and established privileged occasions, when as between the individual interest of the owner of land to enjoy it uninjured and that of the owner of a cow which has been let out of the pasture by a wrongdoer without his knowledge or consent,⁹ it imposed a liability without fault to maintain the social interest in the general security — in all such cases the common law "subjects rights" to "public policy" exactly as the statutes do of which the minority of the court complain. Our legal terminology has blinded us to these compromises, which make up the whole body of the common law. The same terminology leads us to think of like compromises taking account of new interests, when made by the legislature, as startling and revolutionary.

MUST WE RECOGNIZE A NEW PRIVILEGE IN THE LAW OF EVIDENCE? — It is axiomatic in our law that the public has a right to every man's evidence.¹ To this principle the law of privileged communications forms an important exception. There is to-day no privilege for confidential communications, merely as such.² But communications made in the course of a few specific relationships have been recognized as privileged from disclosure. In each the law accords the privilege purely on grounds of policy, because it considers that greater social mischief would probably result from requiring the disclosure of such communications than from

⁹ *Noyes v. Colby*, *supra*.

¹ See 4 WIGMORE ON EVIDENCE, quoting Lord Hardwicke, § 2192.

² Dean Wigmore tells us that in early English trials the obligation of honor among gentlemen, in regard to matters revealed to them in confidence, seems to have been recognized as an excuse for maintaining silence. See 4 WIGMORE ON EVIDENCE, § 2286. But a sterner view of the necessities of justice prevailed. "It is not befitting the dignity of this High Court," wrote Lord Campden in 1776, "to be debating the etiquette of honor at the same time when we are trying lives and liberties." *Duchess of Kingston's Case*, 20 How. St. Tr. 586. See also 1 GREENLEAF ON EVIDENCE, 16 ed., § 248.

refusing to insist upon it.³ To outweigh the undeniable social mischief of impeding justice, some relation, which it is imperative that the law should foster, and to the existence of which a privilege of silence is essential, must stand endangered.⁴ Obviously the number of such relationships is strictly limited.

The case of *Lindsey v. People*⁵ suggests the inquiry: should common-law reasoning extend to an hitherto unknown relationship, that of juvenile-court judge and child delinquent, this privilege of silence? The facts were these: A twelve-year-old boy confessed in strict confidence his part in the murder of his father to the juvenile-court judge of his district. Thereupon delinquency proceedings were instituted against him. At the trial of the boy's mother for the murder, he testified in her favor. To impeach this testimony the judge was asked to divulge the boy's confession, and was adjudged in contempt and fined on refusing to do so upon order of court. From that judgment he appealed. It appears that the boy consented to the judge's testifying. The Supreme Court of Colorado, three judges dissenting, held the confession not to have been a privileged communication; and the adjudgment in contempt was affirmed.⁶

There seems to be afloat in our law a somewhat ill-defined doctrine that judges, as such, have a testimonial privilege.⁷ Whether this is law may be questioned.⁸ Some jurisdictions deny it *in toto*.⁹ Many merely allude to it *obiter*.¹⁰ At most, on the authorities, it probably nowhere extends beyond according to judges of courts of record a privilege not to be compelled to state what had occurred in court in a case there on trial before them.¹¹ Moreover, this doctrine is one of personal privilege rather than of privilege based upon a relationship, and rests at best upon principles of very limited application.¹² From both points

³ See 1 GREENLEAF ON EVIDENCE, 16 ed., § 236.

⁴ For Dean Wigmore's analysis of the four elements which must be present if the test of social expediency is to be satisfied, see 4 WIGMORE ON EVIDENCE, § 2285.

⁵ 181 Pac. 531 (1919). See RECENT CASES, p. 116.

⁶ Whether or not the decision should be supported in view of the Colorado Statute as to privileged communications, is beyond the scope of the present inquiry. The act provides: "Fifth, a public officer shall not be examined as to communications made to him in official confidence, when the public interest, in the judgement of the court, would suffer by the disclosure." See REV. STAT. OF COLO. 1908, § 7274, paragraph 5.

⁷ Declaration of Grievances, 1 COBBETT'S PARL. HIST. 1206; *Regina v. Gazzard*, 8 C. & P. 595 (1838); *People v. Pratt*, 133 Mich. 125, 131, 94 N. W. 752, 754 (1903); *Hale v. Wyatt*, 98 Atl. (N. H.) 379 (1916).

⁸ "If such privilege exist it has been honored by breach rather than observance." *Parsons, C. J.*, in *White Mt. Freezer Co. v. Murphy*, 101 Atl. (N. H.) 357, 360 (1917).

⁹ *Lindsey v. People*, 181 Pac. (Colo.) 531, 536 (1919).

¹⁰ *Welcome v. Batchelder*, 23 Me. 85 (1843); *People v. Pratt*, 133 Mich. 125, 137, 94 N. W. 752, 757 (1903); *White Mt. Freezer Co. v. Murphy*, 101 Atl. (N. H.) 357, 360 (1917); *Hale v. Wyatt*, 98 Atl. (N. H.) 379 (1916).

¹¹ *Knowles' Trial*, 12 How. St. Tr. 1179 ff. (1697); *Regina v. Gazzard*, 8 C. & P. 595 (1838); *Regina v. Harvey*, 8 Cox Cr. 99, 103 (1858). See 1 GREENLEAF ON EVIDENCE, 16 ed., § 254 c; 4 WIGMORE ON EVIDENCE, § 2372 (3).

¹² Dean Wigmore would seem to suggest that judges of superior courts are exempted from attendance in court on the same theory of personal privilege which relieves the chief executive from the duty of appearing as a witness. See 4 WIGMORE ON EVIDENCE, § 2372 (3). The language of the cases, however, appears rather to reflect a feeling that it is improper to expose a judge to criticism of his judgment by compelling him to testify as to facts which were presented to him in court and upon which he presumably

of view, then, it is of little help in solving the problem before the Colorado court.¹³

But is there not a new social relationship involved which calls for a true relational privilege? It is submitted that there is. Three analogies suggest themselves. The privilege of husband and wife is accorded because that relationship, the family, is perhaps more jealously safeguarded than any other in our law, and is one to which complete confidence is a *sine qua non*.¹⁴ The privilege of attorney and client rests upon the needs of the law itself. In a system as technical and intricate as the common law the legal profession is essential, not only for actual litigation, but for the orderly conduct of everyday affairs; and only the most complete frankness, impossible but for insured secrecy, makes the work of the lawyer possible.¹⁵ The privilege of informer and public official has a similar basis in social expediency. The administration of criminal justice would suffer immeasurably were freedom from disclosure not accorded informers.¹⁶ Consider the privilege now contended for. The jurisdiction of the juvenile court is not criminal, it is that of the English Court of Chancery, enlarged.¹⁷ The discretionary powers of the judge are enormous. The relation sought to be created is one of guardianship, with a view to uplifting and benefiting the child by state help in those instances where parental direction has proved inadequate or vicious.¹⁸ It is the social background behind the delinquent child that the juvenile-court judge primarily seeks to reach.¹⁹ It seems clear that the relation is one in which trust and confidence on the part of the child, complete freedom from fear of disclosure, are prerequisites to any hope of success.²⁰ Further, no legal reform of to-day promises greater social benefits for the future. The relationship should be, and is, of vital interest to the law itself. In that essential it is similar to those relationships already considered, for the protection of which the law has accorded a privilege of silence; in that essential it differs from such relationships as penitent and priest, to the maintenance of which secrecy is also of the highest importance, but from which the law has withheld the privilege because they do not fall sufficiently within the scope of the law's utilitarian aims and aspirations.²¹

based his decision. Under either view, no principle applicable to the principal case seems involved.

¹³ A feeling that the privilege contended for was allied to that of a judge in regard to a case on trial before him appears to be what led the majority of the court to emphasize their denial that "instantaneous jurisdiction" over the boy could have been acquired by his mere confession. Though jurisdiction in the technical sense may not have been acquired, nevertheless a guardianship relation, worthy of protection, may have thereby in fact come into existence. As to which see *post*.

¹⁴ See 4 WIGMORE ON EVIDENCE, § 2336, and cases there quoted.

¹⁵ See *idem*, § 2291, and cases there quoted.

¹⁶ *Worthington v. Scribner*, 109 Mass. 487; *Home v. Bentinck*, 2 B. & B. 130 (1820); *Beatstone v. Skene*, 5 H. & N. 838 (1860). See 4 WIGMORE ON EVIDENCE, § 2374; also cases collected in § 2374, note 1, and § 2375, note 1.

¹⁷ LAWS OF COLORADO, 1908, chap. 158; *Lindsey v. People*, 181 Pac. 531, 537 (1919). See FLEXNER AND BALDWIN, JUVENILE COURTS AND PROBATION, p. 7.

¹⁸ *Cf. State v. Scholl*, 167 Wis. 504, 508, 167 N. W. 830, 831 (1918); *Lindsay v. Lindsay*, 257 Ill. 328, 100 N. E. 892 (1913).

¹⁹ See JUVENILE COURTS AND PROBATION, *supra*, p. 5.

²⁰ For a full description of juvenile court procedure, see *idem*, Parts I and II. For a collection of juvenile court statutes, see H. H. HART, JUVENILE COURT LAWS OF THE UNITED STATES.

²¹ See 4 WIGMORE ON EVIDENCE, § 2394, and cases cited in note 4. In *White Mt.*

If it be admitted that common-law reasoning requires that a privilege be predicated on the new judge, child delinquent relationship, should this privilege include such a confession as that in *Lindsey v. People*? It would seem, with all deference to the *dictum* in that case, that it should. True, formal delinquency proceedings had not as yet been instituted, but it seems clear that the boy voluntarily appealed to the judge in the latter's official capacity. His purpose was to invoke the jurisdiction of the court; and he was thereupon taken in charge as a delinquent child. The relationship to be protected existed in fact; and the privilege should have attached. In the case of attorney and client,²² and probably in that of physician and patient when privileged by statute,²³ the courts go even further. It would seem the accepted view, in order fully to achieve the purpose of the privilege, that preliminary communications made as overtures, before the professional relation has actually been consummated, are protected.²⁴

A single inquiry, but one of extreme delicacy, remains. Assuming that the privilege existed, whose was it? More specifically, who might assert it, and who waive it? The first point is of academic interest only, since on the facts the boy had waived the privilege, provided it was his to waive.²⁵ But was it? It is submitted with hesitancy that it was not. It would seem, it is true, that normally the person for whose protection the privilege is accorded should have exclusive power to waive it. Such is the law in the case of lawyer and client;²⁶ of physician and patient.²⁷ In that of informers, however, the privilege is conceded to be waivable by, and only by, the public official, the recipient of the information.²⁸ The distinction, like the privilege itself, is based on practical expediency. Informers are not to be trusted as sole arbiters of their own privilege. Though for a very different reason, are not twelve-year-old children, for whose protection and care the whole juvenile-court system is planned, less fitted to be repositories of the power to waive the protecting privilege than is the juvenile-court judge? It is the very essence of that system to impose upon him a guardianship over them. Is he not better qualified than they to judge of the necessity for disclosure that may arise because of an impending perversion of justice if the disclosure be not made? And

Freezer Co. v. Murphy, 101 Atl. (N. H.) 357 (1917), the court refused to recognize as privileged communications made to a labor commissioner during a trade dispute. The ground, however, was largely that secrecy was not essential to the relationship.

²² *People v. Pratt*, 133 Mich. 125, 94 N. W. 752 (1903); *Peek v. Boone*, 90 Ga. 767, 17 S. E. 66 (1892); *Crisler v. Garland*, 11 Sm. & M. (Miss.) 136 (1848); *Cross v. Riggins*, 50 Mo. 335 (1872). *Contra*, *Theisen v. Dayton*, 82 Iowa, 74, 47 N. W. 891 (1891); *Heaton v. Findlay*, 12 Pa. St. 304 (1849). See 4 WIGMORE ON EVIDENCE, § 2304.

²³ See 4 WIGMORE ON EVIDENCE, § 2382.

²⁴ Moreover, it should be noted that the statute creating the Juvenile Court aims to secure informal procedure. To attempt to delimit the relationship by lines based on legal forms rather than on *de facto* existence would seem at variance with the spirit of the institution to be protected. See REVISED STAT. OF COLORADO, 1908, §§ 586, 1590, 1607; LAWS OF COLO. (1909) chap. 199; and LAWS OF COLO. (1913) chap. 51.

²⁵ If there has been no waiver, it is submitted that though the party whose privilege it is be absent, the other party to the relationship should be entitled to assert the privilege in the owner's behalf.

²⁶ See WIGMORE ON EVIDENCE, § 2321.

²⁷ See *idem*, § 2386.

²⁸ *Worthington v. Scribner*, 109 Mass. 487 (1872), and cases collected therein.

surely it cannot be maintained that serious danger would result from intrusting this additional exercise of discretion to a man already occupying a post of such enormous trust.

INJUNCTIONS TO RESTRAIN FOREIGN PROCEEDINGS. — It is clear that a court of equity has jurisdiction to restrain a party from proceeding further with a foreign suit, since the decree operates on the person of the defendant and is not directed against the foreign court itself.¹ But while there is no direct interference with the functioning of the other tribunal, still considerations of interstate harmony and of proper respect due to another court competent to adjudicate the controversy, make the exercise of this jurisdiction a very delicate matter. Formerly, with the English and some American courts, these considerations controlled, and they refrained scrupulously from entertaining such jurisdiction in all cases.² Since then, courts have not hesitated to make free use of their power to enjoin, deeming it no violation of the principles of comity to interfere in cases, where to do otherwise would lead to grossly inequitable results. Instances are numerous, however, where interposition was a clear abuse of discretion, and where the foreign court, left unhampered, could have reached, in the end, a more desirable conclusion.

Practically all courts are agreed to-day that a multiplicity of suits, if vexatious, — and such is true in most instances — presents a fair case for the exercise of the Chancellor's discretion.³ Consequently the defendant is required either to elect the forum most advantageous to his cause,⁴ or to pursue his remedy only in the jurisdiction where he first instituted proceedings.⁵ No one, it seems, can quarrel with the results in these cases; the defendant's conduct is clearly inequitable in putting the complainant to the expense and annoyance of defending several suits, and restricting him to a single action assures him sufficiently of the justice he seeks. The case is not so clear, however, where the action abroad is the only one pending, and this the complainant claims is vexatious. Mere additional expense and trouble in defending the suit should not warrant interference, since a party is not constrained to sue where it is most convenient for his opponent. He is entitled to any procedural advantage he can secure, and the court should not deny him the privilege unless he exercises it in a manner so unconscientious as to outweigh all other considerations. In the much-discussed case of *Kempson v. Kempson*,⁶ the

¹ *Portarlington v. Soulby*, 3 Myl. & K. 104 (1834); *Dehon v. Foster*, 4 Allen (Mass.), 545 (1861); *Cole v. Cunningham*, 133 U. S. 107 (1889). In the last case it was held that an injunction of a foreign proceeding does not violate any provisions of the Federal Constitution.

² See *Lowe v. Baker*, 2 Freem. 125 (1677); *Mead v. Merritt*, 2 Paige (N. Y.), 402 (1831); *Harris v. Pullman*, 84 Ill. 20 (1876).

³ See AMES, CASES ON EQUITY JURISDICTION, 28, note.

⁴ *White v. Caxton Bookbinding Co.*, 10 Civ. Pro. (N. Y.) 146 (1886).

⁵ *Monumental Saving Assoc. v. Fentress*, 125 Fed. 812 (1903); *Old Dominion Copper, etc. Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193 (1909); *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238 (1874). See also 26 HARV. L. REV. 347.

⁶ 58 N. J. Eq. 94, 43 Atl. 97 (1899), where the husband of the complainant brought a suit for divorce in North Dakota, invoking the jurisdiction of the court by a fraudulent allegation of his residence in that state. See 15 HARV. L. REV. 145.

court granted an injunction, and properly so, since the facts disclosed not only hardship but also fraudulent conduct. In a recent Kentucky case, however, the injunction seems totally unwarranted, since it appears that the defense of the action abroad only occasioned slight additional expense and that the defendant sought only a more favorable forum.⁷ Where the foreign suit is brought solely to harass the complainant, as after a complete adjudication of the matter in the home state, it is clear that it should be enjoined.⁸

Again, it is laid down as a general rule that foreign actions in evasion of the domestic law will be enjoined.⁹ A citizen of a state often garnishes the wages of a fellow citizen in a sister state or attaches his property temporarily there, and brings suit solely to evade the domestic exemption laws. It is almost universally held, and with sufficient reason, that the suit may be restrained.¹⁰ The local legislature, by statute, has outlined a strong policy of the state in assuring a citizen and his family of fair physical subsistence. To allow another citizen to defeat that policy by resorting to a mere procedural device is something that should not be countenanced by the courts of that state. Of course, this reasoning does not apply when a foreign creditor sues, even though the court can render an effective decree, since the creditor is under no duty to uphold the policy of any state other than his own.¹¹ Suits in evasion of the state insolvency laws have also been generally enjoined.¹² Here the state is interested in providing adequate machinery whereby an insolvent's property may be ratably apportioned among all his creditors. A single creditor, by attaching the debtor's property outside of the jurisdiction not only evades the operation of the statute and interferes with the insolvency proceedings, but seeks to gain for himself a highly inequitable advantage over the other creditors. The court therefore should entertain no scruples in restraining further action abroad. But whether there is just cause for such a decree before insolvency proceedings have been begun is doubtful, since the machinery of the statute has not yet been put into operation.¹³ The whole question, however, has been of diminished importance since the passage of the Federal Bankruptcy Act; and to-day it will perhaps arise only in cases where the debtor's property is situated outside of the United States.

Protection of state policy, alone, justifies the injunction granted in the above class of cases. No such justification, nor any other, exists for enjoining suits brought merely in evasion of some common-law rule of reme-

⁷ Reed's Admr. v. Ill. Cent. R. R. Co. 206 S. W. (Ky.) 795 (1919).

⁸ O'Haire v. Burns, 45 Colo. 432, 101 Pac. 755 (1909). It is true that the complainant could plead *res judicata* as a complete defense to the foreign action, but it would be unfair to require him to incur hardship in the defense of a purely vexatious suit.

⁹ Miller v. Gittings, 85 Md. 601, 37 Atl. 372 (1897); Sandage v. Studabaker, 142 Ind. 148, 41 N. E. 380 (1895); AMES, CASES ON EQUITY JURISDICTION, 28, note.

¹⁰ Wierse v. Thomas, 145 N. C. 261, 59 S. E. 58 (1907); Keyser v. Rice, 47 Md. 203 (1877); Snook v. Snetzer, 25 Ohio St. 516 (1886); Allen v. Buchanan, 97 Ala. 399, 11 So. 777 (1892).

¹¹ See Moor v. Anglo-Italian Bank, 10 Ch. D. 681 (1879); Reynolds v. Adden, 136 U. S. 348 (1889); Barry v. Mut. L. Ins. Co., 2 Thomp. & C. (N. Y.) 15 (1873).

¹² Cole v. Cunningham, *supra*; Dehon v. Foster, *supra*; Sercomb v. Catlin, 128 Ill. 556, 21 N. E. 606 (1889).

¹³ See Cunningham v. Foster, 142 Mass. 47 (1886).

dial or of even substantive right. The state cannot properly be said to have a vital interest in having litigation between its citizens determined solely by the commonlaw of the state. Mere disparity of remedies or difference of substantive law is an insufficient consideration for interfering with a case before a court which, it must be assumed, will make just disposition of the controversy. The balance of convenience is against enjoining, since there is no inequity in the defendant's merely seeking a more favorable forum. Some courts, however, are not in accord with this view and treat these cases no differently from those discussed above. Thus, a tort suit in Georgia was enjoined by an Alabama court on the ground that the Georgia court would refuse to apply the Alabama rule relative to contributory negligence and thereby deprive the complainant of a defense to which he was entitled.¹⁴ In another case, the court improperly enjoined an action when it did not even appear that the defense of failure of consideration could not be set up as well before the foreign tribunal.¹⁵ A recent case goes even further. In *Culp v. Butler*¹⁶ an Illinois action was enjoined by the Indiana court, because the defense of the Statute of Limitations, which the complainant could plead in Indiana, would not avail him in Illinois.¹⁷ The court obviously confuses barring the right with barring the remedy; the substantive right still subsists, but the domestic court simply refuses a remedy thereon. It is therefore difficult to perceive why the application to a forum that *will* grant the defendant a remedy constitutes an evasion of the home law, for admittedly there is a good cause of action. An Illinois decision is directly opposed to that of the principal case on the exact point discussed above,¹⁸ and on the general principle involved, the weight of authority is also against it.¹⁹ It is submitted, that the true rule in this class of cases should be that only suits prosecuted to evade a strong domestic policy should be restrained.

EFFECT OF FEDERAL POSSESSION AND CONTROL OF INSTRUMENTALITIES OF INTERSTATE COMMERCE ON THE POWER OF THE STATES. — Two recent decisions of the United States Supreme Court are interesting as new monuments on the vexed boundary line dividing federal from state power. In *Northern Pacific Ry. Co. et al. v. North Dakota*¹ the court held that under the war legislation of Congress² the Director General of

¹⁴ *Weaver v. Ala. G. S. R. Co.*, 76 So. (Ala.) 364 (1917).

¹⁵ *Sandage v. Studabaker*, *supra*. See also *Dinsmore v. Neresheimer*, 32 Hun (N. Y.), 204 (1882).

¹⁶ 122 N. E. (Ind.) 684 (1919).

¹⁷ It is difficult to see how the facts in the case raised the question of law upon which the court bases its decision. Presumably the defendant brought his action, before the Statute of Limitations had run in either state. The complainant waited until the limitation period had run in Indiana and then filed his bill there to enjoin. Clearly, under no view was there an attempt to evade the Indiana law.

¹⁸ *Thorndike v. Thorndike*, 142 Ill. 450, 32 N. E. 510 (1892).

¹⁹ *Edgell v. Clarke*, 19 App. Div. 199, 45 N. Y. Supp. 979; *Bigelow v. Old Dominion*, etc. Co., 47 N. J. Eq. 457, 71 Atl. 153 (1908); *Carson v. Dunham*, 149 Mass. 521, 20 N. E. 312 (1889); *Illinois Life Ins. Co. v. Prentiss*, 277 Ill. 383, 115 N. E. 554 (1917); *Am. Exp. Co. v. Fox*, 187 S. W. (Tenn.) 1118 (1916); *Federal Trust Co. v. Conklin*, 87 N. J. Eq. 185, 99 Atl. 109 (1916); *Wade v. Crump*, 173 S. W. (Texas) 538 (1915).

¹ U. S. Sup. Ct. No. 976, October Term, 1918.

² 39 STAT. AT L. 645; 40 STAT. AT L. 451.

Railroads has power to fix intrastate rates. It was likewise decided, in *Dakota Central Telephone Co. et al. v. South Dakota*³ that under other but similar legislation⁴ the Postmaster General can regulate intrastate telephone and telegraph rates.⁵ That such powers could be exercised by the United States under appropriate legislation by Congress was not seriously disputed on the part of the states. The question principally agitated was whether, in view of the peace-time power of the states to control these rates and in view of expressions in the acts of Congress that nothing therein should be construed to impair or affect the existing police regulations of the several states, the federal executives had Congressional sanction for their interference.⁶

It has been held that where there is a federal incorporation of a railroad company under the interstate commerce power it is to be presumed, in the absence of express enactment to the contrary, that the corporation is intentionally left subject to state control in matters of taxation, rates, and police regulation.⁷ Where a new entity is created which must, in the nature of things, be subject to some control as to rates, etc., and Congress has provided none, this presumption is sound. When, however, the federal government itself takes possession of property and undertakes to manage it, there is no room for such a rule of construction. Congress gave the President extended powers in order that the war emergency might be handled with dispatch. When the provisos saving "the lawful police regulations" of the several states are read in the light of this fact, "police regulations" can only mean the police power of the states in the limited sense of the phrase which designates the power to regulate concerning the safety, health, and morals of the public.⁸ On the question of the true construction of the acts of Congress the cases consequently appear to have been well decided.⁹

In the joint resolution of the 16th of July, 1918, by which Congress authorized the President to take possession and assume control of the telephone and telegraph systems, no express authority to fix rates is found.¹⁰ The railroad legislation in terms gave the President this power,

³ U. S. Sup. Ct. No. 967, October Term, 1918. See RECENT CASES, p. 115. Mr. Justice Brandeis dissented.

⁴ 40 STAT. AT L. 904.

⁵ Similar cases originating in other states and disposed of on the same principles are: *Burleson v. Dempsey*, U. S. Sup. Ct. No. 1006, October Term, 1918; *Macleod et al. v. New England Telephone and Telegraph Co.*, U. S. Sup. Ct. No. 957, October Term, 1918.

⁶ In the legislation concerning both the railroads and the telephone and telegraph systems the language saving the police regulations of the states is substantially the same: In the first case it reads: "... nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds." The telephone legislation only substitutes "transmission of Government communications" in place of "transportation of troops, war materials, Government supplies."

⁷ *Reagan v. Mercantile Trust Co.*, 154 U. S. 413 (1894).

⁸ *State v. Wisconsin Telephone Co.*, 172 N. W. (Wis.) 225. See FREUND, POLICE POWER, § 10.

⁹ See Henry Wolf Bicklé, "State Power over Intrastate Railroad Rates During Federal Control," 32 HARV. L. REV. 299. The writer interprets the act of Congress of March 21, 1918 (40 STAT. AT L. 451), and forecasts correctly the result of cases arising thereunder.

¹⁰ 40 STAT. AT L. 904.

and by implication gave him the power to exclude rate-making by the states. In the Dakota Central Telephone case the states were not so deprived of their authority to fix intrastate rates unless by necessary implication arising from the fact that the federal government took possession and control. Chief Justice White expressed the problem in these words: "Conceding that it was within the power of Congress, . . . to transplant the state power as to intrastate rates into a sphere where it, Congress, had complete control over telephone lines because it had taken possession of them and was operating them as a governmental agency, it must follow that in such sphere there would be nothing upon which the state power could be exerted except upon the power of the United States. . . ." If political developments are to be in the direction of government ownership or operation of the instrumentalities of interstate commerce, this suggestion that the relation of the states to interstate commerce will be determined by different principles from those heretofore applied when such commerce was exclusively carried on by private persons and corporations is of considerable interest. As in the past, there will be two principal points of contact: (1) state taxation; (2) state police power.

It has been argued with force that Congress has the power to enjoin all state taxation and control of property engaged in interstate commerce.¹¹ But in the absence of plain words from Congress the states have enjoyed a limited power to tax and control.¹² This has been so, even though the legal entity engaged in commerce between the states was itself created by Congress.¹³ Without attempting to bound this state power meticulously, we may say that two general rules have been followed: (1) the *property* as distinguished from the *operation* of persons in interstate commerce may be taxed; (2) such persons are subject to reasonable local control, *i. e.* reasonable state regulations concerning the public safety, health, and morals. If we accept the suggestion of the Chief Justice, what are to be the governing principles when the vehicle of interstate commerce is the United States?

It is fundamental that property owned by the federal government is not taxable by the states.¹⁴ Taxation of privately owned property in the possession of the federal government is found in the case of property in the hands of receivers appointed by the federal courts and therefore regarded as in the possession of the court. In such case, however, federal possession is had on behalf of private litigants, not to secure the execution of public functions. Moreover, the tax cannot be enforced against the property in the receiver's custody without the consent of the court.¹⁵ So far as the difficulty of enforcing state taxes is concerned it would be as great in the case of federal possession as in the case of

¹¹ See 2 TIEDEMAN, STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY, § 217. See also Victor Morawetz, "The Power of Congress to Enact Incorporation Laws and to Regulate Corporations," 26 HARV. L. REV. 667, 678.

¹² See *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, 436 (1819). See also 22 HARV. L. REV. 437; 26 HARV. L. REV. 78; 28 HARV. L. REV. 93; 23 HARV. L. REV. 643.

¹³ *Railroad Company v. Peniston*, 18 Wall. (U. S.) 5 (1873). See Frederick H. Cooke, "State and Federal Control of Corporations," 23 HARV. L. REV. 456.

¹⁴ *Van Brocklin v. State of Tennessee*, 117 U. S. 151 (1886); *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, 504 (1889). See JUDSON ON TAXATION, § 21.

¹⁵ See HIGH ON RECEIVERS, 4 ed., § 59.

federal title. Consequently, unless the states are expressly authorized to tax, possession alone by the United States should remove interstate commerce from local taxation.¹⁶

On the other hand, the federal government's ownership of lands within the states does not *ipso facto* withdraw such property from the local police power.¹⁷ It seems to be the rule that the police power persists until the state cedes its jurisdiction to the central government.¹⁸ This power of police, however, is brought to bear only on private persons; it seems never to have circumscribed the power of the United States. As in the case of interstate commerce privately carried on, the state has police powers incidental to its territorial jurisdiction. When these powers reach the point of interfering with the *means* used by the United States to attain the ends of its government, they cease.¹⁹ When the United States elects to operate the agencies necessary to obtain these ends with its own hands, it is arguable that the property taken over becomes more of a *means* of governmental operation than it was under private control. At all events, local regulation of the property now becomes a direct interference with the governmental operation of the United States, whereas before the interference was only indirect. This is as incompatible with the supremacy of the federal government within its sphere as is taxation of its property.²⁰ To require a sovereign to fence his right of way or to forbid him to carry freight on Sunday is to impose a restraint as inconsistent with his character as a tax on his assets within a given radius. This leads to the conclusion that the states cannot, without the express consent of Congress, tax or regulate property in the possession of the United States when engaged in interstate commerce.

RIGHT OF PUBLIC SERVICE COMPANY OR STATE COMMISSION TO ALTER RATES FIXED BY CONTRACT. — II. The recent unprecedented increase in the costs of labor, materials, and capital has brought before the public utilities of the country the difficult legal question whether they may lawfully increase the prevailing low utility rates above a maximum fixed in unexpired long-term rate contracts with their patrons,¹ or in municipal franchises under which they are oper-

¹⁶ But see Henry Hall, "Federal Control of Railways," 31 HARV. L. REV. 860, 867. The writer seems not to distinguish between taxation of instrumentalities of the federal government which are private persons, and taxation of private property operated by and in the possession of the federal authorities. In either case he thinks express exemption from state taxation necessary.

¹⁷ *United States v. Sutton et al.*, 165 Fed. 253 (1908). See 22 HARV. L. REV. 456.

¹⁸ See FREUND, POLICE POWER, § 85. See also 31 HARV. L. REV. 1164.

¹⁹ *M'Cullough v. Maryland*, *supra*.

²⁰ The United States Supreme Court has upheld the imposition of internal revenue taxes on a state engaged in the liquor business on the grounds that this was not a governmental function and that state socialism should not be permitted to deprive the United States of its sources of income. *South Carolina v. United States*, 199 U. S. 437 (1905). These arguments will probably not prove so persuasive when the shoe is on the other foot. See 1 WILLOUGHBY ON THE CONSTITUTION, § 59; 19 HARV. L. REV. 286.

¹ Discussed in 32 HARV. L. REV. 74.

ating, so that the increased rates, reasonable under the new conditions, should apply equally to all members of the public receiving a like or substantially similar service.

In some states the law permitted the public utility proprietor to establish the increased rates, subject to the common-law power of the courts to pass upon their reasonableness,² or subject to regulation by a statutory public service commission empowered to declare reasonable rates;³ but in the majority of states which have enacted modern public utility statutes no change in rates may be made by the utility without first obtaining an order of the state public service commission authorizing the new rate.⁴

A mass of litigation ensued upon this question before the state commissions and in the state courts, and the problem has recently been presented to the United States Supreme Court in a number of cases, many of which are still pending. Among those decided two especially deserve notice.

The first, *Union Dry Goods Company v. Georgia Public Service Corporation*,⁵ involved the legality of an order of a state commission, declaring certain increased rates for electric light and power to be reasonable and requiring the utility to enforce them, as applied to a patron who held an unexpired long-term rate contract fixing a lower maximum charge for the service. This contract had been made, however, subsequently to the effective date of the act creating the commission and empowering it to regulate such utilities. The decision of the Supreme Court of Georgia,⁶ upholding the order of the commission and denying specific performance of the contract, was affirmed by the United States Supreme Court on the ground that the regulation of public utility rates is a lawful exercise of the police power of the state not subject to control by any person or persons by contract or otherwise. *A fortiori*, where made while the regulating act was in force,⁷ such contract is not within the protec-

² See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1406.

³ *Leiper v. Balt. & Phila. R. Co.*, 262 Pa. St. 328, 105 Atl. 551 (1918); *Cincinnati v. The Public Utilities Com.*, 96 Ohio St. 270, 276, 117 N. E. 381 (1917). See 32 HARV. L. REV. 74. Under some state public utility acts, as under the federal Interstate Commerce Act, it is held that while the utility may initiate an original schedule of rates, increased rates may not be put into effect without the approval of the commission. *State Public Utilities Com. v. Chicago & West Towns Ry. Co.*, 275 Ill. 555, 114 N. E. 325 (1916). *Advances in Rates — Western Case*, 20 I. C. C. R. 307 (1911).

⁴ *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 28, 129 N. W. 925 (1911); *Sultan Timber Co. v. Great Northern R. Co.*, 58 Wash. 604, 109 Pac. 320 (1910). In a number of states such permission is expressly required by the public service statute, and in at least one state, even as to rates in existence prior to the date when the act became effective. *Washington Public Service Commission Law*, 1911, § 34 (GEN. STAT. 1915, §§ 8626-34). See 32 HARV. L. REV. 74, 77, note 11.

⁵ 248 U. S. 372 (1919).

⁶ 142 Ga. 841 (1914).

⁷ In *V. & S. Bottle Co. v. Mountain Gas Co.*, 261 Pa. St. 523, 104 Atl. 667 (1918), discussed in 32 HARV. L. REV. 74, the contract was made prior to the effective date of the Public Service Act, and although treated by the court as valid when made, was held to have become inoperative and void when that statute went into effect, since by reason of the fixed rate it contravened the provisions of the act against discrimination. It would seem that the same principles are involved irrespective of whether the contract is entered into before or after the regulating act is in force.

tion of the contract clause,⁸ or the Fourteenth Amendment⁹ of the Federal Constitution.

In the second case, *Columbus Railway, Power & Light Co. v. City of Columbus*,¹⁰ the utility not being able under present-day conditions to make a fair return on its investment¹¹ at the rates fixed by the unexpired long-term franchise which it had accepted as a condition of its right to operate within the municipality, and having in vain sought the city's consent to increased rates, declared that it surrendered the franchise, raised its rates, and brought suit to enjoin the continued enforcement of the street railway franchise ordinances fixing rates. The ground taken was that these ordinances constituted a deprivation of its property without due process of law. The United States Supreme Court, in affirming the decree of the federal district court dismissing the bill,¹² held that as the Supreme Court of Ohio had construed the state statute¹³ to expressly confer upon the municipality the power of making binding contracts of that character, both the city and the utility became bound thereby for the franchise period;¹⁴ that the utility was not excused from the obligation of rendering service at the fixed rate by the unprecedented increase in costs, nor by the fact that the federal government through the National War Labor Board had greatly increased the wage scale, where the utility was still solvent, and, taking the franchise term as a whole, was unable to show that the contract would prove unremu-

⁸ "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ." Art. I, § 10, U. S. Constitution.

⁹ "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Art. XIV, Amendments U. S. Constitution.

¹⁰ 249 U. S. 399 (1919).

¹¹ *Smyth v. Ames*, 169 U. S. 466 (1898), upheld the right of a public utility to earn a fair return on its investment.

¹² 253 Fed. 499 (1918).

¹³ PAGE AND ADAMS, OHIO GEN'L CODE, §§ 3768, 3771.

¹⁴ *Citing Interurban Ry. & Terminal Co. v. Public Utilities Com.*, 98 Ohio St. 287, 120 N. E. 831 (1918). In support of this interpretation of the Ohio statute the United States Supreme Court also referred to *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517 (1904), which construed similar Ohio statutes to have authorized the municipality to enter into binding contracts with a public utility company fixing rates for a definite period, and, therefore, the city could not subsequently reduce said rates within said term without violating the constitutional prohibition against the impairment of the obligation of contracts. To the same effect: *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496 (1907); also see *Detroit v. Detroit St. Ry. Co.*, 184 U. S. 368 (1902); *Georgia Ry. & Power Co. v. R. Com. of Georgia (Ga.)*, 98 S. E. 696 (1919); *Milwaukee Electric Ry. & Light Co. v. Railroad Com.*, 238 U. S. 174 (1915); *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U. S. 265 (1908).

On the other hand, it has been held that a statute empowering the municipality to contract with public utilities for the privilege of operating therein, so far as authorizing the regulation of rates and service, is a delegation of the police power which the city has no right to contract away. *City of Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210 (1917). In *Portland v. Public Service Com.*, 89 Ore. 325, 173 Pac. 1178 (1918), the order of the State Public Service Commission increasing rates above the maximum specified in a street railway franchise was upheld upon the ground that the state, having exercised its police power in granting the franchise through the city as its agent, could withdraw that authority and vest it in the Public Service Commission, which as the state's representative in the exercise of said power could agree with the utility company to such a change in the contract without violating any constitutional rights of the city or its inhabitants. *Acc. Robertson v. Wilmington & Pa. Traction Co.*, 104 Atl. (Del.) 839 (1918).

nerative. Having contracted, it must bear the loss, even though "it may be that the efficiency of the service and fairness in dealing with the company which performs such important and necessary service ought to require an advance in rates."¹⁵

The chief distinction in the facts of the two cases is that in the Union Dry Goods case the increased rates were approved and put into effect by order of the state commission, while in the Columbus case the increase was made by the utility without any commission action;¹⁶ and, further, the former had to do with a contract between a public utility and its patrons, the latter with a municipal franchise granted to and accepted by a public utility.¹⁷

The court in the Columbus case quite properly treated the franchise fixing rates on the same basis as any public service rate-contract, for, as the Supreme Court of Pennsylvania well said recently, "There seems to be no difference in principle between the case of a contract indeterminate and one that is determinate, nor is there any difference in principle between a contract with a borough, a corporation, or with an individual."¹⁸

The *ratio decidendi* of the Columbus decision is not based upon the procedural rule that in general the United States Supreme Court adopts the prior interpretations of state statutes by the highest court of the state,¹⁹ nor on the line of precedents represented by the Vicksburg case cited,²⁰ both of which merely establish the power of this municipality to enter into such a contract, but rather upon general principles of the law of private contracts relating to impossibility as an excuse for non-performance, thus completely ignoring the public service character of the subject matter of said contract.

In the Union Dry Goods case we have state action increasing the rates, and the court meets the constitutional objections by falling

¹⁵ 249 U. S. 399, 414 (1919).

¹⁶ The Ohio Public Utilities Commission Act (1913) (PAGE AND ADAMS, OHIO GEN'L CODE, §§ 614-616 *et seq.*) does not require prior consent of the commission to the establishment of increased rates by a public utility.

It should be noted in passing that where the utility proprietor increases rates above the maximum fixed by contract with a patron, no constitutional question is raised, but simply whether there has been a breach of contract which the law will redress; whereas, when the rate is thus increased by state action the question is whether that constitutes a violation of the federal or state constitutions against the impairment of obligations of contracts, and the taking of private property without due process of law. *United States v. Stanley* (Civil Rights Cases), 108 U. S. 3 (1883).

¹⁷ In general, a franchise is treated as a contract and within the protection of the contract clause of the U. S. Constitution. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518 (1819).

That the state may withdraw the power of regulation of the charges and service of public utilities from the municipality and transfer that authority to a state commission, since a grant of governmental or political authority by the state to cities, counties, and the like, does not constitute a contract within the meaning of the Federal Constitution. *Pawhuska v. Pawhuska Oil and Gas Co.*, 250 U. S. 394, 39 Sup. Ct. Rep. 526 (1919).

¹⁸ *Leiper v. Baltimore & Philadelphia R. Co.*, 262 Pa. St. 328; 334, 105 Atl. 551 (1918).

¹⁹ See 2 FOSTER, FEDERAL PRACTICE, 5 ed., 1573; HUGHES, FEDERAL PROCEDURE, 2 ed., 13.

²⁰ *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 508 (1907).

back upon the doctrine of the police power in the sense of that great unclassified residuum of the sovereign power of the state to promote the general welfare of its citizens.²¹ Although the weight of authority in the state courts has resorted to the same plausible reasoning to avoid the constitutional difficulties of the question, it is submitted that this is not only unnecessary in order to reach the obviously just result in sustaining such state action, but it is an evasion of the realities of the situation, and imposes an unwarranted limitation on the functioning of a well-recognized branch of the law directly applicable to this subject, — the law of public utilities.

The very nature of the subject matter with which it deals demands that the law of public utilities be a living law. No field of human activity is more directly influenced by the progress of science and invention, and by the economic and social conditions of the day. It is, and must continue, flexible and elastic enough to protect the public necessity as developed by the actual situation prevailing at that time and place.

Especially with regard to the service to be rendered, and the rates to be charged therefor by those engaged in public service enterprises, it is impossible in the nature of things to attain that just regulation essential to the ultimate protection of the public interest by the application of rigid rules based on dogmatic, presupposed principles, or by adherence to the iron-bound doctrine of *stare decisis*. In short, the reasonableness of public utility rates must be determined by the facts as they exist when it is sought to put such rates into operation, or when established rates are challenged.²²

The common law in the experience of ages learned this truth, and formulated practical, flexible legal standards, automatically adjusting themselves to the realities of the situation by requiring from public utilities reasonable service at reasonable rates under the circumstances,²³ — the question of reasonableness being a relative matter of time, place, and character of the undertaking.²⁴

It must follow, therefore, that when a public utility rate ceases to be reasonable under actual conditions then and there existing it *ipso facto* becomes unlawful, as either too high and extortionate, or too low and endangering the maintenance of a reasonably adequate service to meet the public necessity.²⁵ Under these circumstances it becomes

²¹ JAMES BRADLEY THAYER, *LEGAL ESSAYS*, 27.

²² *Smyth v. Ames*, 171 U. S. 361 (1898) (second case).

²³ See address, "Administrative Application of Legal Standards," by Roscoe Pound, before the Public Utility Law Section of the American Bar Association, Boston, Massachusetts, September 2, 1919.

²⁴ *Cumberland Tel. & Tel. Co. v. Kelly*, 160 Fed. 316 (1908).

²⁵ "What was lawful in 1897 was just and reasonable rates and practices. . . . We must assume that the rates and practices then fixed were at the time just and reasonable. But it can hardly be that with changing circumstances those rates and practices would forever remain just and reasonable. We are admonished by present-day conditions that the higher level of prices and wages may have made old rates unreasonably low. . . . And if the rates become unreasonable and the practices unjust, they would cease to be lawful. Unchangeable rates and practices are almost certain to become unlawful. The legislature did not in this respect change the law by the Public Utilities Act of 1911. That act only authorizes just and reasonable rates and practices. It puts into statutory form what was in 1897 and always has been lawful." Per Swayze, J., in *Atlantic*

the legal duty of the utility itself, or of the state commission, to raise or lower the rates so that they are again reasonable, and as such applicable to all members of the public receiving a like or substantially similar service.²⁶ Although the law of public utilities recognizes the right of the utility to establish reasonable rate differentials corresponding to a real difference in the service rendered,²⁷ that is of no avail here, for the service to the contract patron and non-contract patron is the same, and there can be no legal justification for a more favorable rate to the contract patron.

In substance, then, the long-term rate contract or franchise between the public utility proprietor and the patron, irrespective of whether that patron is a municipality or a person, is simply an attempt to subject to contractual control a subject which is peculiarly a matter of law as affected by overpowering external influences, which in the nature of things cannot be bound down to *a priori* agreements or enactments.²⁸ To enforce these long-term fixed rates under the changed conditions of the present day would result in the anomaly of the law defeating the law.

It is submitted that the solution of this problem, applicable to both cases discussed and supporting the legal right to increase the rates in each, is to be found in the well-recognized legal category of the law of public utilities; that the very nature of the subject matter of these long-term rate contracts and franchises, and the necessary operation of the common-law standards requiring reasonable service at reasonable rates, make such contracts unlawful as dealing with that which is primarily a matter of law, and not only beyond the scope of the doctrine of liberty of contract, and hence outside the class of legally enforceable obligations, but, *a fortiori*, without the protection of the contract clause or the due process clause of the federal or state constitutions.

FEDERAL REVIEW OF DECISIONS OF STATE COURTS INVOLVING FEDERAL QUESTIONS UNDER THE JUDICIAL CODE, § 237, AS AMENDED. — The extent to which the federal judiciary should control the state judiciary

Coast Electric Ry. Co. v. Board of Public Utility Commissioners, 104 Atl. (N. J. L.) 218, 220 (1918).

Of course, in order that the rates could be classed as unreasonable under the circumstances the prevailing conditions must be such as to substantially affect the ability of the utility to earn a fair return on its investment, and to maintain the necessary standard of service properly to fulfill its duty to the public, for the courts recognize the business fact that in such undertakings there is a certain extent of "missionary" effort required in order to build up the plant and introduce its product more widely; and again, the law does not undertake to guarantee even public service enterprises against any and all losses, since they should prepare to meet temporarily unfavorable conditions, and to render incidental services which may not in themselves be profitable. *People of the State of New York v. McCall*, 245 U. S. 345 (1917); *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1 (1907). Cf. *Northern Pacific Ry. Co. v. State of North Dakota*, 236 U. S. 585 (1915).

²⁶ See 32 HARV. L. REV. 74, 78.

²⁷ *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U. S. 263 (1892).

²⁸ The power of the legislature to fix public utility rates is limited to reasonable rates. *Chicago & Grand Trunk Ry. v. Wellman*, 143 U. S. 339 (1892); *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362 (1894); *Smyth v. Ames*, 169 U. S. 466, 526 (1898); *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578 (1896); *San Diego Land and Town Co. v. National City*, 174 U. S. 739 (1899).

has always been a delicate problem. That the federal judiciary should finally determine federal questions regardless of the court of origin is, however, undisputed. A proper balance between federal and state sovereignty in this matter was at first sought by subjecting final proceedings in a state court to review, on writ of error or appeal, by the federal Supreme Court, broadly, when a federal right was claimed and denied, or when a state right asserted to be inconsistent with a federal right was upheld.¹ Thus were the authority of the United States, and the rights claimed thereunder, protected, while the state was left supreme in its own field.² By such legislation the existence of the federal authority was preserved, but its scope could not be defined by the federal judiciary, for the federal issue was still determined in the state court whenever the questioned right, if federal, was sustained, or if state, was denied. Thus individual rights involving federal questions were unprotected from the point of view of the party who unsuccessfully asserted a state right; moreover, so long as the state court held state laws invalid under the Federal Constitution, the state was unable to get an authoritative determination of the issue of constitutionality. In addition, federal statutes were subjected to divers constructions so long as the different state courts sustained the federal right claimed thereunder.³

In response to a demand by the bench and bar for reform,⁴ jurisdiction was conferred on the United States Supreme Court in 1914 to review by writ of *certiorari* federal questions finally determined in state courts regardless of the course of decision.⁵ In 1916 a restrictive amendment established the present system.⁶ Instead of both writ of error and *certiorari*, *certiorari* alone now lies where, in the highest state court, a federal right, title, or immunity was denied; with this exception, review by *certiorari* is restricted to cases in which the court below has sustained the federal claim. Accordingly, writs of error now issue to state courts where the decision below (1) denied the validity of a treaty, statute, or authority exercised under the United States, or (2) affirmed the validity of a state statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States; while writs of *certiorari* issue to state courts when the decision below (1) affirmed the validity of a treaty, statute, or authority exercised under the United States, or (2) denied the validity of a state statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or (3) affirmed or denied the validity of a title, right, privilege, or immunity claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States. Since the exercise of such jurisdiction is a discretionary matter,⁷ the Supreme Court is thus

¹ U. S. REV. STAT. § 709; JUD. CODE, § 237; *Commonwealth Bank of Ky. v. Griffith*, 14 Pet. (U. S.) 56, 58; *Gordon v. Caldcleugh*, 3 Cranch (U. S.), 268; *Missouri v. Andriano*, 138 U. S. 496.

² *Commonwealth Bank of Ky. v. Griffith*, *supra*; *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304, 344, 348. See Dodd, "The U. S. Supreme Court as the Final Interpreter of the Federal Constitution," 6 Ill. L. REV. 289.

³ See 28 HARV. L. REV. 408.

⁴ 36 AM. BAR ASSOC. REP. 462, 469.

⁵ 38 STAT. AT L. 790 (Dec. 23, 1914). See 28 HARV. L. REV. 408.

⁶ 39 STAT. AT L. 726 (Sept. 6, 1916); JUD. CODE, § 237.

⁷ *Ireland v. Woods*, 246 U. S. 323.

enabled to widen its scope of review and yet control the natural increase in causes demanding its consideration.

Unfortunately, it seems impossible to determine whether the purpose of the amendments has been effected. The numerical results are of course ascertainable. Under the 1914 amendment but three petitions for writs of *certiorari* to state courts were filed. All were denied.⁸ Under the 1916 amendment, up to the October (1919) term, one hundred and thirty-five petitions for such writs had been considered by the court.⁹ In only twenty-nine cases did the writ issue. Of the latter, eight could not, prior to 1914, have properly come before the court, for in the case below the state court had sustained the validity of the federal right claimed.¹⁰ Seventeen cases, in which the state court had denied the validity of such right, were formerly reviewable by writ of error.¹¹ Only three of these twenty-nine cases have, up to the present time, been finally determined by the court. Of these, two were not formerly reviewable, having sustained the federal claim;¹² the remaining case denying that claim was formerly reviewable by writ of error only.¹³ The state court was

⁸ *Stowe v. Taylor*, 241 U. S. 658; *Callaghan v. Commonwealth of Mass.*, 241 U. S. 667 (223 Mass. 150, 111 N. E. 773); *Baltimore v. United Ry. Co.*, 241 U. S. 671 (127 Md. 660, 96 Atl. 880). The lower court decisions are given where obtainable. An examination of the proceedings in the lower court affords the best means of ascertaining the issue involved, since the Supreme Court renders memorandum decisions only.

⁹ In the October term, 1916, seventeen were denied and five granted; in the October term, 1917, forty-one were denied and seven granted; in the October term, 1918, forty-eight were denied and seventeen granted.

¹⁰ *Macleod v. N. E. Tel., etc. Co.*, 39 Sup. Ct. Rep. 389 (122 N. E. (Mass.) 547); *Seaboard Air Line R. Co. v. Horton*, 39 Sup. Ct. Rep. 8 (175 N. C. 472); *Calhoun v. Massie*, 39 Sup. Ct. Rep. 289 (97 S. E. (Va.) 576); *Southern Pacific R. Co. v. Berkshire*, 39 Sup. Ct. Rep. 494 (207 S. W. (Texas) 323); *Philadelphia, etc. R. Co. v. Smith*, 39 Sup. Ct. Rep. 6 (103 Atl. (Md.) 945); *Northern Pacific R. Co. v. McComas*, 243 U. S. 653 (82 Ore. 639); *Gratiot County Bank v. Johnson*, 243 U. S. 645 (193 Mich. 452).

¹¹ See *Hull v. Philadelphia, etc. R. Co.*, 39 Sup. Ct. Rep. 7 (104 Atl. (Md.) 274); *Ward v. Commissioners*, 39 Sup. Ct. Rep. 12 (173 Pac. (Okla.) 1050); *Chicago, etc. R. Co. v. Ward*, 39 Sup. Ct. Rep. 10 (173 Pac. (Okla.) 212); *Tyrell v. Shaffer*, 39 Sup. Ct. Rep. 19 (174 Pac. (Okla.) 1074); *Broadwell v. Commissioners*, 39 Sup. Ct. Rep. 259 (175 Pac. (Okla.) 828); *Lee v. C. of Georgia R. Co.*, 39 Sup. Ct. Rep. 7 (95 S. E. (Ga.) 718); *Hartford Life Ins. Co. v. Johnson*, 245 U. S. 664 (197 S. W. (Mo.) 132); *Postal Tel. Co. v. Dickenson*, 39 Sup. Ct. Rep. 11 (79 So. (Miss.) 719); *Pere Marquette R. Co. v. French*, 39 Sup. Ct. Rep. 494 (204 Mich. 578); *Brooks Scanlon Co. v. Commissioner*, 39 Sup. Ct. Rep. 494 (81 So. (La.) 727); *Kenney v. Lodge*, 39 Sup. Ct. Rep. 390 (285 Ill. 188); *N. Y., etc. R. Co. v. Goldberg*, 245 U. S. 655 (149 N. Y. Supp. 629).

¹² *Gratiot County Bank v. Johnson*, 39 Sup. Ct. Rep. 263 (*certiorari* granted, 243 U. S. 645; lower court decision, 193 Mich. 452, 160 N. W. 544). In this case the defendant in error claimed, under the Federal Bankruptcy Act, that as all creditors could intervene in bankruptcy proceedings, it must be assumed that they had, and therefore all creditors would be bound as to all subsidiary facts upon which the adjudication was based. The state court decision upholding this contention was reversed by the Supreme Court.

In *Northern Pacific R. Co. v. McComas*, 39 Sup. Ct. Rep. 546 (*certiorari* granted, 243 U. S. 653; lower court decision, 82 Ore. 639, 161 Pac. 562), the defendant in error claimed title by adverse possession of lands which it alleged had been granted to the plaintiff in error under a federal statute. The state court decision, holding that this land had passed to the railroad under the statute and was held by the company during the period of adverse possession relied on, was reversed by the Supreme Court.

¹³ *Baltimore & Ohio R. Co. v. Leach*, 39 Sup. Ct. Rep. 254 (*certiorari* granted, 243 U. S. 639; lower court decision, 173 Ky. 452, 191 S. W. 310). In this case the state court gave judgment for the defendant in error, for damages based on injury to his

reversed in all three cases. These figures indicate that in so far as the amendments were designed to prevent the overloading of the court, they have been successful.

Whether the main purpose of the legislation — to insure a uniform interpretation of federal law — has been effected, is a more difficult question. The road of review by writ of error is well marked;¹⁴ but there are few judicial guideposts in the maze of *certiorari*. The petitions are granted or denied by memorandum decisions; no reason for the decision is given, no declaration of principles is made which guide the exercise of its discretionary authority. Since a writ of error issues as of right, the decisions on petitions for these are of slight significance as to the court's action on petitions for writs of *certiorari*. Nevertheless, cases of this latter type, in which the writ has been denied for want of jurisdiction, contain the only judicial construction of the legislation under consideration. In certain recent cases, the court has stated that a writ of *certiorari* should have been requested, but has given no further indication that such would have been granted.¹⁵ A less satisfactory class of cases is comprised of those in which the court, by elimination, has determined that a writ of error does not lie, but has refused to commit itself as to the propriety of *certiorari* proceedings.¹⁶ Perhaps it is

stock while in transit on the railroad company's line. The shipper had not complied with the provision of the bill of lading, approved by the Interstate Commerce Commission, which specified that notice of claims must be filed within five days from removal of stock from transit to preserve the liability of the railroad company. The state court's decision refusing to recognize the validity of the defense of the railroad company based on the lack of such notice was reversed by the Supreme Court.

¹⁴ For valuable notes on this subject, see 62 L. R. A. 513; 63 L. R. A. 33; 5 FED. STAT. ANN. 724; FED. STAT. ANN. (Supplement, 1918) 412.

¹⁵ *Erie R. Co. v. Hamilton*, 248 U. S. 369. In this case the railroad claimed to have secured a valid release of Hamilton's claim for damages from the Russian consul, acting under the authority of a United States treaty. The lower court denied the consul's power to make a valid release. Petition for writ of error was dismissed for want of jurisdiction, since the validity of the treaty was not questioned, but only an authority exercised thereunder. The court stated that a writ of *certiorari* should have been requested.

In *Rust Land & Lumber Co. v. Jackson*, 39 Sup. Ct. Rep. 424, the result of a controversy in a state court depended upon the location of the state boundary line. The state court refused a continuance asked for on the ground that the boundary dispute was at that time being adjudicated in the United States Supreme Court. The plaintiff in error claimed that by such refusal the validity of the authority of the Supreme Court to determine the question was denied, and sought a writ of error. The court dismissed the writ, remarking that *certiorari* was the only available proceeding here, since the plaintiff in error did no more than assert a title, right, privilege, or immunity under the United States Constitution. See also *Philadelphia & Reading Coal & Iron Co. v. Gilbert*, 245 U. S. 162.

¹⁶ *Dana v. Dana*, 39 Sup. Ct. Rep. 449. The state court in this case held that certain interests in property without the state were taxable under the state succession tax. A writ of error was requested on the ground that the property being real estate outside the state, the assessment of the tax was a violation of the rights secured by the Fourteenth Amendment to the Constitution of the United States, in that it took the property of the plaintiff in error without due process of law. The court said: "... Neither the validity of the statute, nor the validity of any authority exercised under the State, was drawn in question. The case was decided on the view which the Supreme Judicial Court entertained of the character of the property involved, and neither in the record, nor in the opinion of the Court, does it appear that any question was raised or decided which involved the validity of the statute of the State, on the ground of its repugnancy to the Constitution, treaties, or laws of the United States. It follows that the only

significant that in the three cases finally decided, the state court was reversed.¹⁷ But if the writs are to issue only when the court is ready to reverse, it would seem that the final arguments should be made at the preliminary hearings on the petition, which, of course, is not the present practice.

It is likely that the Supreme Court, in the exercise of this discretionary jurisdiction, will be governed by the considerations affecting its action on petitions for writs of *certiorari* to the circuit courts of appeal. In such cases the power is exercised sparingly, only when the question is of gravity and importance and of such a national or public concern as to require a considered determination of the issue by the supreme judicial authority of the country.¹⁸ The writ will probably be granted by the court only when it is convinced of the necessity of settling a controverted federal question, or when a state court has departed rather widely from an accepted construction of federal law.¹⁹

RECENT CASES

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — RECOVERY FOR AGENT'S NEGLIGENCE DENIED WHERE EQUIVALENT TO AN INDEMNITY FOR PRINCIPAL'S OWN TORT. — The plaintiff in a letter to the defendant, his confidential financial investigator, maliciously libeled A. Through the carelessness of the defendant, A learned of the defamatory remarks, and recovered substantial damages in a libel suit against the plaintiff. The latter then brought this action to be reimbursed for the loss sustained. *Held*, that the plaintiff was entitled to nominal damages only. *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520.

In general, an agent negligent in the performance of his duty is liable to the principal for all damages proximately resulting from that negligence. *Geisse v. Franklin*, 56 Conn. 83, 13 Atl. 148; *Gilson v. Collins*, 66 Ill. 136. See 1 MECHEM, AGENCY, 2 ed., §§ 1275 *et seq.* The difficulty in the present case is that the enforcing of this relational obligation would indemnify the principal for the consequences of his own wrong. Formerly, a tortfeasor could never recover indemnity. *Merryweather v. Nixan*, 8 T. R. 186. See 12 HARV. L. REV. 176. But to-day he may where the tort was unintentional. *Navigation Company v.*

right of review in this court of the decree of the Supreme Judicial Court of Massachusetts was by writ of *certiorari*."

¹⁷ See notes 12, 13, *supra*.

¹⁸ *Forsyth v. Hammond*, 166 U. S. 506; *American Construction Co. v. Jacksonville, etc. Co.*, 148 U. S. 372; *McClelland v. Carland*, 217 U. S. 268; *Lutcher, etc. Lumber Co. v. Knight*, 217 U. S. 257.

¹⁹ See notes 12, 13, *supra*. It is interesting to note that in no case in which the writ was granted had the validity of a state statute, or authority exercised under the state, been attacked and denied on the ground of repugnancy to the Constitution, treaties, or laws of the United States. It was thought that under the new legislation, decisions of reactionary state courts denying the constitutionality of modern legislation dealing with new economic problems would be corrected. 28 HARV. L. REV. 408. A reading and comparison of *State v. Williams*, 189 N. Y. 131, with *Muller v. Oregon*, 208 U. S. 412, and of *People v. Orange County Road Construction Co.*, 175 N. Y. 84, with *Atkin v. Kansas*, 191 U. S. 207, convinces one that the advocates of the reform legislation had this in mind. As yet, however, no writs have issued in this class of case; but this is not surprising, considering the comparative youth of the amendments.

Compañía Española, 134 N. Y. 461, 31 N. E. 987; *Adamson v. Jarvis*, 4 Bing. 66. However, the rule of no indemnity or contribution still applies where the wrong is intentional or morally blameworthy. *Boyer v. Bolender*, 129 Pa. 324, 18 Atl. 127; *Davis v. Gelhaus*, 44 Ohio St. 69, 4 N. E. 593. The finding that the plaintiff was actuated by malice would therefore amply justify the court in refusing to allow a substantial recovery. But the award of nominal damages is open to criticism. Although the court implies a contractual duty of indemnification — a pure fiction — it overlooks the fact that such contracts, where the tort is a malicious libel, are illegal, and so unenforceable. *Smith and Son v. Clinton*, 25 T. L. R. 34; *Shackell v. Rosier*, 2 Bing. N. Cas. 634; *Arnold v. Clifford*, 2 Sumn. (U. S.) 238. The proper decision would seem to be simply judgment for the defendant.

BILLS AND NOTES — NEGOTIABLE INSTRUMENTS LAW — EFFECT ON THE LIMITATION OF ACTION. — The defendant drew a check on a local bank to the order of the plaintiff. Ten years later the plaintiff presented the check, was refused payment, and gave notice of dishonor to the defendant. Section 186 of the Negotiable Instruments Law provides as follows: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." The defendant relied on the Statute of Limitations. *Held*, that the plaintiff's cause of action was barred. *Cohwell v. Cohwell*, 179 Pac. 916 (Ore.).

The rule that, in the case of a demand note, the Statute of Limitations begins to run after a reasonable time has elapsed, even though no demand has been made, has been applied to the presentment of a check. *Scroggin v. McClelland*, 37 Neb. 644, 56 N. W. 208. This seems sensible. However, many states have held that section 119 of the Negotiable Instruments Law, which provides five ways in which parties primarily liable may be discharged, abrogates the older common or statutory law that a surety is discharged by an extension of time given to the principal debtor. *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679; *Richards v. Market Exchange Bank*, 81 Ohio St. 348, 90 N. E. 1000. But in such a case the terms of the Negotiable Instruments Law and the previous rule of suretyship can be said to be inconsistent, whereas, in the principal case, the section in question and the Statute of Limitations can unquestionably stand together. Therefore those cases furnish no analogy. The exact point is new; but it seems properly decided.

CARRIERS — STATE REGULATION — VALIDITY OF AN INCREASE IN RATE ALLOWED WITHOUT A VALUATION OF CARRIER'S PROPERTY. — The New Jersey Board of Public Utilities Commissioners allowed certain trolley companies to increase their rates, basing its order on the advance in operating expenses due to an ascertained rise in prices without making any valuation of the companies' property. *Held*, that it was proper to allow the increase. *O'Brien v. Board of Public Utilities Commissioners*, 106 Atl. 414 (N. J.).

Administrative orders, of such judicial character as to require a hearing, are void if the hearing granted was inadequate or manifestly unfair. *Chin Yow v. United States*, 208 U. S. 8; *Atchison, T. & S. F. Ry. Co. v. Spiller*, 158 C. C. A. 227. The same is true if the facts found do not as a matter of law support the order made. *United States v. B. & O. S. W. R. R.*, 226 U. S. 14. See *Interstate Commerce Commission v. Louisville & Nashville R. R.*, 227 U. S. 88, 91. In the principal case, if the original rate had been proved reasonable, then it would seem to follow that the new rate would also be reasonable if calculated by adding the increase due to a rise in operating expenses produced by unavoidable causes. See *American Express Company v. Michigan*, 177 U. S. 404, 408; *The Five Per Cent Case*, 32 I. C. C. 325. It would seem equally clear that

if evidence of the unreasonableness of the old rate had been excluded at the hearing, or had been introduced and had been disregarded, the order would be void as based upon an inadequate or unfair hearing. See *Interstate Commerce Commission v. Louisville & Nashville R. R.*, *supra*. But in the principal case no evidence pro or con as to the reasonableness of the old rate was offered. See 13 RATE RESEARCH, 261; P. U. R. 1919 A 204. Where an existing rate is attacked, the burden is on the complainant to establish that it is unreasonable. *Louisville and Nashville Railroad v. United States*, 238 U. S. 1; *Louisville and Nashville Railroad v. Finn*, 235 U. S. 601. By the same reasoning, it would seem that in the principal case the commission was justified in assuming the old rate to be reasonable and in ordering an increase on the basis of the rise in operating expenses.

CONSTITUTIONAL LAW — PERSONAL RIGHTS: CIVIL, POLITICAL, AND RELIGIOUS — POWER OF THE STATE TO LEGISLATE IN FEDERAL MATTERS. — A state statute provided that all male residents of the state between the ages of eighteen and fifty-five, not in the national army, should be usefully employed, and that "every such person who shall not be so employed shall be subject to be assigned by the said council [of defense] to such employment as the said council shall from time to time determine and at such compensation as the said council and employer shall agree to be reasonable and proper." The statute made a refusal to work a misdemeanor. *Held*, that this statute is constitutional. *State v. McClure*, 105 Atl. 712 (Del.).

In time of peace, this statute would probably not be violative of the Thirteenth Amendment, since one could exercise his volition in the choice of and change of his occupation, although there are very few decisions upon involuntary servitude that are at all helpful. See *Peonage Cases*, 123 Fed. 671, 680; *Bailey v. Alabama*, 219 U. S. 219, 241. Although the question has never been decided, it is also probable that such a statute would not be held to deprive one of liberty without due process of law, nor deny to him the equal protection of the laws. See Felix Frankfurter, "Constitutional opinions of Justice Holmes," 29 HARV. L. REV. 683. Whatever might be true in time of peace, such an enactment by Congress in time of war would undoubtedly be constitutional. U. S. CONSTITUTION, Art. I, § 8; *Selective Draft Law Cases*, 245 U. S. 366. See Charles M. Hough, "Law in War Time — 1917," 31 HARV. L. REV. 692. The only other question is whether a state has power to pass such a statute in aid of the federal government. A state may exercise any power that is not taken from it expressly or by necessary implication. *Halter v. Nebraska*, 205 U. S. 34. Thus, it has been held that a state may legislate against the use of the United States flag for advertising purposes. *Halter v. Nebraska*, *supra*. And a state may pass laws in aid of interstate commerce, an admittedly federal matter. *Western Union Telegraph Co. v. James*, 162 U. S. 650; *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364. The statute under consideration seems therefore to have been properly upheld.

CONSTITUTIONAL LAW — PRIVILEGES, IMMUNITIES, AND CLASS LEGISLATION — DENIAL TO ALIENS OF THE RIGHT TO MAINTAIN BILLIARD ROOMS. — An ordinance of Cincinnati required persons maintaining pool and billiard rooms to be licensed, and provided that no license be granted to a person who was not a citizen of the United States. *Held*, that the ordinance is constitutional. *State ex rel. Balli v. Carrell, auditor*, 124 N. E. 129 (Ohio).

Keeping public billiard rooms for hire is an occupation which the state may prohibit in the exercise of its police power. *Murphy v. People of California*, 225 U. S. 623. *A fortiori*, the state may require persons engaged in that occupation to be licensed. Aliens may be excluded from privileges of citizens when, as a class, they are the persons from whom the evil sought to be corrected is

mainly to be feared. *Patsone v. Pennsylvania*, 232 U. S. 138. But, in view of recent events, undue ardor in restricting aliens may be expected and this tendency must be checked by the courts. Thus, a statute which prohibited the employment of aliens beyond a certain percentage of the total number of employees was properly declared unconstitutional. *Truax v. Raich*, 239 U. S. 33. However, a state may refuse to grant liquor licenses to aliens. *Trageser v. Gray*, 73 Md. 250, 20 Atl. 905. Or peddlers' licenses. *Commonwealth v. Hana*, 195 Mass. 262, 81 N. E. 149. *Contra*, *State v. Montgomery*, 94 Maine, 192, 47 Atl. 165. But not barbers' licenses. *Templar v. Board of Examiners*, 131 Mich. 254, 90 N. W. 1058. It seems proper, in the exercise of the police power, that the legislature primarily should decide whether there is sufficient reason to deny to aliens a given privilege. In the principal case, the restriction seems well within the discretion of the legislature.

CONTRIBUTORY NEGLIGENCE — STATUTORY ACTIONS — NEGLIGENCE OF AN EMPLOYEE OF A PROHIBITED CLASS. — A statute provided that no child under fourteen years of age should be employed to run an elevator. The plaintiff sues for injuries received while employed in violation of this statute. His injuries were partly the result of his own negligence. *Held*, that the plaintiff recover. *Karpeles v. Heine et al.*, 124 N. E. 101 (N. Y.).

Obviously, the decision is to be limited to cases where the plaintiff is one of a class which the violated statute intended to protect or benefit. Yet even in such cases the majority of the older decisions allowed the defense of contributory negligence. *Freeman v. Glens Falls Paper Mill Co.*, 70 Hun (N. Y.) 530; *Lee v. Stirling Silk Mfg. Co.*, 115 N. Y. App. Div. 589, 101 N. Y. Supp. 78. But the modern tendency is in accord with the principal case. *Strafford v. Republic Iron and Steel Co.*, 238 Ill. 371, 87 N. E. 358; *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. 311, 67 Atl. 642. There is still, however, authority in support of the opposite view. See *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 95 N. E. 876, 879. It is submitted that the confusion arises from the attempt to treat the liability incurred by the violation of the statute in these cases as based on negligence, whereas it is really an absolute liability. This view is not without support. See *Lenahan v. Pittston Coal Mining Co.*, *supra*.

CORPORATIONS — CORPORATE STOCK — ATTACHMENT — REFUSAL TO ISSUE CERTIFICATES OF STOCK. — At a judicial sale under statutory provisions, the plaintiff bought shares of stock in a domestic corporation. The shares were owned by a nonresident, who at the time held the certificates outside of the jurisdiction. Thereupon the plaintiff demanded of the officers of the corporation that they issue to him new certificates. On their refusal he sued for the value of the stock. *Held*, that no statute imposed any duty on the corporation to transfer the stock upon its books. *Harris v. Mid-Continent Life Ins. Co.*, 182 Pac. 85 (Okla.).

Some courts hold, with the principal case, that stock is an intangible property right subject to attachment only at the situs of the corporation, and that the certificates are but evidence of ownership. *Maertens v. Scott*, 33 R. I. 356, 80 Atl. 369; *Barber v. Morgan*, 84 Conn. 618, 80 Atl. 791. The court admits that the purchaser at the attachment sale became a stockholder. As such he was entitled to a certificate. *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348; *Nat'l Bank v. Watontown Bank*, 105 U. S. 217; *Rio Grande Cattle Co. v. Burns*, 82 Texas, 50, 17 S. W. 1043. Without it his right practically was nonmarketable. See 1910 1 REV. LAWS OF OKLA., § 1237. Had the corporation issued the certificates to the plaintiff it would have incurred the risk of liability to a *bona fide* purchaser of the outstanding certificates. *Nat'l Bank v. Stribling*, 16 Okla. 41, 86 Pac. 512. See 2 COOK ON CORPORATIONS, 7 ed., § 489. The decision makes the assumption of this risk

unnecessary; but simultaneously it emasculates the statute which permitted the attachment of the stock. The difficulty in the principal case can be avoided by a statutory provision that only the certificates shall be attachable. See UNIFORM TRANSFER OF STOCK ACT, § 13. Such provision is consonant with business custom which regards the certificate as the *res*. See *Puget Sound Bank v. Matther*, 60 Minn. 362, 363, 62 N. W. 396, 397.

CORPORATIONS — PROMOTERS — CONTRACTS MADE FOR CORPORATION TO BE FORMED. — Certain promoters of a corporation to be formed agreed, *inter alia*, that if the plaintiff would transfer his interest in some mine property to one of the promoters, as trustee for himself and his associates, to be by him transferred to the corporation when formed, the corporation would give the plaintiff a one fifth interest in the completed enterprise. The plaintiff brought this bill against the corporation and the promoters for specific performance of the contract. *Held*, that it be granted. *Wallace v. Eclipse Pocahontas Coal Co. et al.*, 98 S. E. 293 (W. Va.).

In England it is settled that a corporation cannot ratify or adopt a contract made by promoters in its behalf before incorporation. *In re Northumberland Ave. Hotel Co.*, 33 Ch. D. 16; *Natal Land Co. v. Pauline Colliery Syndicate*, [1904] A. C. 120. The English rule is not without support in the United States. See *Abbott v. Hapgood*, 150 Mass. 248, 252, 22 N. E. 907, 908. But some American jurisdictions allow ratification on such facts. *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 38 N. E. 461; *Kaeppler v. Redfield Creamery Co.*, 12 S. D. 483, 81 N. W. 907. Other states rely on a doctrine of adoption. *McArthur v. Times Printing Co.*, 48 Minn. 319. See *Robbins v. Bangor Ry. Co.*, 100 Me. 496, 501. Theoretically, the English rule seems correct. On the other hand, the result reached in the American cases is the desirable one. To reach this result without overthrowing fundamental principles of agency, several theories have been suggested. If there has been a novation effected between the corporation and the third party, all agree that the corporation is bound. *Snow v. Thompson Oil Co.*, 59 Pa. St. 209. See *Oldham v. Mt. Sterling Imp. Co.*, 103 Ky. 529, 531. Another theory advanced is that the original contract may be regarded as a continuing offer which, if not withdrawn, may be accepted by the corporation. *Pratt v. Oshkosh Match Co.*, 89 Wis. 406, 62 N. W. 84. See 14 HARV. L. REV. 536. Neither of these suggestions help to support the decision in the principal case. The bill is brought for the enforcement of the agreement made with the promoters and not of any contract made by the corporation itself.

CRIMINAL LAW — CONCURRENT JURISDICTION OF STATE AND UNITED STATES — SEDITION ACT. — A New Jersey statute made it a crime to incite hostility against the United States (N. J. LAWS, 1918, chap. 44, § 2). *Held*, statute is constitutional. *State v. Tachin*, 106 Atl. 145 (N. J.).

In the absence of a federal statute on the subject, a state may enact that an offense primarily against the United States is an offense against the state as well. *Halter v. Nebraska*, 205 U. S. 34. A state and the United States may have concurrent jurisdiction over a crime against both sovereignties, where the crime is covered by a federal statute and the state statute does not interfere with its operation. *State v. Holm*, 139 Minn. 267, 166 N. W. 181; see 40 STAT. AT L. 219, chap. 75, § 1. Each sovereign punishes the offense against itself.

CRIMINAL LAW — FORMER JEOPARDY — IDENTITY OF OFFENSES. — The defendant was indicted for a homicide that was the result of violence in the perpetration of a robbery. He had been previously convicted of the robbery, and he set up this former conviction as a defense. *Held*, a valid defense. *State v. Mowser*, 106 Atl. 416 (N. J.).

It is generally said that to constitute double jeopardy the two offenses must be the same in law and fact. See *Commonwealth v. Roby*, 12 Pick. (Mass.) 496, 504. But the decisions differ as to when such identity exists. That both offenses arose out of the same transaction is not enough. *Morey v. Commonwealth*, 108 Mass. 433; *The King v. Barron*, [1914] 2 K. B. 570. If on trial of the first indictment the accused could lawfully have been convicted of the offense charged in the second, or *vice versa*, by the English rule, followed in many American jurisdictions, there is double jeopardy. *Spears v. People*, 220 Ill. 72, 77 N. E. 112; see *Regina v. Gilmore*, 15 Cox C. C. 85, 87; 2 EAST, PLEAS OF THE CROWN, 522. Thus, it is clear that if one crime is included in the other, or, *a fortiori*, if they are different degrees of the same offense, prosecution for either will be a defense to the other. *Grafton v. United States*, 206 U. S. 333; *Floyd v. State*, 80 Ark. 94, 96 S. W. 125. But if conviction for one of two offenses cannot be had under proof of the other, some states hold that there is not the requisite identity, even though the offenses arose out of the same transaction and have a common essential ingredient. *State v. Rose*, 89 Ohio St. 383, 106 N. E. 50; *State v. Patterson*, 66 Kan. 447, 71 Pac. 860. Other courts, however, under like circumstances, consider a common essential ingredient sufficient to cause jeopardy. *State v. Cooper*, 13 N. J. L. 361; *Herera v. State*, 35 Tex. App. 607, 34 S. W. 943. This view, followed in the principal case, seems sound. See 20 HARV. L. REV. 642.

CRIMINAL LAW — STATUTORY OFFENSES — REQUIREMENT OF *MENS REA* FOR A CRIME BASED ON POSSESSION. — A Mississippi statute provides that it shall be unlawful to possess liquor, and imposes a penalty of a fine or imprisonment, or both (1918 MISS. LAWS, c. 189, § 2). Liquor was found in the shop of the defendant. The jury found that the defendant did not own the liquor, and had no knowledge of the fact that it was in his shop. *Held*, the defendant should be acquitted. *City of Jackson v. Gordon*, 80 So. 785 (Miss.).

For certain statutory offenses, such as violations of police regulations, in their nature mere torts against the state, to a conviction of which no moral obloquy attaches, *mens rea* may well be considered unnecessary. *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *Commonwealth v. Weiss*, 139 Pa. St. 247, 21 Atl. 10. But as to certain more serious offenses, particularly where the penalty is imprisonment, justice requires that the defendant be allowed all common-law defenses not expressly negated by the legislators. *Sherras v. De Rutzen*, [1895] 1 Q. B. 918; *State v. Brown*, 188 Mo. App. 248, 175 S. W. 131; *State v. Cox*, 179 Pac. 575 (Ore.). The court in the principal case fails to note the distinction between these two classes of offenses but reaches the correct result by reading the word "knowingly" into the statute. The court intimates that the case might have been rested simply on the ground that one cannot possess that of which he has no knowledge. But specific knowledge is not essential to possession if there is a general intent to control that in which the chattel is included. *Ford v. State*, 85 Md. 465, 37 Atl. 172. See *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44, 47; HOLMES, THE COMMON LAW, 220. The principal case seems to indicate that the courts will be reluctant to hold a defendant guilty of any crime based on possession unless he has a more specific intent than is generally considered necessary to constitute possession for the purposes of civil rights and liabilities.

DAMAGES — EXEMPLARY DAMAGES — LIABILITY OF A CORPORATION FOR PUNITIVE DAMAGES FOR THE TORT OF AN AGENT. — In an action for personal injuries alleged to have been sustained by the plaintiff as the result of having been shoved from the platform of one of the defendant's street cars by the defendant's motorman, the court instructed the jury that if the acts of the motorman were done by him wilfully and without legal justification or excuse

or provocation, they might assess punitive damages against the defendant. The jury returned a verdict including punitive damages, and the defendant appealed from the judgment rendered thereon. *Held*, that the judgment be affirmed. *Kennelly v. Kansas City Rys. Co.*, 214 S. W. 237 (Mo.).

Theoretically, a rule allowing punitive damages in civil cases is objectionable, since the purpose of the civil law is to compensate for injury, not to punish the wrongdoer. See 1 SEDGWICK, DAMAGES, 9 ed., § 353; H. E. Willis, "Measure of Damages when Property is Wrongfully taken by a Private Individual," 22 HARV. L. REV. 419, 420. But the doctrine is established by the weight of authority. *Stalker v. Drake*, 91 Kan. 142, 136 Pac. 912; *Yazoo & M. V. R. Co. v. May*, 104 Miss. 422, 61 So. 449. *Contra*, *Longfellow v. Seattle*, 76 Wash. 509, 136 Pac. 855. Whatever may be said in favor of the rule in general, there can be no justification for allowing punitive damages against a principal who is liable only on *respondet superior*. When the principal is a natural person, the weight of authority is to this effect. *Gaertner v. Bues*, 109 Wis. 165, 85 N. W. 388; *Lake Shore Ry. Co. v. Prentice*, 147 U. S. 101. *Contra*, *Boyer v. Coxen*, 92 Md. 366, 48 Atl. 161. The result should be the same though the principal is a corporation. *Peterson v. Middlesex Traction Co.*, 71 N. J. L. 296, 59 Atl. 456; *Voves v. Great Northern Ry. Co.*, 26 N. D. 110, 143 N. W. 760. But the doctrine of the principal case, imposing punitive damages on a corporation principal liable only on *respondet superior*, has support in decisions of other states. *Goddard v. Grand Trunk Ry.*, 57 Me. 202; *So. Express Co. v. Brown*, 67 Miss. 260, 7 So. 318. It is argued that otherwise a corporation would never be subject to punitive damages, since it can act only through agents. See *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53. But unless the corporation directed or ratified the misconduct, or was negligent in selecting its agents, it could not possibly be said to deserve punishment. The decisions therefore seem unsound, even in a state permitting punitive damages generally.

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DIVORCE—CRUELTY—ABUSE BY MOTHER-IN-LAW.—A husband was financially unable to furnish his bride with any other home than that belonging to his widowed mother with whom he lived. He always treated his wife kindly, but his mother abused her severely. The wife returned to her parents and filed a petition for divorce on the ground of cruelty. *Held*, that the divorce be granted. *Thompson v. Thompson*, 171 N. W. 347 (Mich.).

Where a husband acquiesces in the mistreatment of his wife by third persons, he is chargeable with their cruelty. *Snyder v. Snyder*, 98 Misc. 431, 162 N. Y. Supp. 607; *Sayles v. Sayles*, 103 Atl. 225 (R. I.). Or where he arbitrarily refuses to provide a home away from such persons. *Dakin v. Dakin*, 1 Neb. Unof. 457, 95 N. W. 781; *Hall v. Hall*, 9 Ore. 452. The principal case extends the imputation of cruelty to a husband without fault. The wife was undoubtedly justified in separating herself from the household where she was mistreated. *Marshak v. Marshak*, 115 Ark. 51, 170 S. W. 567; *Hall v. Hall*, 69 W. Va. 175, 71 S. E. 103. And the husband would be chargeable with desertion at the end of the statutory period if by his own fault he failed to provide a separate home. *Curlett v. Curlett*, 106 Ill. App. 81. But not if his inability continued without his fault. *Skean v. Skean*, 33 N. J. Eq. 148. In the principal case, the wife's grievance narrows down to the non-culpable inability of the husband to furnish her a proper home. It would seem that the court should have gone no further than to decree legal separation, in the absence of a statute making nonsupport a ground for absolute divorce.

EQUITABLE SERVITUDES—STATUTE OF FRAUDS—REPRESENTATION OF FUTURE CONDUCT AS BASIS OF ESTOPPEL.—The defendant sold the plaintiff a lot near the ocean, retaining the intervening land, and orally promising to build nothing except a boardwalk upon it. The plaintiff, relying upon the

defendant's promise, built a house. The defendant being about to sell the land in front of the plaintiff's house, free of restrictions, the plaintiff sought an injunction. *Held*, injunction granted. *Phillips v. West Rockaway Land Co.*, 124 N. E. 87 (N. Y. Ct. of App.).

It has been held that, because an equitable servitude is a property right, the servient land cannot be condemned without compensation to the dominant tenant. *Flynn v. N. Y. W. & B. Ry. Co.*, 218 N. Y. 140, 112 N. E. 913. By the same reasoning, the better view is that equitable servitudes are within the Statute of Frauds. *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Pitkin v. Long Island Ry. Co.*, 2 Barb. Ch. (N. Y.) 221; *Rice v. Roberts*, 24 Wis. 461. *Contra*, *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876. The court does not consider this question, apparently confusing the creation of equitable servitudes with the creation of quasi-easements, which do not come within the purpose of the Statute. For estoppel, upon which doctrine the court rests its decision, the representation must be as to an existing fact, not merely as to future action. *Maddison v. Alderson*, L. R. 8 A. C. 467; *White v. Ashton*, 51 N. Y. 280. The case seems erroneous in principle and inconsistent with two lines of decisions of the same court.

EVIDENCE — ADMISSIONS — CONDUCTOR'S REPORT OF ACCIDENTS. — To prove defendant's negligence, the plaintiff introduced in evidence, over defendant's objection, the report of the accident, submitted to the defendant by its conductor. *Held*, error, but not prejudicial. *Bell v. Milwaukee Electric Ry. & Light Co.*, 172 N. W. 791 (Wis.).

When the reports can be regarded as being obtained with a view to the particular litigation, they are held to be privileged. *Cossey & Wife v. London, Brighton & South Coast Railway Company*, L. R. 5 C. P. 146. But this requisite, precedent to such privilege, is not present in the facts of the principal case. *Mahoney v. National Widows Life Assurance Fund, Ltd.*, L. R. 6 C. P. 252; *Woolley v. North London Railway Company*, L. R. 4 C. P. 602; *In re Bradley*, 71 N. H. 54, 51 Atl. 264. However, such reports are plainly hearsay. Some courts have admitted an agent's statements in evidence when the time and manner of their utterance bring them within the somewhat loosely defined doctrines of *res gestae*. *Peto v. Hague*, 5 Esp. 134; *Keyser v. Chicago & G. T. Ry. Co.*, 66 Mich. 390, 33 N. W. 867. Conversely, courts have excluded them when they cannot be brought within those doctrines. *Carroll v. East Tennessee, V. & G. Ry. Co.*, 82 Ga. 452, 10 S. E. 163. But, in the principal case, the report was prepared some time after the event and is clearly not part of the *res gestae* within the cases cited. An agent's report is sometimes rejected on the theory that an agent's statements cannot be a principal's admissions. *Atchison, T. & S. F. Ry. Co. v. Burks*, 78 Kan. 515, 96 Pac. 950. But the distinct weight of authority is against this view, and makes the criterion, whether the agent has acted within the scope of his authority. *Meyer et al. v. Great Western Ins. Co.*, 104 Cal. 381, 38 Pac. 82; *Patterson v. United Artisans*, 43 Ore. 333, 72 Pac. 1095; *Hildebrand v. United Artisans*, 50 Ore. 159, 91 Pac. 542. See 2 WIGMORE, EVIDENCE, § 1078. Usually conductors are required to report to the company circumstances of accidents. *A fortiori*, they are authorized to do so. And it should have no effect on the admissibility of the report as an admission that the conductor based it, in whole or in part, on what bystanders told him.

FEDERAL COURTS — JURISDICTION BASED ON NATURE OF SUBJECT MATTER — REVIEW OF DECISIONS OF STATE COURTS INVOLVING FEDERAL QUESTIONS, UNDER JUDICIAL CODE, § 237, AMENDED. — The procedure by which state court decisions involving a federal question may be reviewed by the United States Supreme Court, and the jurisdiction of that court to review such decisions, has been changed by amendments to the Judicial Code, § 237, in 1914 and 1916.

That such changes have not yet been appreciated by the profession is evidenced by late decisions of the Supreme Court dismissing writs of error for want of jurisdiction, with the remark that a writ of *certiorari* should have been requested.

For a discussion of these cases, see NOTES, p. 102.

FOREIGN CORPORATIONS — WHAT CONSTITUTES DOING BUSINESS WITHIN A STATE. — The defendant, a foreign railway corporation, had no property in Georgia but maintained a commercial agent there to solicit freight. He had no authority to make contracts. The plaintiff brought suit in Georgia for negligent injury that occurred in another state, and served the agent with process. *Held*, that the service was invalid. *De Bow v. Vicksburg S. & P. Ry.*, 98 S. E. 381 (Ga.).

No valid personal judgment can be rendered against a foreign corporation unless it is doing business within the state. *St. Clair v. Cox*, 106 U. S. 350; *Goldey v. Morning News*, 156 U. S. 518. What acts constitute doing business are matters of fact, and it is difficult to find any helpful general criterion. However, acts done by agents who have authority to bind the corporation are considered to be a transaction of business. *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245. And, conversely, acts done by agents who have no authority to bind the corporation in any way have been held not to constitute doing business. *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79. *Cf. International Harvester Co. v. Kentucky*, 234 U. S. 579. Thus, it has been frequently decided that a foreign railway, having no lines within the state, is not doing business therein merely by maintaining an agent to solicit shippers. *Abraham Bros. v. Southern Ry. Co.*, 149 Ala. 547, 42 South. 837; *Booz v. Texas & P. Ry.*, 250 Ill. 376, 95 N. E. 460; *Green v. Chicago, B. & Q. Ry.*, 205 U. S. 530. It should be noted, however, that there has been suggested a doctrine that, for acquiring jurisdiction over a foreign corporation that does not expressly consent to the jurisdiction, the cause of action must have arisen within the state and out of the business therein transacted. *Simon v. Southern Ry. Co.*, 236 U. S. 115. See *Old Wayne Life Association v. McDonough*, 204 U. S. 8, 22. The principal case and most of the cases holding that mere soliciting is not doing business could on their facts have been decided on this ground. There seems to be no good reason why soliciting is insufficient to give the state jurisdiction over causes of action arising within the state and out of the soliciting. Where this question was squarely presented, this view has been taken. *Armstrong Co. v. New York Central & H. R. R. Co.*, 129 Minn. 104, 151 N. W. 917.

INJUNCTIONS — ACTS RESTRAINED — SUITS IN FOREIGN JURISDICTION IN EVASION OF THE DOMESTIC LAW. — The defendant, a citizen of Indiana, brought an action of tort against the complainant, a fellow citizen, in Illinois. After the Statute of Limitations had run on the cause of action in Indiana, the complainant filed his bill to enjoin the Illinois suit on the ground that he would be deprived of the defense of the statute in Illinois. *Held*, that the action be enjoined. *Culp v. Butler*, 122 N. E. (Ind.) 684.

For a discussion of the principles involved, see NOTES, p. 92.

INSURANCE — RIGHTS OF BENEFICIARY — COMPLIANCE WITH CONDITIONS REGULATING CHANGE OF BENEFICIARY. — The beneficiary of a life certificate in a fraternal benefit association predeceased the insured. The latter took the certificate to the only representative of the association in the state and had him insert the name of a new beneficiary. A by-law of the association provided that a change of beneficiary would not be effective until the old policy had been surrendered and the executive committee had given its approval. Neither the insured nor the agent knew of this by-law. The insured died, and his

next of kin and the new beneficiary both claim the proceeds of the certificate. The association paid the money into court. *Held*, that the new beneficiary is entitled. *Adams v. Police & Firemen's Insurance Association*, 172 N. W. 755 (Neb.).

The by-laws of a benevolent or mutual benefit association are, in the absence of any stipulation to the contrary, incorporated into the contract of insurance. *Grand Lodge A. O. U. W. v. Edwards*, 111 Maine, 359, 89 Atl. 147; *Supreme Council American Legion of Honor v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770. See VANCE, INSURANCE, 190. The insured must therefore be charged with notice of their provisions. Accordingly, no question of the incidental powers of the agent to waive any requirement can arise. *Quinlan v. Providence Washington Insurance Co.*, 133 N. Y. 356, 31 N. E. 31. *Contra*, *Lamberton v. Connecticut Fire Insurance Co.*, 39 Minn. 129, 39 N. W. 76. See 13 HARV. L. REV. 146; 15 HARV. L. REV. 575. In appointing new beneficiaries, the insured must comply substantially with the procedure indicated in the contract. *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506; *Deal v. Deal*, 87 S. C. 395, 69 S. E. 886. See 31 HARV. L. REV. 657. But equity has made an exception where the insured has done all in his power to change the beneficiary and dies before the change is completed. *Supreme Conclave Royal Adelpia v. Capella*, 41 Fed. 1; *Hall v. Allen*, 75 Miss. 175, 22 So. 4. See 2 JOYCE, INSURANCE, 2 ed., §§ 740 *et seq.* Since the rights of the beneficiary vest at the death of the insured, it would seem that this exception should not be made where there is non-performance of an act declared by the contract to be a condition precedent to the change becoming effective. *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893. See 26 HARV. L. REV. 271. The association does not waive compliance with the by-laws by paying the money into court. *Boyle v. Fitzgerald*, 146 App. Div. 668, 131 N. Y. Supp. 469. *Contra*, *Pleasants v. Locomotive Engineers' Mutual Life and Accident Insurance Ass'n*, 70 W. Va. 389, 73 S. E. 976. The correctness of the decision in the principal case, therefore, may well be doubted.

INTERSTATE COMMERCE — CONTROL BY STATES — INABILITY OF STATES TO CONTROL INTRASTATE RATES UNDER FEDERAL CONTROL. — On the 16th of July, 1918, Congress authorized the President to take possession and assume control of telephone and telegraph systems. Under proclamation of the President the Postmaster General ordered an increase of rates. The State of South Dakota brought a bill to enjoin defendant from putting the order into effect. *Held*, that the bill be dismissed. *Dakota Central Telephone Co. et al. v. South Dakota*, U. S. Sup. Ct., No. 967, October Term, 1918.

For a discussion of this case, see NOTES, p. 94.

INTOXICATING LIQUORS — SALES — CRIMINAL RESPONSIBILITY OF EMPLOYER FOR ACTS OF EMPLOYEE. — A New Jersey statute made it unlawful to sell or permit to be sold certain liquors without a license. An illegal sale was made by an employee of the defendant. The lower court charged that the defendant was criminally responsible if he knew or reasonably should have known of the illegal sale. *Held*, the charge was erroneous. *State v. Waxman*, 107 Atl. 150 (N. J.).

Criminal liability for the acts of an agent differs radically from civil liability therefor. See *George v. Gobe*, 128 Mass. 289, 290; *People v. Green*, 22 Cal. App. 45, 50, 133 Pac. 334, 336. Usually express or implied authority or consent by the employer to an illegal sale by an employee is necessary for conviction of the former. *Commonwealth v. Wachendorf*, 141 Mass. 270, 4 N. E. 817; *Beane v. State*, 72 Ark. 368, 80 S. W. 573. Such authorization may be inferred from the circumstances. *State v. Legendre*, 89 Vt. 526, 96 Atl. 9. Under statutes expressly prohibiting the sale either by employer or employee, the former is

held liable regardless of knowledge or instructions. *Noecker v. People*, 91 Ill. 494; *People v. Longwell*, 120 Mich. 311, 79 N. W. 484. Where liability of the employer for the criminal acts of his employee is not imposed expressly, many courts have held that an illegal sale is *prima facie* evidence of authority. *State v. Campbell*, 180 Mo. App. 608, 163 S. W. 549; *State v. Fagan*, 1 Boyce (Del.) 45, 74 Atl. 692. Other courts have held that the sale is conclusive proof of delegation of authority. *State v. Gilmore*, 80 Vt. 514, 68 Atl. 658; *Olson v. State*, 143 Wis. 413, 127 N. W. 975. Even following the interpretation which requires a guilty mind unless negated by express words of the statute, it would seem that knowledge of an illegal sale by one's agent should be sufficient for *mens rea*. Further, such knowledge would seem to make a *prima facie* case of authority.

LANDLORD AND TENANT — TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH — DATE OF EXPIRATION OF CURRENT YEAR FOR TENANT HOLDING OVER. — Land was leased for a year and a quarter at an annual rent payable quarterly. The lessee held over and the lessor accepted rent. The lessee gave notice to quit, six months before the anniversary of the date of expiration of the original lease, but less than six months before that of the commencement of the lease. *Held*, that the notice was effectual. *Croft v. W. F. Blay, Ltd.* [1919] 1 Ch. 277.

The earlier English cases held that the expiration of the current year for a tenant holding over coincides with the date of his original entry. *Kelby v. Patterson*, L. R. 9 C. P. 681; *Roe v. Ward*, 1 H. Bl. 97. In these two cases, however, the tenant's original term was ended by the determination of his lessor's title, and it was said that the new lessor had accepted the dates of the original term. It was in this way, probably, as well as through a general looseness of language, due to the fact that in most instances the anniversary of the commencement of the original term and that of its expiration are identical, that the rule came to be considered of general application. *Berry v. Lindley*, 3 M. & G. 498; *Doe v. Dobell*, 1 Q. B. 806. For no clear reason this rule was never applied where the tenant assigned his term and the assignee held over. *Doe v. Lines*, 11 Q. B. 402. There can be no doubt of the correctness of the decision in the principal case, and it is to be hoped that it marks the end of the old rule, for which no defense can be made. The precise point does not appear to have been decided in the United States.

MASTER AND SERVANT — EMPLOYERS' LIABILITY ACTS — CONSTITUTIONAL LAW — LIABILITY WITHOUT FAULT. — The plaintiff, an employee of the defendant, while using due care, was injured by an accident in a mine without any negligence of the defendant. An Arizona statute provided for liability of employers "in all hazardous occupations" for death or injury of any employee due to conditions of such occupation in all cases in which the employee was not contributorily negligent. The plaintiff sued under this statute. *Held*, that he may recover. *Arizona Copper Company v. Hammer*, U. S. Sup. Ct., No. 20, October Term, 1918.

For a discussion of this case see NOTES, p. 86.

PUBLIC SERVICE COMPANIES — RATE REGULATION — RIGHT OF COMPANY TO INCREASE RATES FIXED BY CONTRACT — (FRANCHISE). — Complainant, a street railway company, found itself unable in the face of the abnormal rise in costs, and a sharp increase in its wage-scale caused by the federal government acting through the National War Labor Board, to earn a fair return on its investment at the rates fixed by an unexpired twenty-five year franchise under which it was operating. Having vainly sought the city's consent to increased rates, it served notice that it surrendered the franchise, raised its rates, and

brought suit in the federal district court to enjoin enforcement of the franchise rates on the ground that they constituted a taking of its property without due process of law. *Held*, that the bill be dismissed. *Columbus Railway, Power & Light Company v. City of Columbus*, 249 U. S. 399 (1919).

For a discussion of the principles involved, see NOTES, p. 97.

STATUTES — INTERPRETATION — EXCLUSIVENESS OF STATUTORY REMEDY. — A statute provided in substance that the municipalities of the state pay dependent families of soldiers and sailors a certain sum for each week of service. A failure to pay the money subjected the municipalities to a penalty recoverable by the injured claimant in an action on the case (1917 LAWS OF MAINE, c. 276). The plaintiff, dependent wife of a service man, brought an action against the defendant town to recover the amount she would have received if the stipulated payments had all been made. *Held*, that she could not recover. *Nash v. Inhabitants of Sorrento*, 107 Atl. 32 (Me.).

The general rule undoubtedly is that where a statute creates a new duty and expressly provides a remedy for its enforcement, such remedy is exclusive. *Mairs v. B. and O. R. R. Co.*, 73 N. Y. App. Div. 265, 76 N. Y. Supp. 838; *Brattleboro v. Wait*, 44 Vt. 459. The rule is upheld even when the remedy is admittedly inadequate. *Globe Newspaper Co. v. Walker*, 210 U. S. 356; *Kennedy v. Reames*, 15 S. C. 548. The solution of any case involving a breach of statutory duty depends so largely upon the construction of the particular statute that any sweeping rule or formula is unwise. See *Groves v. Wimborne*, [1898] 2 Q. B. 402, 416. The providing of a criminal remedy should not be held to exclude a civil remedy when it is clear that the legislature in creating the new right intended to benefit the class to which the injured plaintiff belongs. *David v. Britannic Coal Co.*, [1909] 2 K. B. 146; *Willy v. Mulledy*, 78 N. Y. 310. In effect, the decision leaves payment of a lump sum or a series of weekly payments optional with the towns, and sets a maximum recoverable at law by dependents of service men. The holding may perhaps be justified on the theory that the legislature's purpose was primarily to benefit the state as such, by relieving it temporarily of the burden of maintaining persons likely to become public charges.

STATUTE OF FRAUDS — PART PERFORMANCE — PAROL AGREEMENT FOR CHANGE OF LOCATION OF EASEMENT. — The plaintiff had a prescriptive easement of a ditch across the defendant's land. The parties orally agreed to a change of location advantageous to the defendant. The old ditch was filled up and a new one constructed. The plaintiff sued to enjoin an obstruction of the new ditch. *Held*, injunction granted. *Babcock v. Gregg*, 178 Pac. 284 (Mont.).

The entire doctrine that part performance will sometimes take a case out of the Statute of Frauds may well be criticized. See Lord Blackburn, *Maddison v. Alderson*, L. R. 8 A. C. 467, 487. But the doctrine being well established, at least there should always be required acts of part performance which are unequivocally referable to an agreement concerning the land. *McManus v. Cooke*, 35 Ch. D. 681; *Wiseman v. Lucksinger*, 84 N. Y. 31. In addition, the circumstances should be such that it is more equitable to go forward than to undo what has already been done. See Lord Selborne. *Maddison v. Alderson*, L. R. 8 A. C. 467, 470. The principal case can be supported upon these grounds. Further, nonuser coupled with acts which clearly indicate an intention to abandon an easement effect a present extinguishment of it. *King v. Murphy*, 140 Mass. 254; *Snell v. Levitt*, 110 N. Y. 595. Therefore, having lost the old easement, the plaintiff here would be irreparably injured if he were not protected in the enjoyment of the new one. The situation could be met by a decree enjoining the obstruction of the new easement unless the old one were

restored. There is strong authority that would go no further than this. *Hamilton v. White*, 5 N. Y. 9; *Wright et al. v. Willis*, 23 Ky. L. Rep. 565, 63 S. W. 991. Many jurisdictions would reach the result of the principal case on the doctrine that a parol license becomes irrevocable after money has been expended on improvements on the strength of it. *Rerick v. Kern*, 14 S. & R. (Pa.) 267; *Ferguson v. Spencer*, 127 Ind. 66. But the weight of authority is now opposed to this doctrine and rightly so. *Crosdale v. Lanigan*, 129 N. Y. 604; *The St. Louis Nat. Stock Yards v. The Wiggins Ferry Co.*, 112 Ill. 384.

TAXATION — PARTICULAR FORMS OF TAXATION — INCOME TAX — WHETHER BUSINESS TRUSTS ARE TAXABLE AS ASSOCIATIONS UNDER THE FEDERAL INCOME TAX LAW. — The Income Tax Act of October 3, 1913, subjects to the normal tax the net income of "every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships" (38 STAT. 114). The plaintiffs, trustees of a Massachusetts business trust, seek to recover that portion of an income tax which was collected from them on the theory that the trust constituted an association within this provision. *Held*, that such sum be refunded. *Crocker et al. v. Malley, Collector of Internal Revenue*, 249 U. S. 223.

Statutes levying taxes are to be strictly construed. *Gould v. Gould*, 245 U. S. 151, 153. The decision that neither the trustees nor the beneficiaries, nor both of them together, were an association within the meaning of such a statute seems right. *Cf. Williams v. Milton*, 215 Mass. 1, 102 N. E. 355. It is submitted that the terms of the statute, in this respect, have not been broadened by the subsequent Income Tax Acts. See 39 STAT. 765, 40 STAT. 333; REVENUE ACT OF FEB. 24, 1919, § 1. The United States Internal Revenue Regulations for 1918, however, expressly provide that the term "association" should include these business trusts. See REGULATIONS 33, revised (T. D. 2690), Arts. 57, 58. But it seems very doubtful whether the rules of an executive department can, in this way, reverse the judicial definition of a provision of a statute.

TORT — LIABILITY WITHOUT INTENT OR NEGLIGENCE — OWNER OF AUTOMOBILE. — The plaintiff leased rooms in the building in which the defendant kept his automobile. As the defendant's chauffeur was starting the motor, without any negligence on his part, gasoline in the carburetor caught fire. But due to the negligence of the chauffeur the fire was allowed to spread and consumed the plaintiff's property. *Held*, that the defendant was liable. *Musgrove v. Pandelis*, [1919] 2 K. B. 43.

A number of American courts have stated that an automobile is not a dangerous instrumentality imposing absolute liability on the owner. See *Steffen v. McNaughten*, 142 Wis. 49, 52, 124 N. W. 1016, 1017; *Jones v. Hoge*, 47 Wash. 663, 665, 92 Pac. 433, 434. But in these cases it is the negligent operation of the machine, not its mere existence, which is a menace, so that the doctrine of *Rylands v. Fletcher* is not squarely involved. See *Rylands v. Fletcher*, L. R. 3 H. L. 330. In the principal case an automobile is said to be an agency dangerous *per se* within the rule in *Rylands v. Fletcher*. This seems doubtful on principle. Under particular circumstances the storage inside a garage of gasoline and of automobiles containing gasoline has been enjoined as a nuisance. *O'Hara v. Nelson*, 71 N. J. Eq. 161, 63 Atl. 836 and 842. But this is far from a decision that an individual automobile is an instrument inherently dangerous. Although the decision might have been rested on another ground, the case is at least one more manifestation of a noticeable vitality of the *Rylands v. Fletcher* doctrine in England. *Cf. Charing Cross Co. v. London Hydraulic Power Co.*, [1914] 3 K. B. 772; *Greenock Corp. v. Caledonian Ry. Co.*, [1917] A. C. 556.

WITNESSES — COMPELLING TESTIMONY — REFUSAL OF A WITNESS TO TESTIFY ON THE GROUND THAT A STATUTE IS UNCONSTITUTIONAL. — A federal grand jury was investigating alleged violations of certain federal statutes. When witnesses refused to testify before it on the ground that the statutes were unconstitutional, presentment was made to the District Court, which, after a hearing on the merits, ordered the witnesses to answer the grand jury's questions. On refusal, witnesses were adjudged guilty of contempt of court and remanded. They then sued out writs of *habeas corpus*. *Held*, the writs were properly dismissed. *Blair v. United States*, U. S. Sup. Ct. No. 763, October Term, 1918.

Witnesses who refuse to give material testimony before judicial bodies are guilty of contempt. *In re Grunow*, 84 N. J. L. 235, 85 Atl. 1011. Since, however, it is doubtful whether the administration of justice would thereby be expedited, witnesses need not give testimony tending to degrade them unless it is material to the issue. *Walters v. Seattle, R. & So. R. R.*, 48 Wash. 233, 93 Pac. 419. Nor need a witness disclose trade secrets unless justice to the litigants renders disclosure necessary. *Herreshoff v. Knietsch*, 127 Fed. 492. Voters who are witnesses are not allowed to tell how they voted at political elections even if willing to do so, because the state gains more from the concealment of such facts than it would from their disclosure. *Commonwealth v. Barry*, 98 Ky. 394, 33 S. W. 400. For the same reason a party was not allowed to maintain an action which required a public officer to disclose military secrets. *Totten v. United States*, 92 U. S. 105. The decision in the principal case seems sound, since the witnesses claimed neither an excuse nor a justification. They were not, moreover, as witnesses, proper persons to attack the constitutionality of the statutes, not being the parties whose interests the statutes affected. *Mason v. Rollins*, 2 Biss. (U. S. C. C.) 99; *Wilkinson v. Board of Children' Guardians of Marion County*, 158 Ind. 1, 62 N. E. 481.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — DUTY OF COURT TO INSTRUCT WITNESS CONCERNING PRIVILEGE. — In a prosecution for adultery, the court received as substantive evidence certain self-incriminating testimony previously given by the accused as a non-party witness in a divorce proceeding against his paramour. The court, in the divorce proceeding, did not instruct the witness as to his privilege. Neither did the witness assert this right at any time. *Held*, that the testimony was improperly admitted against the accused. *People v. Maloy*, 170 N. W. 690 (Mich.).

It has always been deemed proper for the court, in its discretion, to caution a witness that he is not bound to answer questions where his answers would tend to criminate him. *State v. Dangelo*, 166 N. W. 587 (Iowa); *Dunn v. State*, 99 Ga. 211, 25 S. E. 448; *Emery v. State*, 101 Wis. 627, 78 N. W. 145. In some jurisdictions, it has been held to be the duty of the court to instruct the witness as to his right, when he was manifestly uninformed. *Ivy v. State*, 84 Miss. 264, 36 So. 265; *Bowen v. State*, 47 Texas Cr. R. 137, 82 S. W. 520; *United States v. Bell*, 81 Fed. 830, 853. But a majority of the more recent decisions hold that the court is not required to inform the witness. *Hanson v. Village of Adrian*, 126 Minn. 298, 148 N. W. 276; *Brown v. State*, 108 Miss. 478, 66 So. 975; *Commonwealth v. Shaw*, 4 Cush. (Mass.) 594. It would seem that the matter ought to be left to the discretion of the trial court. See 4 WIGMORE, EVIDENCE, § 2269. The mere fact that the court did not give such warning should not render the testimony inadmissible. The testimony was not involuntary merely because it was given under oath. *Burnett v. State*, 87 Ga. 622, 13 S. E. 552. See also *People v. McMahon*, 15 N. Y. 384, 390; *People v. Mitchell*, 94 Cal. 550, 555, 29 Pac. 1106, 1107; *People v. Gallagher*, 75 Mich. 512, 525, 42 N. W. 1063, 1067. As a practical matter, witnesses generally know their privilege. There seems to be no good reason for treating this privilege

differently from other privileges of a witness, which must be asserted to be claimed. The technical rule adopted by the Michigan court, excluding this evidence unless the witness was instructed as to his privilege by the court, seems undesirable.

WITNESSES — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT — WHERE THEY ARE CO-TRUSTEES. — The plaintiff filed a bill against the trustees named in a will, claiming to be the *cestui que trust* of a secret trust, and praying discovery of certain documents. The defendants refused to produce them on the ground that they were confidential communications between one of the trustees as solicitor and his co-trustees as clients. The documents related to trust matters but were not made in contemplation of the present action. *Held*, that they were privileged. *In re Whitworth*, [1919] 1 Ch. 320.

A trustee cannot, as against his *cestui*, claim privilege for communications to an attorney in regard to trust matters, unless they are written in respect to the present litigation. *Devaynes v. Robinson*, 20 Beav. 42; *Talbot v. Marshfield*, 2 Dr. & Sm. 549. This is so because the *cestui* has an equitable right in the documents. A mere claim to be a *cestui*, however, is not sufficient to defeat the privilege. *Wynne v. Humbertson*, 27 Beav. 421. The prime requisite of this privilege in any case is that the communication be incidental to the relation of attorney and client. *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310. *Turner v. Turner*, 123 Ga. 5, 50 S. E. 969. That there was also the relation of co-trustees between the same persons should not preclude the existence of this requisite. In England a solicitor-trustee cannot charge the estate compensation for professional services, unless they were rendered in a judicial proceeding. *Bainbrigge v. Blair*, 8 Beav. 588; *Lincoln v. Windsor*, 9 Hare, 158. Hence in the principal case, since compensation was charged, the co-trustees must have consulted the solicitor-trustee as a solicitor, not as a trustee. Thus the general principles governing this privilege were properly applied.

WITNESSES — PRIVILEGED COMMUNICATIONS — CHILD DELINQUENT AND JUVENILE COURT JUDGE. — A twelve-year-old boy confessed in strict confidence his part in the murder of his father to the juvenile court judge of his district. Thereupon delinquency proceedings were instituted against him. At the trial of the boy's mother for the murder he testified in her favor. To impeach this testimony the judge was asked to divulge the boy's confession. Though notified that the boy had consented to his testifying he refused; was ordered by the court to do so; again refused; and was adjudged in contempt of court, and fined. *Held*, that the judgment be affirmed. *Lindsey v. People*, 181 Pac. (Colo.) 531 (1919).

For a discussion of this case, see NOTES, p. 88.

BOOK REVIEWS

THE BARONIAL OPPOSITION TO EDWARD II. A Study in Administrative History.
By James Conway Davies, Emmanuel College, Cambridge. Cambridge:
The University Press. 1918. pp. x, 644.

"What the study of English mediæval history wants, if it is to be kept up as a living thing," declares Professor Tout, "is a more technical and detailed cataloguing and systematising of the dry facts. It is only when the spade-work of history has been done that we may hope to come to any authoritative generalisations." No part of English history has suffered more for the lack of this indispensable "spade-work" than the fourteenth century, and no one has made a more promising beginning of such work than Professor Tout himself in his "Place of Edward II in English History."

For a long time it has been apparent that Stubbs's account of this century, masterly though it is, is inadequate. The rapid growth of parliamentary institutions after the reign of Henry III drew his attention away from the administrative development which he had treated with greater fullness for the period preceding, and we have had no adequate account of England's administrative history in the all-important fourteenth century, such, for example, as Viollet gives us for France in his "*Histoire des Institutions Politiques et Administratives de la France*."

A beginning has happily now been made in the supplying of this defect by such books as Harcourt's "*His Grace the Steward*," and by these works of Professor Tout and Mr. Davies on the administration under Edward II, which, it may be hoped, will be followed up by similar studies for the equally important half century of Edward III's reign. Mr. Davies's volume is an attempt to do for the reign of Edward II much the same as is done in Mr. Tout's earlier work, but in a more minute and exhaustive way, the result of a more extensive examination of the official records, both printed and unprinted; and if its completeness as a "technical and detailed cataloguing and systematising of the dry facts" be a test, its success is unquestionable: the result is a book which no serious student of English legal and institutional history will safely dare ignore, but one that none but the most serious is likely to read through.

The author has given us the fullest account we have of the English administrative system at a critical period in the struggle between royal rights and baronial claims which marks the first stage in the growth of that control over the exercise of the powers of the Crown summarized by our phrase "the limited monarchy." The gradual evolution of the means of securing this control is one of the most significant things in English history as a whole, and Edward II's reign is no insignificant part of it. As usual in this development, the baronial opposition was actuated by temporary and practical motives; but in this case the barons attempted almost for the first time to justify their action by an appeal to a principle that we may term constitutional — the distinction between the King and the Crown, what Mr. Davies calls "the doctrine of capacities," a principle second to none in importance in the development of English constitutionalism. Mr. Davies unduly belittles the importance of his own work and evinces a remarkable ignorance of the later history of England in his assertion that this important doctrine "was . . . to have no future in English history or political theories."

But the famous attempt of the Lords Ordainers to control the Crown, though it must be considered an important precedent for future development, was in itself a practical failure, and the bulk of Mr. Davies's book consists in a successful attempt to explain this failure. In a word, the failure was due to the fact, then a practical actuality, now become only a legal fiction, that the King was the sole executor of the law. The enforcement of law, even the authentication and publication of a statute of Parliament, was not only solely his as a matter of law: in the time of Edward II all these things remained subject to his personal control as a matter of fact. This immense power the baronial opposition was utterly unable to wrest from the King, try as the barons would, and herein lies the explanation of their failure.

To make it clear, a full description of the existing executive organs and their methods is necessary, and Mr. Davies satisfactorily supplies it. The chief factor in the King's success against all the baronial onslaughts is his ability personally to control the administration of his Household, and at the same time to make the Household a part of the actual administration of the State. When his control of the Exchequer and the Chancery was successfully disputed, he took refuge in the Chamber and the Wardrobe, through which he continued to exercise his personal will over the public funds and the administration of the government, and from this refuge no assaults of the barons were yet strong

enough to dislodge him. Through his use of the privy seal, of the signet, of the secret seal, and even of informal instructions or oral commands, he was able not merely to secure fulfilment of his personal will in competition with the more formal documents under the great seal which had passed out of his power with the assertion of baronial control over the Exchequer and the Chancery: he was strong enough by the same means even to invalidate the acts of these great departments of government. The King was still too powerful to be reduced to the abstraction we call the Crown. Edward for the time was successful in his challenge of "the doctrine of capacities."

The elucidation of these things leads Mr. Davies to treat of many things of the greatest importance to the legal historian. His study of this period strengthens the impression, more vividly felt, alas! by historians than by lawyers as a rule, that the definition of the jurisdiction of the several courts was in this general period by no means so exact as it is often represented, and that the organization of the courts was much more fluid. The King's frequent personal interference with the processes of the courts, which is here proved, is also likely to surprise a reader of the older histories of our law.

There is not much of a controversial nature in Mr. Davies's book. The author is usually content to illustrate and amplify views that have already been pretty generally accepted on slighter evidence. But where he does occasionally touch a controverted point his reasons are usually convincing. His fuller examination of the unprinted records somewhat dulls the edge of Stubbs's dictum that Edward II was "the first King since the Conquest who was not a man of business." In these disputed questions Mr. Davies usually follows the safe lead of Professor Tout, notably in his rejection of the theory of a struggle for power between the Exchequer and the Chancery which he characterizes as "an imaginary feud"; but in one case he presents cogent arguments for an independent view on a subject of considerable importance for the constitutional lawyer and historian. An enactment by a Parliament at York in 1322 has been supposed to be the first formal declaration that no statute is binding unless assented to by King, Lords, and Commons, and hence a landmark in the history of the House of Commons. In 1913 Mr. G. T. Lapsley cast doubt upon this by insisting that the famous enactment concerned only such matters as affect the framework of government with which the ordinances of 1311 had dealt, thus incidentally inferring what is of far greater constitutional consequence—the existence of the idea of a "constitutional law" as early as the fourteenth century. This theory has been accepted by Professor Tout, but Mr. Davies has given convincing reasons for its complete rejection. In Mr. Davies's judgment this provision refers to the *jus regni* as a whole. "What touches all should be approved by all." The real distinction drawn is not between "constitutional" matters and ordinary law, but between the *jus coronae* and the *jus regni*. The former is beyond the reach of Parliament entirely; for the latter, the assent of King, Lords, and Commons is necessary. It is not a difference between ordinary and "constitutional" enactment; it is a distinction between the law of the Crown and the Law of the Realm. For the long history of fundamental law this is of great importance.

C. H. McILWAIN.

EQUITY, AN ANALYSIS OF MODERN EQUITY PROBLEMS DESIGNED PRIMARILY FOR STUDENTS. By George L. Clark, S. T. D., Professor of Law in University of Missouri. Columbia, Mo.: E. W. Stephens Publishing Company. 1919. pp. 639+52.

There is a real need for short textbooks on important branches of the law. We cannot reasonably expect more than one exhaustive treatise on a subject

like equity in a generation. Few men could give the time to collecting every point and every case which would be necessary to produce a work rivaling that of Story or Pomeroy. Nevertheless, it is well that the conclusions of these men and their editors should be continually tested by writers with diverse points of view. This may be done in an intensive study of some topic in the field, like trusts or specific performance, or by a survey of the whole subject of equity, which aims to present its nature and main principles, face and solve its baffling problems, and send its readers away better equipped to handle the mass of citations which will be found elsewhere, either in the digests and encyclopædias, or in the many-volumed treatises just mentioned. Such a short study can devote some of the time and space saved from the mechanical gathering of decisions from every state to extended theoretical discussion of problems. It can afford to omit cases, if it does not omit principles. It need not provide an extended list of citations for the verification of its statements if their accuracy is painstakingly insured. On the other hand, unless a book of this sort is true to fact and sound in theory, it is especially liable to mislead, since it furnishes no storehouse of cases by which the reader can check it up.

Professor Clark has endeavored to give us a survey of the field of equity in one volume. After an introduction on the history of equity, its nature and maxims, he takes up in turn specific performance of contracts, specific reparation and prevention of torts, prevention of crimes and criminal proceedings, trusts, reformation of instruments, rescission, bills *quia timet* and to remove cloud on title, interpleader, bills of peace, and certain miscellaneous topics. The text contains much more than the succession of abstracts of cases too often found in legal writing. Most of the leading cases included in Ames's books on Equity and Trusts are considered, and the student who is obliged to prepare himself in equity outside a law school could profitably use this work of Professor Clark's in connection with the Ames case books, reading the law review articles cited in the footnotes for further training.

It may be questioned, however, whether the student who is already familiar with the leading cases in equity and accustomed to turn them inside out in the classroom will find much here to supplement his knowledge. The book does not grapple with many of the real difficulties of the subject. No question is more important in equity than the nature of an equitable interest — is it a property right or merely a right *in personam*, a chose in action against the trustee or other holder of the legal title? Mr. Clark takes the first view (§ 280), but devotes to the problem only a page, in which he relies chiefly on secondary sources, citing only one case and not mentioning on this point the important decision, *In re Nisbett and Potts' Contract*.¹ The power of equity to award damages where no equitable relief is given receives little attention, with no citation of *Milkman v. Ordway*,² and similar decisions. Perhaps the greatest difficulty in equitable jurisdiction over torts is presented by nuisances and other torts which benefit the public at the expense of private individuals. The discussion of this question (§ 215) makes no distinction of the cases where the defendant is a public service company, so that the refusal of equity to enjoin may be regarded as merely leaving the plaintiff to an informal condemnation through an action for damages. The two sections (§§ 432, 433) on privity in bills of interpleader do little to clear up this perplexing topic. Rescission for unilateral mistake is briefly treated, and no mention made of the numerous cases recently decided where a contractor puts in a low bid because of his mistake in adding the items.³ Indeed, there is a serious neglect of recent cases; e. g., under equitable servitudes nothing is said of two very important developments.⁴

¹ [1906] 1 Ch. 386.

² 106 Mass. 232 (1870). See 1 AMES CAS. EQ. 571, note; 16 COL. L. REV. 326.

³ See 30 HARV. L. REV. 637.

⁴ See "Effect of Changed Conditions upon Equitable Servitudes," 31 HARV. L. REV.

Inaccuracies of statement occasionally appear. For example, in the section on the English courts before Equity (§ 3), it is said that "the habit grew up of deciding according to the decisions of previous cases," although Maitland gives strong reason for believing that the judges of the fourteenth century cited cases but rarely.⁶ The common-law right of free speech is said (§ 239) to go back to the privilege of being "free from injunctions in the publication of political libels." The censorship and political prosecutions are usually stated as the reason for insistence on this right. No instance of an attempted injunction is cited, or known to the reviewer, unless the isolated proceeding of Chief Justice Scroggs be meant.⁶

The dangers of a concise textbook may be indicated by a brief examination of the discussion of waste. Professor Clark states (§ 184) that by the early common law only tenants in dower and curtesy were liable for waste. In a footnote he admits that Kirchwey has challenged this passage of Coke's, which has been a mine of historical material for so many judges deciding waste cases and which has only one fault, — it isn't so. Coke was proved wrong by the existence of several common-law actions for waste against life tenants in Bracton's notebooks.⁷ In the same section it is said that an action on the case was allowed to any one whose estate was injured by acts of waste, on the authority of Williams' Saunders. It is very doubtful whether the remainderman in fee subject to an intervening life estate could bring such an action;⁸ and for even an immediate remainderman for life or years no decision is cited by Sergeant Williams,⁹ although the cases on which he probably relied have since been found.¹⁰ Professor Clark mentions that equity will give relief in these cases (§ 185), without explaining why its concurrent jurisdiction was exercised in the total absence of any remedy at law. Much more could be said of the factors which govern relief against ameliorating waste that alters the premises,¹¹ and of the influence of length of term upon equitable relief.¹² It is stated that equity has protected a wife's inchoate dower,¹³ on the authority of a case denying protection.¹⁴

The most interesting problem in waste is the attitude of equity toward tenants without impeachment of waste, and other persons whom it forbids to use the land unreasonably although the law court gives them complete immunity. Professor Clark says that "the real basis of the doctrine is the public and social interest in the economic and beneficial use of the land."¹⁵ Professor Clark gives no arguments for the acceptance of this explanation, which, though given in an early case,¹⁶ has been rejected by Lord Nottingham¹⁷

786, commenting upon *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 243 (1917); and "Equitable Servitudes in Chattels," 32 HARV. L. REV. 278, commenting on recent United States Supreme Court cases as to restrictions upon the use and resale of chattels. In § 106 Professor Clark discusses *Murphy v. Christian*, 38 App. Div. 430, without citing the later modifying decision, *Straus v. American*, 193 N. Y. 496.

⁶ SELDEN SOCIETY YEAR-BOOK SERIES, Vol. III p. x.

⁷ 8 How. St. Tr. 108.

⁸ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 9.

⁹ 1 AMES EQ. CAS. 467, note.

¹⁰ 2 Wms. Saund. 252, a; see 1 AMES EQ. CAS. 468, note.

¹¹ *Jeremy v. Lowgar*, Cro. Eliz. 461*; *Cudlip v. Rundell*, 4 Mod. 9; *Hicks v. Downing*, 1 Salk. 13.

¹² §§ 183, 185. No citation of *Melms v. Pabst*, 104 Wis. 7 (1899).

¹³ No mention is made of *Kingston v. Lehigh*, 236 Pa. St. 350 (1912).

¹⁴ § 185, note 2.

¹⁵ However, Professor Clark cites 28 HARV. L. REV. 615, which mentions one case giving relief.

¹⁶ § 188.

¹⁷ *Bishop of Winchester's Case*, 1 Rolle Ab. 380 (I, 3).

¹⁸ "He who hath a power to commit waste may sometimes be restrained from the

and Lord Hardwicke.¹⁸ Equity does not ordinarily protect public and social interests, but private interests, usually in property. It will enjoin public nuisances, it is true, but only at the suit of the Attorney-General. Care for the economic and beneficial use of the land does not lead equity to prevent the utmost destruction by a tenant in fee simple,¹⁹ and if it be said that no individual has a standing to complain against him, this argument cannot apply to a tenant in tail, who is equally free to commit waste without limit to the injury of succeeding remaindermen as well as the public welfare. It can hardly be contended that the public is not affected by waste by a jointress in tail,²⁰ but must be protected against the destructiveness of a tenant in tail after possibility of issue extinct.²¹ Any such distinction must rest on the nature of the ownership of the waster, and not on economic welfare. There is no more social and economic interest behind the relief for equitable waste than that for legal waste or trespass or libel or most other torts, where society finds it advantageous to protect individuals from unjustified harm. In both equitable and legal waste the defendant has injured the *corpus* of the plaintiff's real estate, but in equitable waste the cause of action may be cut off by a justification (privilege or defense), due to the nature of the defendant's tenancy. The law court interpreted this defense as complete, but equity having regard to the settlor's reasonable intention²² and the duration of the tenancy construed it as extending only to reasonable use. Obviously, the equitable side of the dispute is right, but the divergence between the two courts cannot be explained economically.

In spite of such shortcomings the book is a distinct step forward in equity textbooks. It is not a digest; it deals with principles, and it should do much to bring the conclusions of scholars to the attention of the courts. In particular, the numerous references to law review articles are very valuable. It should be helpful to practitioners in suggesting new views of equitable principles, and to students who have not been trained in case-system schools in presenting to them many of the most significant decisions.

Z. C., JR.

THE LEAGUE OF NATIONS: THE PRINCIPLE AND THE PRACTICE. Edited by Stephen P. Duggan. Boston: Atlantic Monthly Press. 1919. pp. xv, 357.

This volume consists of a collection of essays, by sixteen contributors, on various topics of major interest in relation to a league of nations. The editor, Professor Duggan, one of the moving spirits of the League of Free Nations Association, has accomplished the purpose of eliciting a dispassionate discussion of some of the most pressing international problems of the day. Whether he has obtained substantial support for the particular Covenant now under examination by the world is more problematical. The essays were prepared

exercise of that power, when it tends only to a private damage." *Skelton v. Skelton*, 2 Swans. 170, 172.

¹⁸ "The question does not concern the interest of the public, unless it had been in the case of the King's forests and chases; for this is merely a private interest between the parties." *Perrot v. Perrot*, 3 Atk. 94, 95.

¹⁹ *Clark*, § 186.

²⁰ *Skelton v. Skelton*, 2 Swans. 170, incorrectly cited for the opposite conclusion by Professor Clark in § 187, note.

²¹ *Williams v. Day*, 2 Cas. in Ch. 32.

²² The Michigan cases cited by Professor Clark in § 188 hold that the testator intended an estate without impeachment of waste, as defendant's counsel contended, and give equitable relief accordingly. His probable intention to give complete immunity is not disregarded on any economic grounds, but is at most erroneously construed not to exist.

immediately after the first draft of the Covenant and before the publication of the Treaty of Peace. Inasmuch as many provisions of the Treaty are difficult to dissociate from the Covenant, probably more trenchant comments would have been obtained by a slight postponement in preparation.

The book, like ancient Gaul, is divided into three parts. Part I, entitled the "History, Philosophy, and Organization of a League of Nations," contains eight chapters of miscellaneous content, including a general introduction by the Editor, the historical background of "the" League, international coöperation during the war, essentials of a league for peace, the national state, organization and operation of "the" League, limitation of armaments, and administrative unions. Part II assembles six chapters under the generic head, "International Coöperation as Applied to Concrete Problems," and includes discussions of national self-determination and the problems of small nations, economic internationalism, the problem of backward areas and colonies, control of international waterways and railways, labor in the peace treaty, and freedom of the seas. Part III consists of two chapters on American policy, — the policy of diplomatic isolation, and the Monroe Doctrine in relation to the League.

Differences of approach, training, credulity, or opinion probably account for a considerable variety of conclusion among the collaborators as to the efficacy of a league or this league in settling those problems which now so often lead to war. The Holy Alliance being regarded as a precedent, advocates of the League seek to distinguish the Alliance from the League (p. 33), whereas the more skeptical point out their essential similarity (p. 65). The editor (p. 7) believes that the increased recognition of the principle of nationality as applied at Paris makes war less likely; other contributors point out (pp. 36, 85, 161) that the spirit of separatism is at variance with the political development of the world, which has been directed toward federation. Some find encouragement in the proposals for disarmament; others are doubtful of their fulfillment. Some regard the mandatory system for severed colonies as a source of hope; others see in it a thin disguise for annexation.

Not all the chapters in the book have equal merit. The ablest, in the reviewer's opinion, is that of Prof. John Bassett Moore, on "Some Essentials of a League for Peace." He makes it clear that the Holy Alliance was also a league of nations, with the same professed objects as the proposed league. The reader will be interested in comparing the preambles of the two documents. The inquiry, "Are you in favor of a league of nations?" Mr. Moore regards as quite as sensible as the question, "Are you in favor of 'alliance' or 'contract' or 'correspondence'?" and he shows that the phrase "league of nations" bears no relation either to the preservation of peace or the observance of law. The desirability of a "league" depends upon "the object in view and the character of the engagement by which it is sought to be attained." The centralization of legislative, judicial, and executive powers in a small executive body he regards as dangerous. He observes that while "preponderant force will end a war," it cannot be relied upon to insure peace; that the "balance of power" is a natural measure of self-preservation; that the responsibility for war is most difficult to determine. His conclusions are usually fortified by convincing illustrations from history. For the cultivation of a mental attitude that will think first of amicable processes rather than of war "it will be necessary to rid the mind of exaggerated but old and widely prevalent notions as to the functions and mission of the state, of superstitions as to 'trial by battle,' of the conceptions that underlie the law of conquest, and of the delusion that one's own motives are always higher, purer, and more disinterested than those of other persons, to say nothing of the passion for uniformity that denies the right to be different" (p. 81).

The great difficulty in accepting the Covenant as a harbinger of peace is the fact that previous covenants with the same benevolent objects have proven

dismal failures, and the fact that international economic conditions in the modern world promote competition and rivalry rather than peace. The competition for the control or monopolization of raw materials, such as oil, or of particular trade-routes and markets, exercises far greater influence on international relations than do particular forms of government. The *causes* of war, as several contributors point out, are hardly studied or affected by the Covenant and are left to operate in all their virility. Having fermented to the point of belligerency, the League then proposes to effect a peaceable settlement. The method having consistently failed heretofore in the larger political issues, we shall await with interest the discovery and production of those new factors which are now to make it a success. The difficulty in the solution of the problem seems to lie in the fact that the struggles for power and for peace cannot long run consistently parallel. For us Americans this Covenant has a special significance. The problem it raises may be reduced to a simple yet vital issue, and is nothing less than this: Shall we resume our independence or shall we intrust the conduct of our foreign affairs to another Power?

The book is remarkably free from those emotional invocations which in the popular discussion of the league of nations have consumed so much intellectual energy. The chapter on the development of the American policy of diplomatic isolation is noteworthy. The chapter on "labor" bears little relevancy to the subject of the book. The more recent social and industrial movements in Europe and elsewhere are not discussed at all. The Covenant itself is considered only incidentally in its bearing on the various topics discussed; many of its most intricate, obscure, or nebulous provisions, which have received critical analysis in recent months, are not considered. The relation of the Covenant to the Treaty, as already observed, is hardly mentioned. For these reasons the title of the book may seem rather misleading, although that hardly detracts from the importance of the work. Appendices reprinting past proposals for a league of nations, beginning with that of the Abbé Saint-Pierre (1713) and bibliographical notes to the various chapters, add measurably to the value of a book which must be considered a serious contribution to the literature of the subject.

EDWIN M. BORCHARD.

JUDICIAL CONTROL OVER LEGISLATURES AS TO CONSTITUTIONAL QUESTIONS.
By Jackson H. Ralston. Washington: Law Reporter Printing Company.
1919. pp. 80.

It is important to notice how this pamphlet happened to be written.

The American Federation of Labor, at an annual convention held in 1918, passed the following resolution:

"Whereas, The sole right to make or unmake laws is vested in legislative bodies or the direct vote of the people by the Constitution of the United States; and

"Whereas, The preservation of this right is essential if we are to remain a self-governing people; and

"Whereas, Courts of the United States without constitutional authority or legislative sanction have assumed the power to invade the prerogatives of the legislative branch by unmaking and rendering invalid laws enacted by the people or their legislative representatives, the exercise of this power setting aside on many occasions the desires and aspirations of the people as expressed through legislation, even when such measures had the approval of the majority of the people, their legislative representatives, and the President of the United States, an action which would be impossible in any other democratically governed nation; therefore, be it

"Resolved, That the Executive Council be and is hereby instructed to have a study made of the successive steps which have been taken by our Federal and Supreme Courts, through which, without constitutional authority, and in opposition to the action of the Constitutional Convention, they laid hold on power which they now exercise; that the results of such study be prepared in pamphlet form and distributed to the affiliated organizations and given such other form of publicity as may be deemed advisable; and that legal counsel be consulted with, so that an adequate measure may be prepared and introduced to Congress, which will prevent any invasion of the rights and prerogatives of the legislative branch of our government by the judiciary."

The American Federation of Labor is understood to have millions of members; and in such a large number there must be many who will wonder in what words of the Constitution of the United States the author of that resolution found a provision for the making or unmaking of laws by a "direct vote of the people." However, after the convention adopted the resolution, preambles and all, the Executive Council, even though some of its members may have doubted the opinions of the draftsman as regards constitutional matters, had no choice. Thus it has happened that a lawyer was employed to prepare a pamphlet which, if one paraphrases the resolution in such way as to visualize its real meaning, is intended to show that when the framers and ratifiers of the Constitution said "All legislative Powers herein granted shall be vested in a Congress," they meant to add "and so shall be all other legislative Powers," and to show also that when the framers and ratifiers of the Constitution said "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," they meant to add "and the Laws of the United States which shall be made in conflict with the Constitution of the United States shall also be the supreme Law of the Land, any Thing in the Constitution of the United States to the Contrary notwithstanding;" and that when the framers and ratifiers of the Constitution of the United States said "No Bill of Attainder or ex post facto Law shall be passed," and laid on Congress other limitations too numerous to quote in this place, and also when the Amendments said "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," and "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," and "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury," and "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people," it was meant to add, in each instance, and in all other instances of limitations upon congressional power, words to the following effect: "but nevertheless all acts of Congress in conflict with this limitation of congressional power shall be deemed valid by the courts" — and all this notwithstanding the constitutional provision that "The Senators and Representatives above mentioned, and the members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

To prepare a pamphlet in compliance with those instructions would seem to be a laborious undertaking; but the pamphlet was prepared, and here it is.

Though it is necessarily classed as an argument rather than as an example of scientific investigation, it is well worth examination, for it is made with moderation and fairness and is accompanied with useful lists of instances in which federal or state statutes and municipal ordinances have been disregarded by the Supreme Court of the United States. There are adequate extracts from many of the writers who are habitually quoted against the judicial refusal to enforce as between litigants legislative acts conflicting with the limitations placed upon legislative power by the Constitution; and the possessor of this pamphlet is probably relieved from the need of examining those earlier writers. The pamphlet itself is distinctly more moderate in tone than the quotations. Its fairness is indicated by the care with which the author points out (pp. 47-49) that what was said by Gibson, J., in *Eakin v. Raub*, 12 S. & R. 330, 344 (1825), was a dissent and was eventually repudiated by Gibson himself, and also by the admission (pp. 36-38) that the Supreme Court of the United States is guilty of no usurpation when it disregards invalid legislation of states, and finally by the recognition that for the supposed impropriety of disregarding invalid legislation by Congress a remedy cannot be found in judicial recall or in recall of judicial decisions or in an act of Congress forbidding judges to treat legislation as unconstitutional (pp. 58-61). Yet notwithstanding its fairness of tone the pamphlet loyally does its best to uphold the views expressed in the resolution to which it owes its origin. Thus it happens that here can be found in small compass a useful exposition of that side. If any one cares to have what may be termed a non-partisan presentation of the history and reason and limits of the judicial function as regards unconstitutionality, there is no better course, even at this late day, than to study carefully Prof. James Bradley Thayer's "The Origin and Scope of the American Doctrine of Constitutional Law," which appeared in 1893 and is accessible both in 7 *HARVARD LAW REVIEW*, 129, and in "Thayer's Legal Essays," 1.

E. W.

SELECT CASES BEFORE THE KING'S COUNCIL, 1243-1482. Edited for the Selden Society by I. S. Leadam and J. F. Baldwin. Cambridge: Harvard University Press. 1918. pp. cxvii, 156.

Volume 36 of the Selden Society's publications, for the year 1918, is printed and published in America by the Harvard University Press. The work was begun by Mr. Leadam and carried part way before his lamented death in 1913; and it was completed by Professor Baldwin of Vassar, whose treatise on the King's Council made him an excellent substitute for the difficult work.

There is an Introduction in which the nature, jurisdiction, and procedure of the King's Council is discussed in a scholarly manner. The development of the Court of Chancery from the Council is traced, and the gradual development of the Chancellor's power, from the president of a branch of the Council to the sole judge of the flourishing court, is made clear and convincing. The introduction will be a help to all students of the history of English equity.

More than half of the introduction is concerned with notes, principally historical, on the "Cases" printed later; and the cases themselves are also enlightened by short notes to the text. In fact, the interest in the work is very little legal, very much historical; nor is the history legal history — at least, if the reviewer is right in feeling that the history of legal institutions is not the history of law, though it is its indispensable tool. If we admit that any law is to be learned from administrative tribunals like the early King's Council, we are also obliged to confess that it is not from such fragmentary records as are left here. These tribunals, apart from the regular courts, were unsuccessful experiments in social order and social justice; equity itself was of no account

in the progress of society until it became a real law court. But, forgetting that law is not to be found in this well-edited volume, we must credit it with being scholarly, careful, thorough, and interesting; and by throwing light upon the age and its institutions it is very useful to the historian, even the legal historian.

J. H. B.

INTRODUCTION TO THE LAW OF REAL PROPERTY—RIGHTS IN LAND. Being Volume II of Cases on the Law of Property, American Case-Book Series. By Harry A. Bigelow. St. Paul: West Publishing Company. 1919. pp. ix, 88; xviii, 741.

This book represents Volume II of the Cases on the Law of Property of the American Case-Book Series. It comprises two parts: first, an introduction to the law of real property of eighty-eight pages. This portion consists largely of a textbook on the elementary principles of the older law of real property down to the eighteenth century, concerning the Feudal System, Estates, Non-Possessory Interests in Land, Joint Ownership, Disseisin, Uses and Trusts. Not over half a dozen cases are printed and few cited. The aim is to state simply, and in as clear language as possible, these old doctrines for assimilation by a beginner. Professor Bigelow has done this partly in his own language and partly in that of the leading text writers. We have nothing but good to say of this task. The author's own work compares most favorably with that of his distinguished predecessors from whom he quotes.

The second and by far the greater portion of the collection consists of about 750 pages of cases on rights in land, including Rights incidental to Possession, such as Air, Land, Waters, etc.; Rights in Land of Another, Profits, Easements, Licenses; Covenants running with Land at Law and to some extent in Equity; Rents, Waste, and Public Rights. The editor states that he has yielded to the traditional method of dealing with these topics in the first year of a student's law course instead of inserting between the matter covered by his Introduction and his second part Professor Aigler's collection numbered III in the same Series on Titles. And so he has presented the collection in a shape available for beginners. At the same time, without being dogmatic, he suggests the propriety of setting the first-year man to work on the making of deeds, on leases and surrenders, and on adverse possession, before easements, covenants, and writs.

We confess our preference for the traditional method and are glad that Professor Bigelow has adapted his case-book to it. We are impressed with the importance of the beginner's studying the rights in land, such as support of land by land, air, water, surface and underground, and public rights in streams and highways, in the same year that he is considering the general principles of liability and of torts. If his teacher in torts informs him that all liability is based on fault and that *Fletcher v. Rylands* is an excrescence, he should be able to compare this with doctrines in the Property class-room. And the subject of Easements would seem, as the editor has grouped it, to be closely associated with natural rights in land. We must admit, however, that the preference is not so apparent in the important subject of covenants running with the land.

J. W.

PRESENT PROBLEMS IN FOREIGN POLICY. By David Jayne Hill. New York: D. Appleton and Company. 1919. pp. xiii, 361.

As the title indicates, this is not a law book. It is a series of papers addressed to the general public. There is, however, at least one paper appealing peculiarly

to lawyers. That is the one entitled "The Treaty-Making Power under the Constitution of the United States."

Throughout the volume the author shows an opinion that the proposed covenant for a League of Nations in some respects goes too far, and in others not far enough.

The line of thought to the effect that the covenant does not go far enough is expressed in the following extract from the preface: "The proper task of the Entente of Free Nations formed in the prosecution of the Great War is not, therefore, to create a mere organ of power but an institution of justice. Such an institution cannot be established by a League of Nations, unless as an organization it makes law and not power the chief object of its existence. If it dedicates its energies frankly to the perfection of International Law, it may indeed rise to the height of world leadership; but, because all sovereign states are equal before the law, it cannot long subsist merely as a 'League,' which is essentially a group of Powers within the general Society of States. What is required is the union, not the division, of that Society."

On the other hand, in the paper on "The Treaty-Making Power under the Constitution of the United States" the author presents an argument tending to show that the treaty-making power in the Constitution as it now stands does not authorize the United States by treaty to enter into a league with even the limited functions described by the proposed covenant.

Yet there is no inconsistency between the two views, for the end suggested in the preface could be secured through an amendment to the Constitution.

E. W.

A HISTORY OF SUFFRAGE IN THE UNITED STATES. By Kirk H. Porter. Chicago: The University of Chicago Press. 1918. pp. xi, 260.

Mr. Porter has endeavored to give a compact presentation of the development of suffrage in the United States since the Revolution, a presentation as much of background as of fact. There is nothing in American literature to compare with Dicey's study of the interrelation of law and opinion in England during the nineteenth century, and any attempt to show the complex nature of the banks through which a single stream of legislation works its way deserves attention. It would be difficult to find a subject better adapted for this treatment than the vicissitudes of the franchise.

During the Revolution and in the years immediately following it, Mr. Porter shows, statesmen found no difficulty in holding that the natural right to participate in the functions of government became discoverable only with the acquisition of a certain amount of riches. Yet by 1857 not one state determined the voting eligibility of its citizens by their possessions, and only six states made taxpaying a qualification. Although the element fighting for the franchise always made use of the principles enunciated in the Declaration of Independence in their struggle, Mr. Porter stresses the fact that the democratization of the vote was, in large part, either the direct or indirect result of actual democratic conditions. New classes in the population created new problems, problems whose aspect varied with the locality in which they arose: while in the West the welcome to the foreigner was so hearty that several states gave aliens the vote, in the East the Know-Nothing Party sprang into existence in his shadow.

With the Fifteenth Amendment Mr. Porter sees passion triumphant, and with the subsequent measures of the Southern states which he groups under the succinct caption, "Disfranchising the Negro," he sees the reassertion of the principle of expediency which, throughout, he has endeavored to make the dominating if subconscious test of the extension of the franchise. The last chapter is a

consideration of some of the ideas and emotions represented in the contest over woman suffrage.

The book is framed with a good sense of proportion, and, for the most part, succeeds in giving the atmosphere in which suffrage legislation was shaped as well as the history of the legislation itself. It might perhaps have added to the background of the study had there been an indication of the contemporaneous suffrage history of other countries, especially of England. A much more serious defect, however, is the method in which Mr. Porter reviews decisions of the federal courts in his chapter on Disfranchising the Negro. The reasoning of the judges is not always adequately presented; the exact point decided is occasionally not made clear; and (p. 200) the court is accused of a disinclination to investigate the merits of a case because it affirmed the sustaining of a demurrer where unlawful exclusion from the polls was claimed and the petition failed to allege that the plaintiff had one of the electoral qualifications required by the state constitution.

THE UNSOUND MIND AND THE LAW. By George W. Jacoby. New York: Funk & Wagnalls Co.

THE GREATER WAR. By George D. Herron. New York: Mitchell Kennerley.

WORKMEN'S COMPENSATION LAWS. RULES OF PROCEDURE. Compiled, annotated, and indexed by James F. Minor. Charlottesville, Va.: The Mitchie Co.

WHAT HAPPENED TO EUROPE. By Frank A. Vanderlip. New York: The Macmillan Co.

MEDICAL JURISPRUDENCE. By Elmer D. Brothers. St. Louis: C. V. Mosby Co.

THE AMERICAN BAR. Prepared and edited by James Clark Fifield. Minneapolis: The James C. Fifield Co.

WHY WE FOUGHT. By Captain Thomas G. Chamberlain. Foreword by Hon. William Howard Taft. New York: The Macmillan Co.

EDUCATIONAL LEGISLATION AND ADMINISTRATION IN THE STATE OF NEW YORK FROM 1777 TO 1850. By Elsie Garland Hobson. Supplementary Educational Monographs, vol. 3, no. 1. Chicago: University of Chicago Press.

AN AMERICAN LABOR POLICY. By Julius Henry Cohen. New York: The MacMillan Co.

LABOR AND RECONSTRUCTION IN EUROPE. By Elisha M. Friedman. New York: E. P. Dutton Co.

THE STATE AND THE NATION. By Edward Jenks. New York: E. P. Dutton Co.

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WATERS: AMERICAN LAW AND FRENCH AUTHORITY

I

THIS paper outlines the history of a branch of the law, and advances the belief that in this instance one nation has given the law to the others. It advocates the value to-day of consulting French sources upon the law of watercourses.

At the beginning of the nineteenth century the law of watercourses in England was represented by the declaration of Blackstone that the first appropriator of a watercourse "hath by the first occupancy, acquired a property in the current,"¹ and by similar judicial declarations, continuing as late as 1831, when the Chief Justice of the Common Pleas ruled: "By the law of *England*, the person who first appropriates any part of the water flowing through his own land to his own use, has the right to the use of so much as he thus appropriates, against any other."² "It all depends upon the priority of occupancy," was the declaration of the period in England.³

¹ 2 BLACKSTONE, 403.

² *Liggins v. Inge*, 7 Bing. 682, 693, 5 Moo. & P. 712, 9 L. J. C. P. (O. S.) 202, 131 Eng. Reprint, 263 (1831).

³ In *Bealey v. Shaw*, 2 Smith, 321, 330, 6 East, 208, 102 Eng. Reprint, 1266 (1805), Lawrence, J., said: "It all depends upon the priority of occupancy." Le Blanc, J., said that the first to erect a mill might take all. In *Canham v. Fisk*, 2 Crompt. & J. 126 (also 2 Tyrw. 155), 149 Eng. Reprint, 53 (1831), Bayley, B., said: "There is a fourth mode of acquiring such a right, *viz.*, by appropriation. If a man find water running through his land, he may appropriate it, and thus acquire a title to the water."

Blackstone died in 1780. The year 1804 was the year of promulgation of the Code Napoléon, the French Civil Code. Its doctrine of the law of watercourses differs from the doctrine of Blackstone and the English law of prior appropriation then prevailing. In articles 644 and 645 the Code Napoléon enacted:

*"He whose property borders on a running watercourse, other than that which is declared an appurtenance of the public domain by article 538, under the title of the Classification of Things, may supply himself from it in its passage for the irrigation of his properties. He whose estate such water crosses is at liberty to use it within the space which it crosses, but on condition of restoring it, at its departure from his land, to its ordinary course."*⁴

"If a dispute arises between the proprietors to whom these waters may be of use, the courts, in giving judgment, should reconcile the interest of agriculture with the consideration due to property rights; and in all cases special and local rules upon the flow and use of water should be observed."⁵

The limitation confining water rights to the bordering landowners, and the limitation requiring of them restoration to its ordinary course (the essential points of the modern common law), are present; the allowance of special right to an appropriator prior in time (the essential of the English rulings above noted) is negatived by those limitations.

Things French in 1804 were welcome in America. England was an enemy but recently fought off, while France was a friend who had given aid, and in the following period when most of the American law was beginning to be made, French authorities were sympathetically used in America. Some states passed statutes forbidding English authorities to be cited.⁶ The use of civil law authorities in the hands of others was usually ineffective for

⁴ "Art. 644 — Celui dont la propriété borde une eau courante, autre que celle qui est déclarée dépendance du domaine public par l'article 538, au titre de la distinction des biens, peut s'en servir à son passage pour l'irrigation de ses propriétés. Celui dont cette eau traverse l'héritage peut même en user dans l'intervalle qu'elle y parcourt, mais à la charge de la rendre, à la sortie de ses fonds, à son cours ordinaire."

⁵ "Art. 645 — S'il s'élève une contestation entre les propriétaires auxquels ces eaux peuvent être utiles, les tribunaux, en prononçant, doivent concilier l'intérêt de l'agriculture avec le respect dû à la propriété; et, dans tous les cas, les règlements particuliers et locaux sur le cours et l'usage des eaux, doivent être observés."

⁶ GRAY, NATURE AND SOURCES OF THE LAW, 323; Pound, in 3 ILL. L. REV. 354.

permanent influence upon the law, but in many branches it became very effective for that purpose in the hands of Kent and Story.⁷

This disposition of Story and Kent to incorporate civil law into the common law has been frequently noted. Story remarked on one occasion: "We really are sadly ignorant of the vast resources of the Roman, the French, and the other foreign laws, which may be brought in aid of our common law studies."⁸ And his biographer records of him that

"in all of his works he has introduced them, (the civil law principles) in illustration or contradiction of the common law, giving the preference often to the former. I cannot but think that his works have tended greatly to determine the attention of the profession in this country towards the continental jurisprudence, and that much credit is due to him in pioneering the way, and recommending the advantages of its systems, as well as for the adoption of many of its principles into our jurisprudence."⁹

Kent's words bear the same testimony for his own case:

"When I came to the bench there were no reports or State precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own, & nobody knew what it was. . . . I made much use of the *Corpus Juris*, & as the Judges (Livingston excepted) knew nothing of French or civil law, I had immense advantage over them. I could generally put my Brethern to rout & carry my point by mysterious want of French & civil law. The Judges were republicans & very kindly disposed to everything that was French, & this enabled me, without exciting any alarm or jealousy, to make free use of such authorities & thereby enrich our commercial law."¹⁰

"I read a great deal in Pothier's works and always consulted him when applicable."¹¹

⁷ "But very few American judges and lawyers who would have liked to make use of the civil law were able to do so effectively. Kent and Story practically stood alone." See "The Place of Judge Story in the Making of American Law," by Roscoe Pound, 48 AM. L. REV. 676, 688; also same article with fuller citations, 3 ILL. L. REV. 354. See also "The Value and Place of Roman Law in the Technical Curriculum," by Charles Sumner Lobingier, 49 AM. L. REV. 349. Likewise 34 L. QUART. REV. 82, 97, citing other papers commenting upon the influence of civil law in America.

⁸ 2 LIFE AND LETTERS OF JOSEPH STORY, 414.

⁹ *Ibid.*, 571, 572.

¹⁰ From a letter of Chancellor Kent, dated October 6, 1828, published in 9 GREENBAG, 206, 209, and 17 YALE L. J. 559.

¹¹ Kent, letter published in 9 GREENBAG, 206, 210.

The biography of Story shows that mutual high regard existed between the two, and each followed with close attention the work of the other, and in rounding out the common law with civil law principles there was a measure of friendly rivalry between them.

While the English courts were laying down Blackstone's rule of prior appropriation as the law of England, America had been dealing with the question through the studies of Story, Kent, and Angell. In 1827 Story rendered an opinion in *Tyler v. Wilkinson*¹² which is a classic in this branch of the law, and the first expression, so far as considerable research of the present writer has disclosed, of the familiar notation of "riparian" in reference to rights in watercourses.

We find no specific authority mentioned by Story for using the term, for he says, "I shall not attempt to examine the cases at large," and, "I have, however, read over all the cases on this subject which are cited at the bar or which are to be found in Mr. Angell's valuable work on Watercourses, or which my own auxiliary researches have enabled me to reach." This sends us to Angell, but examination of Angell's work shows that it was not from there that Story got the suggestion of the term. Angell had not yet used it himself. Nor is it used in any of the cases which Angell's first edition (1824) gives, nor in any case at that time contained in the American or English reports. But Angell's testimony here is interesting nevertheless. His first edition was the only one issued at the time of Story's opinion. In its preface the author says that Justice Story had given advice in preparing the book. For this Angell thanks him as "one whose distinguished talents and profound knowledge of the law have made him an ornament and a blessing to his country." It is not surprising to find Story, in this opinion three years later, commending "Mr. Angell's valuable work." When, in 1833, Angell issued a second edition, the word "riparian" now for the first time appeared in it. He makes special comment upon it as follows: "Those who own the land bounding upon a watercourse are denominated by the *civilians* riparian proprietors, and the same convenient term was adopted by Mr. J. Story in giving his opinion in the case of *Tyler v. Wilkinson*." In his still later editions Angell finds it possible simply to say in that place, "The same significant and convenient term is now fully introduced into the common law "

¹² 4 Mason, 397, Fed. Cas. No. 14, 312 (1827).

deeming it unnecessary to vouch Story for it, the term being so fully introduced by that time.

According to this intimate evidence thus furnished, the introduction of the name "riparian" into the rights to waters at common law is due to this opinion of Story, who, in turn, took it from the "civilians" and not from the common law. In what civil law authorities Story found it we have no mention either by himself or by Angell. The doctrine of Story's opinion is sufficiently exemplified by such expressions as: "The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself," and "There may be, and there must be allowed *to all*, of that which is common, a reasonable use," and "It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy." A construction for this as a following of English law of the period is difficult; while, on the contrary, connection with the opposing civil law is indicated by its similarity to the latter, reinforced by the testimony of Angell.

With a difference of but a year in publication is the equally classical exposition of the common law of watercourses by Kent. The third volume of his Commentaries, in which waters are treated, was issued in 1828. The subject of watercourses coming as it does, in Kent's third volume,¹³ Story's opinion has precedence over Kent by a few months only, in point of time. The origin of Kent's contemporary use of the "riparian" notation, and of his exposition of the riparian doctrine, is not left to inference; it is explicitly stated by him.

Kent is found using in his Commentaries the words of the Code Napoléon,¹⁴ and in elaborating upon them his leading citations are to the Code Napoléon, the Digest of Justinian, the Codex of Justinian, and the works of Pothier, of Toullier, and of Merlin.¹⁵

His text is an unconcealed commentary upon the civil law, dis-

¹³ 3 KENT COMM., 353 *et seq.*

¹⁴ "Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel where it leaves his estate" (3 Com. 12 ed., 439).

¹⁵ 3 KENT COMM., 12 ed., 439, note c, citing at the end Code Civil (Napoléon), Arts. 641, 643, 644, and at the beginning citing DIGEST JUST., 39. 3.4.10, Code Just., lib. 3, t. 34, 1, 7; POTHIER, TRAITÉ DU CONTRAT DE SOCIÉTÉ, second App. Nos. 236, 237; TOULLIER, III, 88, note 133; MERLIN, REP. JURISP., tit. Cours d'Eau.

cussing the rule of Pothier and adopting "the just and equitable principle given in the Roman law"¹⁶ at one place incorporating bodily a passage from the Roman Institutes,¹⁷ and closing the exposition of the subject with the following note: "The Code Napoléon, n. 640, 641, 643, 644, establishes the same just rules in the use of running water," referring to the rules he has set forth in the text of his Commentaries.¹⁸ The term, "riparian proprietor," with civil law and especially French references, comes in freely as an apt expression although none of the English or American decisions prior to his Commentaries, not even his own decisions, had brought it into the subject.

The same fact is made plain, not only in the riparian doctrine of watercourses, but in the doctrine of drainage of surface water. The investigations of Professor Pound disclose: "The common law as to surface water was formative during this period. A number of jurisdictions avowedly adopted the doctrines of the civil law. Most of them in so doing cited Kent. In his discussion of water rights, Kent¹⁹ sets forth the doctrines of the civil law and cites Pothier, Toullier, the Digest and Code of Justinian, and the French civil code; and he states as the controlling principle the Roman maxim," etc.²⁰

Kent cites Story's decision of the previous year as one "where

¹⁶ "Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.*" 3 KENT COMM., 354, 355 (1828).

¹⁷ "The elements of air, light, and water, are the subjects of qualified property by occupancy; and Justinian, in his Institutes, (Inst. 2. 1.1., says, they are common by the law of nature." 2 KENT COMM., 1 ed., 281.

¹⁸ 3 KENT COMM., 2 ed., 441, note c. In subsequent editions reference is added to the Code of Louisiana, Arts. 656, 657, which was framed upon the Code Napoléon at the time when Louisiana was a French colony.

¹⁹ *Ibid.*, 439-441.

²⁰ The maxim cited is "*sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat*" (Pound, in 3 ILL. L. REV., 354, 360). "Any one may improve his own land provided he does not do it in a way that makes his neighbor's land worse." See Ogburn v. Connor, 46 Cal. 346 (1873); McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795 (1890).

the whole law on the subject is stated with learning, precision and force," and it is fairly certain that the term "riparian" was received by Kent from Story's opinion.²¹ But Kent went equally to the original French sources, and the influences of Story and Kent are interwoven, so it is impossible to give precedence to either.

II

From the foregoing it would appear that the line of descent of the modern common law of watercourses, known as the doctrine of riparian rights, might pass back through Kent and Story to the Code Napoléon. Some further attention to the law before Story and Kent will reinforce this conclusion.

The influence of the civil law is illustrated in Scotland and at a much earlier period, as Scotland had early in its history adopted the civil law system. The same year that *Shury v. Piggott* (noted below) was assimilating in England the law of watercourses to the law of ancient custom, a Scotch case (1625) was already laying down the riparian principle in its more familiar form, ruling that a man owning land upon a stream may protect it from diversion irrespective of whether he was using it, and saying: "For albeit he had no present use thereof, yet he might possibly find thereafter some use for the same."²² The same is true of a still more explicit Scotch case²³ of a century and a half later, where the influence of the civil law is expressly acknowledged. But it has been pointed out that Scotch expressions seem to have passed unnoticed in English or American courts.²⁴

²¹ 3 KENT COMM., 353-357 (1828). Kent cites Story's opinion several times, and always without reference other than "before Judge Story, Rhode Island Circuit, 1826." In Mason's Reports it is published as of the June term, 1827. Probably, therefore, it was decided in 1826, but not published until 1827, and Kent had received a copy of it from Story privately. Story's treatise on Conflict of Laws shows their mutual regard by bearing a dedication to Kent.

²² *Bannatyne v. Cranston*, MORISON'S DICT. 12769 (1624). "Property."

²³ *Magistrates of Linlithgow c. Elphinstone of Cumbernauld*, 3 KAMES, 331 (1768).

²⁴ Lord Blackburn in *Orr Ewing v. Colquhoun*, L. R. 2 A. C. 839, 847, 14 S. L. R. 260 (1877).

Some other Scotch cases in Morison: About the year 1625 an action was allowed for diverting a stream, in which it was held sufficient simply to show that the diversion "turned a water property into a dry property." Citing *l. unica. Ne quis aquam de flumine publico*. Morison, 12770. In the year 1768, *Kelso v. William*, 12807 Morison's Dict., Counsel cites Roman law (L. 10, § ult. D. De aqu. et aqu. plu.) as prohibiting diversion of *navigable* river, and L. 4. 7. C. De servit et aqu. as applying to "smaller

The condition of the American law before Kent and Story was one of undevelopment. The Connecticut cases were the earliest. Their only restriction was that the party diverting the stream must return the surplus after his use, but without restriction upon place of use, or upon the size of such surplus.²⁵ The term "riparian," whether in reference to claimants or lands or doctrine, made no appearance. There were a few more cases in Massachusetts than in Connecticut, but they left the matter in the same status as in Connecticut.²⁶ In New York a number of rulings²⁷ by Kent prior to his Commentaries were steps in development, but no riparian doctrine was adverted to in any of them, nor does the word "riparian" appear in any of them or in any connection. There was but one early American decision of possible significance, a decision of 1795 in New Jersey. This case, a charge to a jury, uses the expression "*Aqua currit et debet currere* is the language of the law" as "firmly settled."²⁸ The opinion was copied in paraphrases by Angell,²⁹ and its expression was adopted by Kent and is cited in the

runs of water." Lord Stair held *accord*, citing *Bannatyne v. Cranston*, etc. In the year 1804, *Glenlee v. Gordon*, 12834 *Morison's Dict.*, is a clear statement of principles by counsel with citation of Roman and early Scotch authorities.

²⁵ *Howard v. Mason*, cited in 1 *Root* (Conn.), 537 (1783); *Perkins v. Dow*, 1 *Root* (Conn.), 535 (1793); *Ingraham v. Hutchinson*, 2 Conn. 584, 590 (1818) (per Swift, C. J.).

²⁶ The first reported case is *Adams v. Frothingham*, 3 Mass. 352 (1807), and dealt mainly with accretions to the bed. The subsequent cases tended to fix rights for irrigation by the extent of priority of appropriation. *King v. King*, 7 Mass. 496 (1811); *Weston v. Alden*, 8 Mass. 136 (1811); *Hodges v. Raymond*, 9 Mass. 316 (1812). These were then restricted so as to require the irrigator to return the surplus to the stream after his use, but did not otherwise lay down riparian restrictions. *Colburn v. Richards*, 13 Mass. 420 (1816); *Cook v. Hull*, 20 Mass. (3 Pick.) 269 (1825); *Anthony v. Lapham*, 22 Mass. (5 Pick.) 175 (1827). In none of these does the word "riparian" appear in any connection.

²⁷ *Palmer v. Mulligan*, 3 *Caines* (N. Y.), 307 (1805), (Kent, Chief Justice); *Gardner v. Village of Newburgh*, 2 *Johns. Ch.* (N. Y.) 162 (1816), (Kent, Chancellor); *Van Bergen v. Van Bergen*, 3 *Johns. Ch.* (N. Y.) 282 (1818), (Kent, Chancellor). These are the only water decisions by Kent shown by the index of *Caines' Reports* or *Johnson's Chancery Reports*.

²⁸ "In general it may be observed, when a man purchases a piece of land through which a natural watercourse flows, he has a right to make use of it in its natural state, but not to stop or divert it to the prejudice of another. *Aqua currit, et debet currere*, is the language of the law. . . . This principle lies at the bottom of all the cases which I have met with, and it is so perfectly reasonable in itself, and at the same time so firmly settled as a doctrine of the law, that it should never be abandoned or departed from." *Merritt v. Parker*, 1 *Coxe* (N. J.), 460, 463 (1795).

²⁹ ANGELL ON WATERCOURSES, 1 ed., 5 (1824).

opinion of Story. Their use of it is rather as a corroboration of conclusions reached by them from other sources. The antecedents of the New Jersey expression do not appear, but are later indicated in referring again to this maxim.

The English law which stood for prior appropriation in Blackstone's time was, previous to Blackstone, similarly undeveloped. The earliest cases usually presented a condition where one had from time immemorial used the water for a mill or for watering cattle, or for irrigating a meadow in time of drought,³⁰ and another wholly stopped the stream or diverted it elsewhere and left plaintiff's mill or land dry, whereupon the courts acted to protect the former's ancient enjoyment. In the Year Books several such cases appear,³¹

³⁰ E. g., Y. B. 11 & 12 Edward III, Horwood's ed., 464 (A. D. 1338), where J. (James?) diverted the course of a certain stream of water from T. (Thomas?). The latter complains that water was wont to flow from a spring to his meadow, "with which water he was wont to water his cattle, namely, horses, sheep and cows, and also to fish therein and brew therewith, and water (*adaquare*) the aforesaid meadow in time of drought, and do other needful things therewith," that J. diverted the course of the stream, and that by the diversion T. suffered damage; and it was ordered "that the said nuisance be abated and that the said water be turned into its former course at the expense of the said J."

³¹ See WOOLRYCH ON WATERS, p. 177.

Mr. Richard C. Harrison has kindly contributed the following in reference to water cases in the Year Books:

"The Year Books contain a number of cases relating to the diverting of a stream from its natural course. I would not venture any statement as to how many such cases there are, but I have an impression, based only upon somewhat desultory readings, that the cases predicated upon a deprivation of the use of water are less frequent than those predicated upon damage by a flooding of land, and also that among the cases of the former kind by far the greater number are cases in which the use of which the plaintiff had been deprived was in connection with a mill. In estimating the significance to be attributed to the number of cases relating to watercourses which may be found in the reports, whether the number be large or small, it should be remembered that many cases of that character would never come before any of the courts presided over by the royal judges, and therefore would not be reported at all, simply because, by reason of being of minor importance, they were relegated for adjustment to the sheriff or to the local courts (1 NICHOLS' BRITTON, 109a, 155b).

"In the period covered by the Year Books the common law courts recognized at least two different forms of action adapted to dealing with a diversion of water from a stream. First of all, there was an assise of nuisance *quare divertit cursum aquae*, which may be said to have been the normal remedy in such cases. No such form of action appears among the forms given by Glanville, but the book entitled 'Select Civil Pleas' (Volume III of the publications of the Selden Society) contains two cases of that kind, decided in 1201, — *Blohicu v. Sonka*, pl. 201, and *Prior of Bodmin v. Thierry de Tregew*, pl. 203. Similar cases occur in the *ABBREVIATIO PLACITORUM*, at pages 86, 120, 121, 206, 333. In the Year Books I have noted cases of that kind at 9 Ass. 19 (1335) and 32 Ass. 2 (1358). There are doubtless others. The case at Y. B. 11 & 12 Edw. III, 464, was

giving only arguments over the pleadings, without discussion of any principles of water law. Lord Coke, in his time, also has but a few mentions of waters, isolated and disconnected; such as, "The turning of the whole stream that runs to a mill is a disseisin of the mill itself."³² No doctrine of waters of any kind appears in Coke, much less a "riparian doctrine."³³ Even the law dictionaries up to the

such a case. Where the interest of the plaintiff in the land affected had been acquired by him after the commencement of the diversion, or where the person in possession of the land upon which the diverting was being done was not the one by whom the diversion had been commenced, the appropriate remedy, after the Statute of Westminster II had authorized a remedy in such cases, was an assise *quod permittat reducere cursum aquae*, in which the relief obtainable was merely a restoration of the stream to its former course. A case of that sort is reported at Y. B. 30 Edw. III, 3a, continued at 26a (1356), and another at Y. B. 2 Henry IV, 13a, pl. 55 (1400). After the invention of trespass on the case, that form of action, at least in theory, was an appropriate remedy in cases where no assise of any kind was maintainable because either the plaintiff or the defendant was not a freeholder. There are several *dicta* to that effect in the Year Books of the fifteenth century, but the earliest case so far as I know in which trespass on the case was actually maintained for a diversion resulting in a deprivation of the use of water is Sir Henry Grey's case, Y. B. 21 Henry VII. 30, pl. 5 (1505).

"While none of these forms of action are mentioned by Glanville, he gives the form of writ for an action counting upon damage caused by installing "*fossatum aliquod*" on property not in the possession of the plaintiff (Liber XIII, Cap. 35). Such an action was known as an assise *quare levavit fossatum*, or *de fosso levato*. *Fossatum* means anything produced by digging up the ground. It means a ditch as well as a dyke or embankment. Therefore in some cases this kind of assise was an alternative remedy available to one deprived of the use of water by a wrongful diversion. A case reported at Y. B. 16 Edw. III, 82-86 (Rolls ed.) (1304), seems to have been of that kind.

"In the earlier cases the form of judgment, when in favor of the plaintiff, was that he recover "his seisin." Obviously this did not refer to a seisin of any tangible property, as one might infer from the statement at Co. Litt. 161a. The wrong done by the diversion was regarded as a disseisin, not of tangible, but of incorporeal property, that is to say, an interference with the enjoyment of rights. This is quite explicitly stated by Britton (1 NICHOLS' BRITTON, 139a-141a). Glanvill also refers to a purpresture, not against the Crown, but against an individual, caused by the diverting of a stream from its natural course, as being a disseisin (Liber IX, Cap. 13). Such was the theory. In actual practice the usual form of judgment was much more specific, namely, that the stream be restored to its former course. Thus, in Raymond Bulb v. Roger de Cotteleghe, Abbr. Pl. 120 (1244), the sheriff was commanded "*quod faciat praedictam aquam esse in recto cursu suo sicut prius fuit*."

"I hope to have an opportunity in the near future to prepare a paper setting forth my own conclusions regarding what can be found in the early English authorities on the subject of water courses."

Richard C. Harrison.

³² Co. Litt., 161.

³³ The sole noteworthy passage in Coke is that in which he includes "water" with land under the maxim "*Cujus est solum ejus est usque ad caelum et ad inferos*," a principle which England later accepted for *percolating water*. But that principle never took

nineteenth century do not show the word "riparian" as in use in connection with rights in running water.³⁴

The principle of the English law of the time of Lord Coke and for a century later was to protect long-standing enjoyment of waters by assimilation to prescription or "custom," as the present writer has noted in a previous article.³⁵ The most important of these cases is *Shury v. Piggott*, decided in 1625. The case seems to have excited a good deal of attention at the time, being given in six different reports,³⁶ and has been said to have discussed collaterally many things which were not necessary to the decision.³⁷ The case discussed the matter from the point of view of formal pleading, as was usually the way cases were treated at the time. The plaintiff declared, in the words of pleading on ancient "custom," that the water *currere solebat et consuevit* to his land, and one of the judges rested his decision on the ground that, as he said, "*consuevit* is a good word for a custom."³⁸

So in the other cases of the time: "By reason of the words *consuevit et debuit*, it must be intended that a prescription was given in evidence."³⁹ "*Currere consuevit* had been held well enough in case of a watercourse, because that must be *time immemorial*."⁴⁰ "If I have a right from usage as *currere solebat*, I have the *right* in such manner as the *usage* has been."⁴¹

"Those cases are wherein the plaintiff declared, that the water *currere consuevit et debuisset* to the plaintiff's mill, time out of mind; which words

hold of the law of running water or watercourses, as we hereafter note, nor did Coke attempt to erect a system of law upon it. Aside from the statement of the maxim, Coke is substantially silent.

³⁴ "Riparia (from *ripa*, a bank). In the Statute of Westm. 2 c. 47. Signifies the water or river running between the banks, be it salt or fresh. 2 *Inst. fol.* 478. The word occurs also in *Rot. Char.* 9 *E.* 2 *num.* 12. But in the common translation of *Magna Charta*, cap. 15, *Riparia* is rendered a bank or river. *Cowell, edit.* 1727." CUNNINGHAM'S LAW DICT. (1765). Repeated (paraphrased) in JACOB'S LAW DICT. (1797).

³⁵ 22 HARV. L. REV. 190, 195.

³⁶ Palm. 444; Poph. 166, 81 Eng. Reprint, 1163; 3 Buls. 339; Noy, 84; Latch. 153; W. Jones, 145, 81 Eng. Reprint, 280.

³⁷ Lord Blackburn in *Dalton v. Angus*, L. R. 6 A. C. 740, 825 (1881).

³⁸ As reported in Palm. 444, 81 Eng. Reprint, 1163, Dodderidge, J., in *Shury v. Piggott*, said, "Ici sont sufficient parols d'exprimer un prescription, de temps dont, etc., consuevit currere," adding that, "serre entend ancient."

³⁹ *Rosewell v. Prior*, 1 Ld. Raym. 392, 91 Eng. Reprint, 1160, a case of lights.

⁴⁰ *Powell, J.*, in *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1094, 92 Eng. Reprint, 222.

⁴¹ *Brown v. Best*, 1 Wils. 174, 95 Eng. Reprint, 557 (1747).

are of the same significance as if he had shewed it to be an antient mill. . . . The word *solet* implies antiquity, . . . and it was the opinion of a learned Judge that the words *currere consuevit et solebat* did supply a prescription or custom."

The report says: "The word *solet* implies antiquity and will amount to a prescription."⁴² The maxim *aqua currit et debet currere ut currere solebat* seems to be connected with these early rulings based upon prescription or ancient custom; a stage now, of course, discarded, although the maxim survives.⁴³

Although there were casual expressions more resembling the modern law,⁴⁴ the modern doctrine was not laid down in England until the case of *Mason v. Hill*,⁴⁵ decided in 1833, where Lord Denman undertook "to discuss, and, as far as we are able, to settle the principle upon which rights of this nature depend."⁴⁶

⁴² *Palmer v. Keblethwaite*, 3 Mod. 48, 51, 1 Show. 64, 89 Eng. Reprint, 451; *Skin. 65*, 90 Eng. Reprint, 31. In *Masin v. Hill*, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692 (1833), Lord Denman speaks of these two reports of the case, and says: "The final result of that case does not appear in the books, and the roll has been searched for in vain," but the report of it on appeal appears in four different reports, *viz.*, *Skin. 175*, 90 Eng. Reprint, 81; *Carth. 84*, 90 Eng. Reprint, 653, 87 Eng. Reprint, 30; 3 Mod. 48, 90 Eng. Reprint, 901, and *Holt*, 5. See also 3 Lev. 133, 83 Eng. Reprint, 615.

⁴³ The maxim is referred to in *Shury v. Piggott* by Story in *Webb v. Portland Mfg. Co.*, 3 Sumner, 189, 199 Fed. Cas. No. 17, 322 (1838).

⁴⁴ There is the following interesting passage in Britton: "Sometimes the soil is subject to a servitude by law, *although not by any man's appointment*, or by the establishment of peaceable seisin. . . . For the law forbids anyone . . . to make a ditch in his own soil whereby the water is diverted from his neighbour, *or whereby it is hindered from remaining in its ancient course*. . . ." BRITTON, Baldwin's ed. of NICHOLS' TRANSLATION, 289-290. The foregoing portion is extracted from the whole passage as given in BINGHAM, CASES ON WATER RIGHTS, 1. In *Countess of Rutland v. Bowler*, *Palm. 290*, 81 Eng. Reprint, 1087, plaintiff alleged that a watercourse "*soloit currere per modestum et incessantem cursum*" to a parcel of plaintiff's land where she had a mill. Defendant claimed that the declaration was bad for not alleging that it was an "ancient" mill, so as to found a prescriptive right to the watercourse. But it was held that it was the same whether the mill was new or old; it was enough that the water "used *sequer cest course*. . . . *Car ne poet user son terre, ou le water, qui passe par son terre, al damage d'auter*," and judgment was entered for the plaintiff. In 1805 Lord Ellenborough said: "The general rule of law as applied to this subject is, that, independent of any particular enjoyment used to be had by another, every man has a right to have *the advantage* of a flow of water in his own land without diminution or alteration," and refers later on to this as his "natural right." *Bealey v. Shaw*, 6 East, 208, 102 Eng. Reprint, 1266 (1805). See also *Wright v. Howard*, 1 Sim. & St. 190, 57 Eng. Reprint, 76 (1823).

⁴⁵ 5 Barn. & Adol. 1, 16, 110 Eng. Reprint 692 (1833).

⁴⁶ Lord Blackburn in *Orr Ewing v. Colquhoun*, L. R. 2 A. C. 839, 854 (1877), says the modern law of riparian rights "can hardly be considered as settled law in *England*

This ruling was five or six years after the publication of the opinion by Story and the Commentaries by Kent. No mention is made, in *Mason v. Hill* or any previous English case, of the word "riparian" in connection with the subject, and neither court nor counsel cites either these American jurists or the French Code; but if the vogue of these sources then current be assumed of no influence upon the opinion the influence of the civil law is nevertheless shown. A long discussion of other civil law sources is part of the opinion.

In any event, until Story and Kent were resorted to by the English decisions in the following decade, the English law still wavered in spite of Lord Denman's effort. The Court of Exchequer, in 1839, distinguished *Mason v. Hill* as inapplicable (against the party producing it) to a flow of artificial origin;⁴⁷ while in 1843 percolating or underground water was also excepted from its operation.⁴⁸ The latter decision was made in the Court of Exchequer Chamber, where the judges of all these courts — Common Pleas, King's Bench, and Exchequer — sat together, and Chief Justice Tindal of the Common Pleas (who had decided for prior appropriation in *Liggins v. Inge*, *supra*, two years before *Mason v. Hill*), being again the writer of the opinion, intimated that he still held doubts of the foundation of the doctrine of *Mason v. Hill*. He intimates that the ground and origin of the doctrine is obscure, enumerating various possible explanations, "or it may not be unfitly treated, as laid down by Mr. Justice Story," etc. There was still this atmosphere of uncertainty when, in *Wood v. Waud* in 1849, the ruling in *Mason v. Hill* was reiterated

before the case of *Mason v. Hill*, in 1833." In another case it is said: "Upon the second trial of *Mason v. Hill*, a special verdict was found, on the argument of which Lord Denman delivered an elaborate judgment which . . . has always been considered as settling the law as to the nature of the right." *McGlone v. Smith*, 22 L. R. Ir. 568 (1888). Accord as to the effect of *Mason v. Hill*, see *Cocker v. Cowper*, 5 Tyrw. 103 (1834); *Embrey v. Owen*, 6 Ex. 353, 20 L. J. Ex. 212, 155 Eng. Reprint 579 (1851); *Stockport W. W. Co. v. Potter*, 3 H. & C. 300, 323, 10 Jur. (N. S.) 1005, 159 Eng. Reprint, 545 (1864); *Chasemore v. Richards*, 7 H. L. Cas. 349, 11 Eng. Reprint, 140 (1859), *Wightman, J.*; *Pugh v. Wheeler*, 19 N. C. (2 Dev. & B.) 50 (1836), *Ruffin, C. J.*; *GALE ON EASEMENTS*, 8 ed. (1908), 258; *ANGELL ON WATERCOURSES*, 7 ed., § 133; *SALMOND ON TORTS*, 254.

⁴⁷ *Arkwright v. Gell*, 5 M. & W. 203, 151 Eng. Reprint, 87 (1839). In development of this doctrine, compare the present writer's paper in 29 HARV. L. REV. 137. See also the doubtful ruling in *E. Clemens Horst Co. v. New Blue Point Co.*, 177 Cal. 631, 171 Pac. 417 (1918).

⁴⁸ *Acton v. Blundell*, 12 M. & W. 324, 152 Eng. Reprint, 1223 (1843).

by Chief Baron Pollock as having placed the cases for natural streams "upon their right footing."⁴⁹ The term "riparian" in reference to the subject occurs in *Wood v. Waud* for the first time (so far as we have discovered) in any English authority. As his main reliance, Chief Baron Pollock quotes Kent and Story. "The law is laid down by Chancellor Kent," he says (quoting Kent); "and Mr. Justice Story lays down the same law."⁵⁰ The next case, also in the Exchequer, was *Embrey v. Owen*,⁵¹ in 1851, which has been widely cited. Baron Parke there adopts the use of the term and repeats the statement that the law of flowing water "is now put on its right footing." He cited "the very able judgment of the late Mr. Justice Story,"⁵² and a late edition of "Angell on Water-courses," and quotes at length from Kent's Commentaries.⁵³ No hesitancy appears in English decisions henceforth.⁵⁴

Emphasis upon the way the English decisions bring up with Kent, Story, and thereby the French code, is furnished by the next important English ruling, which appeared in 1858. It was a Privy Council case, appealed from Canada, where French law had once prevailed. Counsel read from Story and Kent, and while the opinion cites no authority it commends counsel for having gone into the questions "with great learning and ingenuity." There occurs the following significant conclusion: "It does not appear that, for the purposes of this case, any material distinction exists between the French and the English law."⁵⁵

⁴⁹ *Wood v. Waud*, 3 Exch. 748, 154 Eng. Reprint, 1047 (1849). See the comment upon this leading case in *E. Clemens Horst Co. v. New Blue Point Co.*, 177 Cal. 631, 171 Pac. 417 (1918).

⁵⁰ Quoting 3 KENT COMM., 2 ed., 439; Story in *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14, 312 (1827).

⁵¹ 6 Exch. 353, 20 L. J. (N. S.) 212, 155 Eng. Reprint, 579 (1851).

⁵² *Webb v. Portland Mfg. Co.*, 3 Sumner, 189, Fed. Cas. No. 17, 322 (1838).

⁵³ Counsel (Bramwell and Beavan) use the name "riparian proprietor" as in common use; opposing counsel cites Story in *Tyler v. Wilkinson*, and both sides refer to other American cases.

⁵⁴ "There was a strong tendency on the part of some of the judges in earlier times to recognize a right to obtain title to water by prior appropriation or occupancy, and at one time it seemed as though that doctrine would be established." Note in 30 L. R. A. 665. "This doctrine was not established until comparatively modern times," etc. . . . "Appropriation of the water of flowing streams for purposes of utility has thus gradually changed from being considered a means of acquiring important water rights to being deemed of importance only as evidence of damage and a measure of damages to be recovered." GODDARD, EASEMENTS, 7 ed., 348.

⁵⁵ *Miner v. Gilmour*, 12 Moore P. C. 131, 14 Eng. Reprint, 861 (1858).

We are therefore referred, by the English reports themselves, to these American jurists for the designation of the doctrine as a "riparian" one, and for the most approved expression of the doctrine, by the aid of which the English courts were enabled to lay contention at rest. The American usage arose through Story and Kent, both of whom at about the same time took the name and doctrine from the French civil law. This is far removed from the Year Books, to which it has been so often ascribed. If this presentation is correct, the common law of watercourses is not the ancient result of English law, but is a French doctrine (modern at that) received into English law only through the influence of two eminent American jurists.

The identity of the modern common law of watercourses with the civil law has been repeatedly acknowledged. Among writers the statement of Angell that the name "riparian proprietor" is taken from the civil law has already been noticed. "The owners of watercourses are denominated by the civilians *riparian* proprietors, and the use of the same significant and convenient term is now fully introduced into the common law."⁵⁶ Speaking of the civil law regarding the use of water, Mr. Yale says: "These rights do not, as has been seen, differ substantially, so far as private property is concerned, from the common law."⁵⁷ According to another writer, the common law of fishing is likewise based upon the civil law.⁵⁸ Washburn declared: "No lawyer need be told that many of the principles of the common law of Easements are derived directly from the civil law, and may be found in the Scotch and Continental systems of jurisprudence."⁵⁹

Among jurists may be cited a well-known decision of Lord Kingsdown that the French law and the common law are not materially different.⁶⁰ In the Supreme Court of the United States we have recent testimony from Mr. Chief Justice White of the same nature.⁶¹ And we have the same testimony in the

⁵⁶ ANGELL ON WATERCOURSES, 6 ed., § 10.

⁵⁷ YALE, MINING CLAIMS AND WATER RIGHTS, 153.

⁵⁸ SCHULTES, AQUATIC RIGHTS, 1.

⁵⁹ WASHBURN ON EASEMENTS, 4 ed., xiii (preface to 1 ed.).

⁶⁰ *Miner v. Gilmour*, 12 Moore P. C. 156, 14 Eng. Reprint, 861 (1858).

⁶¹ *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 Sup. Ct. Rep. 671 (1916).

reports of the supreme courts of California,⁶² Texas,⁶³ and Vermont,⁶⁴ among others.

The doctrine of the French code upon watercourses has spread similarly to the countries of Europe, South America, and even to Japan. The limits of this paper force it to be content with referring to others where that is more adequately set forth.⁶⁵

III

The descent being indicated whereby the common law of watercourses comes to us from the French law, we may examine the doctrines of the French law with justifiable anticipation that they will have interest and profit for us in the investigation of the problems we are now meeting every day, in working under the same law of watercourses which they have, and which came to us from them.

The French system consists principally of the two Code sections already quoted, and the elaboration thereof by commentators. As so unfolded, its fundamental doctrines are: The use of a stream is confined primarily to riparian owners, that is, the owners of land contiguous to the flow of the water, excluding nonriparian owners or lands, and without preference because of priority of use, or penalty because of nonuse. The riparian owners have equal rights for reasonable use upon their riparian lands, what is a reasonable use being left to the discretion of the courts. Riparian land is defined as the land in contact with the stream, the test being applied as of the time of attempted use, so that if a change of boundary of the land occurs it affects the riparian land as follows: If the change is of the river boundary, by a permanent shift of the channel away from

⁶² *Irwin v. Phillips*, 5 Cal. 140 (1855); *Lux v. Haggin*, 69 Cal. 255, 334, 10 Pac. 674 (1886); *Wholey v. Caldwell*, 108 Cal. 95, 41 Pac. 31 (1895). On the argument in *Lux v. Haggin*, Mr. Hall McAllister read passages of the Spanish law from Eschriche, and the following colloquy occurred between him and Mr. Justice McKee: MCKEE, J.: "What is the difference between that and the common law?" McALLISTER: "There does not seem to be any material difference so far as I can understand."

⁶³ "There is no material difference between the common law rule and that of the Roman and French law." *Fleming v. Davis*, 37 Tex. 173, 199 (1872). See also *Rhodes v. Whitehead*, 27 Tex. 304, 310 (1863).

⁶⁴ *Tuthill v. Scott*, 43 Vt. 525 (1871).

⁶⁵ Lobingier, "Napoleon and his Code," 32 HARV. L. REV. 114, 128; Wiel, "Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law," 6 CAL. L. REV. 245, 342. A copy of the latter paper may be had upon application to the Editor of CAL. L. REV., Berkeley, Cal.

the land (as by a sudden freshet), the former contact ceases to be of avail, as there remains no contact at time of attempted use. Similarly if a highway comes to be interposed along the river bank: If the change of boundary is on the exterior side of the land, by a shift inward, causing a contraction of area (as where an outer part of the tract is sold off), the parts cast out by the contraction cease, while so severed, to be riparian, since the parcels so detached cease to have contact with the stream at time of attempted use under such conditions. If the change of exterior boundary is by shift outward (as by a purchase of land next to the outer boundary), causing expansion of area, the united tract has contact with the stream, and the expanded area is all riparian while the union lasts. These fundamental civil law rules are subject to modification by grant, condemnation, or prescription.

In another place the present writer has set out and quoted the French authorities upon these principles at considerable length.⁶⁶ They are believed to be also the correct principles of the common law. The desire of the present paper is to carry the matter into other points not gone into in the previous paper.

1. A little discussion appears in the French commentators as to whether the riparian principles apply to small rivulets; but the distinction is discountenanced. "The law could not but condemn a distinction so little justified. Moreover most authors, notably Daviel and Championnière, have refused to admit a different legal status for rivulets than for rivers."⁶⁷

In English and American law a distinction is stated, namely, that the common law distinguishes small streams in respect to domestic use. It is said that very small streams may be wholly consumed by an upper riparian owner where the water is taken only for such use.⁶⁸ But it is a point in some uncertainty. For

⁶⁶ 6 CAL. L. REV. 245, 342. A reprint thereof will be mailed on request to the Editor of the CAL. L. REV., University of California, Berkeley, California.

⁶⁷ "La jurisprudence ne pouvait donc que condamner une distinction si peu justifiée. Du reste, la plupart des auteurs, et notamment Daviel et Championnière, se sont refusés à admettre pour les ruisseaux une condition légale différente de celle des rivières." 1 PICARD, *TRAITÉ DES EAUX*, 2 ed., 250. *Accord*, AUBRY ET RAU, 5 ed., 2, 47, 3, 80, note 1 ter.

⁶⁸ *Miner v. Gilmour*, 12 Moore P. C. 131, 14 Eng. Reprint, 861 (1858); *Attorney-General v. Great Eastern Ry. Co.*, 23 L. T. (N. S.) 344, affirmed in L. R. 6 Ch. 572 (1871); *Lord Norbury v. Kitchin*, 9 Jur. (N. S.) 132; 7 L. T. 685 (1863); *Jones v. Tennessee, etc. Co.*, 80 So. (Ala.) 463 (1918); *Lux v. Haggin*, 69 Cal. 255, 395, 10 Pac. 674

example, although the rule as thus stated is a preference to physical position upon the upper stream course, it has been also construed as a preference not to position but to character of use, whereby a lower owner might entirely prevent an upper one from taking any water from a rivulet for any other than domestic purposes.⁶⁹ And even for domestic purposes it has been ruled that the whole may not be taken by the upper owner, but that there will be an apportionment among all.⁷⁰ This was in a jurisdiction where the right to take the whole of such a small flow has also been affirmed.⁷¹

This asserted common law distinction has its leading expression in an English case of 1858, where domestic uses are classified as "ordinary" and other uses as "extraordinary."⁷² An eminent writer remarks that this distinction appears for the first time in this case.⁷³ In 1842 an American case had laid down the law in the same form as the English case, under the terms "natural uses" and "artificial uses";⁷⁴ and of this case an American writer remarked: "A distinction of this sort was, for the first time it is believed, expressly laid down in a case before the Supreme Court of Illinois."⁷⁵ In an excellent Scotch book on the law of water in Scotland, quotation is made from a Scotch case of 1791,⁷⁶ where it was said: "There is a certain order of uses: the natural and primary uses are preferable to all others; these are drink for man and beast;" and commenting thereon, the author says that this "appears to afford the earliest instance of this terminology."⁷⁷ It appears to be a will-o'-the-wisp that is hard to put one's finger on, for we find somewhat simi-

(1886); *Gutierrez v. Wege*, 145 Cal. 733, 79 Pac. 449 (1905); *Williams v. Wadsworth*, 51 Conn. 277 (1883); *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N. E. 87 (1913); *Hough v. Porter*, 51 Ore. 318, 98 Pac. 1083 (1909); *In re Sucker Creek*, 83 Ore. 228, 163 Pac. 430 (1917); *Miller v. Miller*, 9 Pa. St. 74 (1848); *Slack v. March*, 11 Phil. (Pa.) 543 (1875).

⁶⁹ See *Williams v. Wadsworth*, 51 Conn. 277 (1883); *Evans v. Merriweather*, 4 Ill. 492 (1842).

⁷⁰ *Wiggins v. Muscupiabe, etc. Co.*, 113 Cal. 182, 45 Pac. 160 (1896).

⁷¹ California cases, *supra*. Upon this general subject see article by Professor Jeremiah Smith in 17 COL. L. REV. 383, 398; also WIEL, WATER RIGHTS, 3 ed., § 740 *et seq.*

⁷² *Miner v. Gilmour*, 12 Moore P. C. 131, 14 Eng. Reprint, 861 (1858).

⁷³ SALMOND, TORTS, 4 ed., 301.

⁷⁴ *Evans v. Merriweather*, 4 Ill. 492 (1842).

⁷⁵ ANGELL, WATERCOURSES, 7 ed., 206.

⁷⁶ *Russell v. Haig*, BELL'S DECISIONS, 338, 346; Morison, 12, 823 (1791).

⁷⁷ FERGUSON, LAW OF WATER IN SCOTLAND, 238.

lar expressions in the civil law writers of a century or so earlier.⁷⁸ Its origin as a common law rule seems as elusive as its actual meaning; and it is therefore of interest that the French writers seem to repudiate it, as do some expressions in this country also.⁷⁹

2. Upon navigable rivers the English and American rulings recognize all riparian rights, but subject to the condition of not interfering with navigation.⁸⁰ In other words, the usual riparian law applies between riparian owners thereon as respects diversion and the like, so long as the state or some one claiming to be injured in navigation is not a party to the controversy, or so long as there is in fact no interference with navigation.⁸¹

The French writers say upon that matter: "Navigable or floatable rivers are excluded by the formal terms of article 644." A law of 1791 had read: "No one may set himself up as exclusive owner of the waters of a navigable or floatable river; consequently all riparian owners may, as of common right, make diversions of water therefrom, provided they do not turn or impair the flow in a way harmful to the general good and the customary navigation of such river." Of this the commentator remarks: "This derogation from the principles of the public domain having occasioned numerous abuses, the legislator of the year XII had to return to the rule of the older law."⁸²

⁷⁸ "*Aqua profluens ad lavandum et potandum unicuique jure naturali concessa*" (Vinnius, quoted in 5 Barn. & Adol. 1, 24, 110 Eng. Reprint, 692 (1833)). Grotius says: "At idem flumen, qua aqua profluens vocatur, commune mansit, nimirum ut bibi haurisque possit." GROTIUS, lib. II, Cap. II, § XII.

⁷⁹ *Wiggins v. Muscupiabe, etc. Co.*, 113 Cal. 182, 45 Pac. 160 (1896); *Lux v. Haggin*, 69 Cal. 255, 407-408, 10 Pac. 674 (1886); *Meng v. Coffee*, 67 Neb. 500, 93 N. W. 713 (1903). It is said of the distinction: "It seems never to have been acted on in any reported case," but adding that as *dictum* it may have a secure place in the law. SALMOND, TORTS, 4 ed., 301.

⁸⁰ *Lyon v. Fishmongers Co.*, L. R. 1 A. C. 662, 673 (1876); *Heilbron v. Fowler, etc. Co.* 75 Cal. 426, 17 Pac. 535 (1888); and cases cited in WIEL, WATER RIGHTS, 3 ed., § 726.

⁸¹ *Ibid.* See also *Roanoke, etc. Co. v. Roanoke, etc. Co.*, 159 N. C. 393, 75 S. E. 29 (1912); *York Haven, etc. Co. v. York Haven, etc. Co.*, 194 Fed. (Pa.) 255, 266 (1911), 201 Fed. 270 (1912); *King v. Schaff*, 204 S. W. (Tex. Civ. App.) 1039, 1042 (1918); *United States v. Chandler, etc. Co.*, 229 U. S. 53, 33 Sup. Ct. Rep. 667 (1913); *United States v. Cress*, 243 U. S. 316, 37 Sup. Ct. Rep. 380 (1916). Compare *State ex rel. Ham v. Sup. Ct.*, 70 Wash. 442, 126 Pac. 945 (1912); *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035 (1913).

⁸² "Les rivières navigables ou flottables sont exclusés en termes formels par l'art. 644. La loi des 28 septembre-6 octobre, 1791, en disposait autrement, en son titre 1^{er}, sec-

From this it appears that the riparian right is not recognized in navigable streams, and that may be the *formal* law; but it also appears that the law "*in practice*" does not follow the formal law to its full extent, for another commentator has it:

"Neither the riparian owner nor the public have any right to use the water of navigable or floatable stream for any purpose whatever. Nevertheless the government, and in less important cases the departmental administrations, may grant to riparian owners the right to take water from such streams, and they tolerate the public use of such water for certain domestic purposes, for washing, for watering animals, etc. These grants and permissions are always revocable, without recourse on the part of the beneficiaries."⁸³

So far as logic is concerned, there seems no reason why the rule above stated as the common law rule is not fully consistent with public rights in navigable streams.

3. Natural lakes and ponds are outside the scope of the articles of the French Code establishing riparian rights, it is said. But when such lake or pond has an inlet or outlet in natural springs or streams there seem to arise differences of opinion.

"This article (644) is considered by the majority of writers as without possible application to a pond, which does not constitute a running watercourse. M. Dalloz, ingeniously enumerating the various supposable cases that may arise, demonstrates in all of them the emptiness of pretensions of the neighboring landowners to take the water of ponds. He distinguishes three cases: (1) the pond is fed by a spring and a watercourse formed thereby, which, taking rise before reaching the pond, traverse it for its length or width; in this case the owner of the pond is obliged to allow the water of the spring and the small watercourse to

tion 1, art. 4: 'Nul ne peut se prétendre propriétaire exclusif des eaux d'un fleuve ou d'une rivière navigable ou flottable; en conséquence, tout propriétaire riverain peut, en vertu du droit commun, y faire des prises d'eau, sans néanmoins en détourner ou embarrasser le cours d'une manière nuisible au bien général et à la navigation établie.' Cette dérogation aux principes de la domanialité publique ayant engendré de nombreux abus, le législateur de l'an XII a dû revenir à la règle de l'ancien droit." 1 PICARD, TRAITÉ DES EAUX, 2 ed., 348.

⁸³ "Les riverains ni le public n'ont aucun droit à user de l'eau des cours d'eau navigables ou flottables, pour quelque objet que ce soit. Néanmoins le gouvernement, et, dans le cas les moins importants, l'administration départementale peut concéder aux riverains le droit d'exercer des prises d'eau, et ils tolèrent que le public use des eaux pour certains besoins domestiques, pour des lavoirs, abreuvoirs, etc. . . . Ces concessions et tolérances sont toujours revocables, sans réclamation possible de la part des bénéficiaires." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 431.

flow out of the pond, for these waters should enure to the benefit of the lands lower down and not to that of the lands bordering on the pond; (2) the pond is formed by springs which rise in its bed: as these springs belong to the owner of the pond, no one has the right to deprive him of the waters without his permission; (3) even in case of floods the land-owners on a pond do not have the right to take water therefrom, since, if each riparian were to effect a diversion of water by trenches, where would be the security of the owner of the pond? But the riparian owners on a pond may by prescription acquire the right to take water therefrom."⁸⁴

On the other hand, another commentator says: "The owner of the pond cannot turn the waters from their ordinary course at the outlet of the pond without exposing himself to an action by the riparian owners lower down."⁸⁵ And other commentators have expressed similarly divergent views.⁸⁶ In this connection a commentator of standing has remarked:

⁸⁴ "L'art. 644, C. civ. sec. 1 pose en principe que toute personne dont la propriété borde une eau courante, autre que celle qui est déclarée dépendre du domaine public, peut s'en servir à son passage pour l'irrigation de ses propriétés. Cette article est considéré par la majorité des auteurs comme sans application possible aux étangs, qui ne constituent pas une eau courante. M. Dalloz (v^o Eaux, n. 251), détaillant ingénieusement les diverses hypothèses qui peuvent se présenter, démontre dans toutes l'inanité des prétentions des voisins à puiser l'eau des étangs. Il distingue trois cas: 1^o l'étang est entretenu par une source et un cours d'eau par elle formé, et qui, prenant naissance avant d'arriver à l'étang, le traversent dans sa longueur ou sa largeur: dans ce cas, le propriétaire de l'étang est obligé de laisser libre l'eau de la source et le cours du ruisseau à la sortie de l'étang, car ces eaux doivent profiter aux propriétés inférieures et non aux propriétés longeant l'étang; 2^o l'étang est formé par des sources qui jaillissent dans son lit: comme ces sources appartiennent au propriétaire de l'étang, nul n'a le droit d'en dériver les eaux sans la permission de celui-ci; 3^o même en cas de crues, il faut refuser aux voisins de l'étang le droit d'y prendre de l'eau, car, si chaque riverain opérât une dérivation par de saignées, où serait la garantie du propriétaire? Mais les riverains d'un étang peuvent, par prescription, acquérir le droit d'y exercer des prises d'eau." 5 *LABORI, RÉPERTOIRE DU DROIT FRANÇAIS*, 466-467.

⁸⁵ "Mais le propriétaire ne peut détourner les eaux de leurs cours normal, à la sortie de l'étang, sans s'exposer à une action des riverains d'aval." 1 *PICARD, TRAITÉ DES EAUX*, 2 ed., 347-348. Likewise *BAUDRY-LACANTINÉRIE ET CHAUVEAU, DES BIENS*, 584, 585.

⁸⁶ "Les dispositions de ces articles sont donc étrangères aux eaux pluviales *quater*, et à celles des lacs, étangs ou réservoirs. Elles restent sans application aux eaux dérivées d'un étang, alors même qu'elles seraient conduites, au lieu où elles doivent être utilisées, par le lit d'une ancienne rivière ou qu'il s'y mêlerait des eaux provenant de ruisseaux supérieurs. Mais il en est autrement des cours d'eau naturels traversant des étangs qu'ils alimentent." 3 *AUBRY ET RAU, DROIT CIVIL*, 5 ed., 80. See *BAUDRY-LACANTINÉRIE ET CHAUVEAU, DES BIENS*, 559.

"One of our good authors, after having established this principle (that lakes and ponds are outside the riparian code section) adduces matters in derogation thereof which are another example of the deplorable uncertainty which prevails upon the doctrine. 'If,' says Proudhon, 'the pond is fed by spring waters which flow naturally and continuously, there is no reason to distinguish it from a running watercourse, and undoubtedly the neighboring landowners thereon may instal ditches.'"⁸⁷

These questions are further discussed at length in the French books, and without doubt any one who has a problem in that line will find profit in consulting them.

In the common law authorities it is said in effect that a lake and its incoming or outletting stream should be considered as a unit, with like rights on every part of it,⁸⁸ and that riparian owners on the lake may take water therefrom as against each other as well as against riparian owners on the incoming or departing streams, and *vice versa*.⁸⁹

4. "Underground waters are governed by article 552 of the French Civil Code. The proprietor of the surface is proprietor of what is beneath."⁹⁰ In repeating this, another commentator adds: "It results that the proprietor of a tract of land is proprietor of the waters originating therein, as he is of the soil, the sand, the stones which make up the land."⁹¹ It is accordingly laid down by these and other commentators that no action lies against a landowner

⁸⁷ "Un de nos bons auteurs, après avoir établi ce principe, y apporte des dérogations qui sont un nouvel exemple de la déplorable incertitude qui règne dans la doctrine. 'Si,' dit Proudhon, 'l'étang est alimenté par des eaux de source qui se reproduisent naturellement et continuellement, il n'y aura plus de raison de la distinguer d'une eau courante, et bien *certainement* les voisins y pourront pratiquer des rigoles.'" 7 LAURENT, PRINCIPES DE DROIT CIVIL, 302.

⁸⁸ Duckworth v. Watsonville, etc. Co., 150 Cal. 520, 89 Pac. 338 (1907); *ibid.*, 158 Cal. 206, 110 Pac. 927 (1910).

⁸⁹ Turner v. James Canal Co., 155 Cal. 82, 99 Pac. 520 (1909). See King v. Chamberlin, 20 Idaho, 504, 118 Pac. 1099 (1911); Kennedy v. Niles, etc. Co., 173 Mich. 474, 139 N. W. 241 (1912); Ryan v. Quinlan, 45 Mont. 521, 124 Pac. 512 (1912); State ex rel. Ham v. Superior Ct., 70 Wash. 442, 126 Pac. 945 (1912); Hardin v. Jordan, 140 U. S. 371, 390, 11 Sup. Ct. Rep. 808 (1891); 2 HARV. L. REV. 196 and 316; 3 HARV. L. REV. 1.

⁹⁰ "Les eaux souterraines sont régies par l'article 552 du Code civil. Le propriétaire du dessus est propriétaire du dessous." 2 FABREGUETTES, TRAITÉ DES EAUX PUBLIQUES ET PRIVÉES, 235 (1911).

⁹¹ "Il en résulte que le propriétaire d'un fonds est propriétaire des eaux qui y jaillissent, comme de la terre, du sable, des pierres, qui constituent le sol." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 400.

excavating in his land and thereby impairing the underground supply in other lands.

In announcing this as likewise the common law an English court remarked:

"The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe." ⁹²

Nevertheless it is a rule that has not wholly stood the test of time either in France or England, and has been laid aside entirely in many states in America.

In France certain code sections particularly relating to the rule, namely, articles 641, 642, 643, were changed in 1898. As they had previously stood and as construed by the courts they had been held by most commentators to leave room for doubt whether they authorized destruction or diversion of springs if they were the source of a stream flowing to the lands of others below.⁹³ The new article 643 of 1898 provides: "If on leaving the land where they arise the waters of springs form a watercourse having the character of public and running waters, the proprietor cannot divert them from their natural course to the prejudice of lower users." ⁹⁴

⁹² *Acton v. Blundell*, 12 M. & W. 324, 353, 13 L. J. Ex. 289, 152 Eng. Reprint, 1223 (1843).

⁹³ "*Droit du propriétaire sur les sources qui émergent dans son fonds.* — Aux termes de l'art. 641 du Code civil, 'celui qui a une source dans son fonds peut en user à sa volonté, sauf le droit que le propriétaire inférieur peut avoir acquis par titre ou par prescription.' Ainsi le Code attribue au propriétaire du fonds où émerge une source un véritable droit de propriété sur cette source." 1 PICARD, *TRAITÉ DES EAUX*, 2 ed., 112.

"Le propriétaire de la source conserve-t-il son droit absolu de propriété sur les eaux quand elles forment l'affluent d'une rivière? On lit dans un arrêt de la cour de cassation que le droit de disposition absolue des eaux reçoit exception 'au cas où les eaux ont été volontairement abandonnées à la communauté irrigative' (c'est-à-dire aux propriétaires inférieurs qui s'en servent pour l'irrigation de leurs fonds); 'qu'elles prennent alors le caractère d'eaux publiques et courantes, et que la loi crée, en ce cas, des droits qui modifient ceux du propriétaire primordial' (Arrêt de rejet du 22 mai 1854 (Dalloz, 1854, 1, 301)). Cette même exception a été admise comme un principe par la cour de Rouen (Rouen, 17 juillet 1857 (Dalloz, 1857, 2, 181)). Il nous semble que la jurisprudence confond deux ordres d'idées tout à fait différents." 7 LAURENT, *PRINCIPES DE DROIT CIVIL*, 213-214.

⁹⁴ "Si dès la sortie du fonds où elles surgissent les eaux de sources forment un cours

It is said that the civil law has a further general exception where the interference with underground water (whether feeding a stream or not) is accompanied by malice in the interferer.⁹⁵ It is therefore interesting to note the following French statement:

"Many authors, notably Pardessus, have maintained, in reliance upon reasons of morality and public policy, that the courts ought to condemn enterprises whose sole object is to harm neighboring property and which amount thus to an abuse in exercising the right of property. This doctrine seems to us, as to Demolombe, against the text of the law; it would give rise, in its application, to inextricable difficulties and would necessitate a veritable inquisition into the motives and the intentions of the makers of excavations: the Court of Cassation has rejected it as applied to springs," etc.⁹⁶

In England the first-mentioned modification (where the underground water affects a surface stream) has been asserted in some decisions,⁹⁷ and, although subsequently discouraged,⁹⁸ it is probably not wholly disposed of as a partial retreat from the original rule. The second modification (the malicious motive) has been more definitely rejected.⁹⁹

In America the first-named modification (ground water affecting a stream) has been established,¹⁰⁰ and, further, the original rule

d'eau offrant le caractère d'eaux publiques et courantes, le propriétaire ne peut les détourner de leurs cours naturel au préjudice des usagers inférieurs." Art. 643, Code civil, nouveau. For a discussion of this new provision see 3 AUBRY ET RAU, 5 ed., 56 *et seq.* BAUDRY-LACANTINÉRIE ET CHAUVEAU, TRAITÉ DE DROIT CIVIL, DES BIENS., 581.

⁹⁵ *Chasemore v. Richards*, 7 H. L. Cas. 349, 383 (1859).

⁹⁶ "Plusieurs auteurs, notamment Pardessus (des Servitudes, n° 78) et Daviel (des Cours d'eau, tome III, n° 895), ont enseigné, en se fondant sur des raisons de morale et d'intérêt public, que les tribunaux devraient condamner les entreprises dont l'unique objet serait de nuire au fonds voisin et qui constitueraient ainsi un abus dans l'exercice du droit de propriété. Cette doctrine nous paraît, comme à Demolombe, contraire aux textes; elle soulèverait dans l'application des difficultés inextricables et nécessiterait une véritable inquisition sur les motifs et les intentions de l'auteur des fouilles; la Cour de cassation l'a repoussée pour les sources, ainsi que nous le verrons plus loin." I PICARD, TRAITÉ DES EAUX, 2 ed., 77.

⁹⁷ *Grand Junction, etc. Co. v. Shugar*, L. R. 6 C. A. 483 (1871); *Dudden v. Clutton Union*, 1 H. & N. 627, 156 Eng. Reprint, 1353 (1857); *Dickinson v. Grand Junction Co.*, 7 Exch. 282, 155 Eng. Reprint, 953 (1852).

⁹⁸ *English v. Metropolitan, etc. Board*, [1907] 1 K. B. 588, 601; *Chasemore v. Richards*, 7 H. L. 349, 11 Eng. Reprint, 140 (1859).

⁹⁹ *Bradford Corporation v. Pickles*, [1895] A. C. 587.

¹⁰⁰ *Chauvet v. Hill*, 93 Cal. 407, 408, 28 Pac. 1066 (1892); *Gutierrez v. Wege*, 145 Cal. 730, 734, 79 Pac. 449 (1905); *McClintock v. Hudson*, 141 Cal. 275, 281, 74 Pac.

is now generally discarded as a whole. The American cases now usually limit each landowner, as against his neighbor, to acts done in the reasonable use of his own land, and not for use elsewhere, nor even for a use on his own land that is not, in the discretion of the court, reasonable under the circumstances presented.¹⁰¹ The general proposition that malice or motive is not a subject of legal inquiry is usually maintained, however.¹⁰²

5. Public lands and the waters thereon have always figured largely in our western water law. A large portion of that law has been devoted to diversions of water from public lands, the United States having with respect thereto recognized the right of the prior appropriator by the Act of Congress of 1866.¹⁰³ The riparian rights in the French law are likewise not applied upon streams that are "appurtenances of the public domain."¹⁰⁴

Another French code section has a unique analogy in California decisions concerning the water rights of the city of Los Angeles. The French section gave preferential rights, against private riparian owners, to a commune, village, or hamlet through which the stream might flow.¹⁰⁵ In California, after much litigation, the city of Los Angeles as successor of the Mexican Pueblo de los Angeles has been held to have succeeded to a public water supply from the Los Angeles River which runs through the city, and to have a right to the whole river as against private riparian owners thereon.¹⁰⁶ This result was reached after an examination of Mexican and Spanish law, without

849 (1903); *Cohen v. La Canada W. Co.*, 142 Cal. 437, 439-440, 76 Pac. 47 (1904); *In re German, etc. Co.*, 56 Colo. 252, 139 Pac. 2 (1914); *Bastian v. Nebeker*, 49 Utah, 390, 163 Pac. 1092 (1917); and other cases in WIEL, WATER RIGHTS, 3 ed., § 1082.

¹⁰¹ *Ballantine & Sons v. Public Service Corp.*, 86 N. J. L. 331, 91 Atl. 95 (1914); *Cason v. Florida Power Co.*, 74 Fla. 1, 76 So. 535 (1917); *Patrick v. Smith*, 75 Wash. 407, 134 Pac. 1076 (1913); and other authorities in WIEL, WATER RIGHTS, 3 ed., §§ 1063, 1066.

¹⁰² Compare *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766 (1903), and *Union Labor Hospital v. Vance Redwood Lumber Co.*, 158 Cal. 551, 555, 112 Pac. 886 (1910). See *Dunshee v. Standard Oil Co.*, 152 Iowa, 618, 132 N. W. 371 (1911).

¹⁰³ 14 STAT. AT L. 253, 254, c. 262, § 4 of A. C. July 26, 1866; U. S. COMP. STATS. 1901, p. 1437; REV. STATS. § 2339; also § 17 of A. C. July 9, 1870, 16 STAT. 218; U. S. COMP. STAT. 1901, p. 1437; REV. STATS. § 2340. See WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., Parts I, II; 1 CAL. L. REV. 11.

¹⁰⁴ Code Napoléon, Article 644.

¹⁰⁵ Code civil, § 643. By amendment in 1898 the provision in this regard was somewhat changed and transferred to § 642.

¹⁰⁶ WIEL, WATER RIGHTS, 3 ed., § 68.

mention of French law. It is an exception to the prevailing common law doctrine that a city as such is not a riparian owner, but only its lot owners who front on the stream.¹⁰⁷ So far as it comes from Mexican law in the case of Los Angeles, it seems to be public land law (which is the reason for mentioning it here).¹⁰⁸ It is placed in the judicial opinions in the Los Angeles cases, however, upon a special power resting in pueblos by general law (similar to the provision in the French code).

The Los Angeles cases enforce the "pueblo right" to the extent of enjoining landowners in the upper San Fernando Valley from using wells so far as the wells prevent underground water from seeping to the headwaters of the river.¹⁰⁹ This goes further than the French authorities indicated in the following passage. Speaking of the code section forbidding the owner of a spring from changing the course of a stream flowing therefrom, when the latter supplies the inhabitants of a commune, village, or hamlet, the commentator says:

"Incorporated into the law for the purpose of dealing with surface springs, it cannot be extended to underground waters. This extension, besides, would have consequences of exceptional gravity, since it would allow opposition to all excavations that might cut veins of water, and would tie up property with a kind of interdict. Therefore the decisions of the Court of Cassation have never hesitated to recognize that the communes cannot, in invoking article 643, interpose obstacles to the exercise of the upper proprietor's right to excavate even when his operations would have the effect of changing the course of underground waters."¹¹⁰

¹⁰⁷ FARNHAM, *WATERS AND WATER RIGHTS*, 603, 609-612; 40 Cyc. 764-765; 37 L. R. A. (N. S.) 312, note. A case of note is *City of Emporia v. Soden*, 25 Kan. 588 (1881), by Mr. Justice Brewer, later of the United States Supreme Court.

¹⁰⁸ See WIEL, *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., § 68.

¹⁰⁹ *Los Angeles v. Hunter*, 156 Cal. 603, 105 Pac. 755 (1909).

¹¹⁰ "Aux termes de l'art. 643 du Code civil, 'le propriétaire de la source ne peut en changer le cours, lorsqu'il fournit aux habitants d'une commune, village ou hameau, l'eau qui leur est nécessaire.' De même que toutes les exceptions au droit commun, cette disposition prohibitive doit être restreinte à l'objet précis pour lequel elle a été édictée. Inscrite dans la loi pour les sources extérieures, elle ne peut être étendue arbitrairement aux eaux souterraines. Cette extension aurait du reste des conséquences d'une gravité exceptionnelle, puisqu'elle permettrait de s'opposer à toutes les fouilles susceptibles de couper les veines d'eaux et frapperait la propriété d'une sorte d'interdit. Aussi la doctrine et la jurisprudence de la Cour de cassation n'ont-elles jamais hésité à reconnaître que les communes ne pouvaient, en invoquant l'art. 643, porter obstacle

6. Easements for dams on riparian lands of others, and rights of way to conduct water therefrom to the place of use, are governed in many respects by two French statutes, one enacted in 1845 and the other in 1847, which are always found discussed in connection with the code sections. "Subsequent to the Civil Code, two laws, one under date of April 29, 1845, and the other of July 11, 1847, have imposed upon properties three new obligations in favor of agriculture by giving very great facilities to irrigation. These three obligations are ordinarily classed as servitudes. They are servitudes of support [for dams], of [right of way for] aqueducts, and of discharge of waters after irrigation. These new provisions have not otherwise produced any modification of the rules laid down by the Code concerning the ownership and use of waters; nor have they affected the laws which have for their object the policing of waters."¹¹¹

The riparian owner on whose land servitude of supporting a dam is thus imposed is entitled to compensation, as is also every landowner over whose land the conduit therefrom is built. The statutes are therefore founded upon the principle of condemnation with compensation.

They apply only to irrigation, and not to industrial works or

au droit de fouille du propriétaire supérieur, alors même que les travaux avaient pour effet de modifier le cours des eaux souterraines. (C. C. civ., 29 novembre 1830, commune de Fagon *c.* Masse; — req. 15 janvier 1833; commune de Fayence *c.* Dubourguet; — civ., 26 juillet 1836 ville d'Apt *c.* Pin; — civ., 4 décembre 1849, Mercader *c.* Couder et Lacvivier; — civ., 28 mai 1872, ville de Toulon et commune du Revest *c.* Ciedu Ragas)." 1 PICARD, *TRAITÉ DES EAUX*, 2 ed., 80, 81.

¹¹¹ "Postérieurement au Code civil, deux lois en date l'une du 29 avril 1845, l'autre du 11 juillet 1847, sont venues mettre à la charge des propriétés trois nouvelles obligations en vue de favoriser l'agriculture par des facilités plus grandes données à l'irrigation; ces trois obligations sont ordinairement qualifiées de servitudes: ce sont les servitudes d'appui, d'aqueduc et d'écoulement des eaux d'irrigation. Ces dispositions nouvelles n'ont d'ailleurs apporté aucune dérogation aux règles tracées par le Code sur la propriété et l'usage des eaux; elles n'ont pas davantage touché aux lois qui ont pour objet la police des eaux (art. 5, L. 29 avril 1845; art. 4, L. 11 juill. 1847)." 5 LABORI, *RÉPERTOIRE DU DROIT FRANÇAIS*, 457.

"Quant aux discussions longues et laborieuses, qui ont précédé le vote de la loi (of 1845), soit à la Chambre des députés, soit à la Chambre des pairs, elles n'établissent pas que le législateur ait entendu modifier les règles du Code civil ou en fixer l'interprétation, dans le sens de l'extension des droits d'usage aux propriétés non riveraines. La plupart des orateurs et spécialement les deux rapporteurs, MM. Dalloz et Passy, ont affirmé à diverses reprises que ces règles demeuraient intactes et qu'il n'y était dérogé ni directement ni indirectement." 1 PICARD, *TRAITÉ DES EAUX*, 2 ed., 361; 3 AUBRY ET RAU, 5 ed., 35, 36, *accord*.

water power.¹¹² The extent of the irrigation, whether a garden or a farm, by urrows or by flooding, is not a factor. The granting or refusing of an application for permit to exercise the servitude is not of right, but is discretionary with the tribunals hearing the petition, in the exercise of which discretion they consider among other things the balance of injury and benefit. The compensation to be awarded includes among other elements the damage expected to result from occupation of the land needed, and from the exercise of the servitude of access to the ditch or dam for the purpose of maintaining and repairing it, but not speculative damages based upon future considerations that cannot be reduced to a reasonable certainty.¹¹³ Parks and enclosures about dwellings are excluded from the law of 1845 relative to rights of way, but are not exempted from the law of 1847 relative to building dams.¹¹⁴ The statutes apply to facilitating riparian uses as well as nonriparian uses,¹¹⁵ and under them a riparian owner may build a dam beyond the middle of the stream on the land of an opposite riparian owner, or may bring his water from a point above his boundary line.¹¹⁶ Some further information regarding these statutes has been noted by the present writer in another place.¹¹⁷

This matter of obtaining access to streams over lands of another has been a source of considerable contention in this country. In early California a statute giving miners a right of entry on private land of agriculturists was held unconstitutional. On the other

¹¹² I PICARD, *TRAITÉ DES EAUX*, 2 ed., 377-379. See Water Supply Paper 238 of the United States Geological Survey, concerning efforts to get legislation extending these acts to water power uses.

¹¹³ I PICARD, *TRAITÉ DES EAUX*, 2 ed., 377-379.

"Cette servitude d'appui n'existe que pour les besoins de l'irrigation; elle ne peut être exercée qu'autant que les besoins sont sérieux, et qu'elle ne causera pas un trop grand préjudice aux propriétés voisines. Par suite, lorsque les tribunaux sont saisis d'une demande tendant à obtenir l'exercice de la servitude au cas de désaccord entre le riverain désireux d'appuyer un barrage et le riverain opposé, ils ont un pouvoir d'appréciation absolu et ne sont nullement astreints par la disposition de la loi du 11 juillet 1847 de reconnaître au demandeur le droit de servitude qu'il prétend exercer. Aubry et Rau, t. 3, sec. 241, texte et note 25; Demolombe, t. 11, n. 228; Ballot, loc. cit. — Bien entendu, elle ne peut être réclamée que moyennant le paiement d'une juste et préalable indemnité. Mais il n'existe aucune limitation en raison du mode d'irrigation employé." 5 LABORI, *RÉPERTOIRE DU DROIT FRANÇAIS*, 457.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, 384.

¹¹⁶ *Ibid.*

¹¹⁷ WIEL, *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., § 614.

hand in early Colorado, followed in a number of other Western states, decisions allowed such entry for dam and ditch-building without compensation and without even an enabling statute. The California stand has been maintained, so far as the water is sought for private use as distinguished from public distribution. The Colorado position has been maintained only so far as statutes have since been enacted for it upon the basis of condemnation with compensation; not, however, confined to public distribution projects, as in California, but extending also to private enterprises (such as water for the irrigation of one's private farm), as in France, and extending (beyond the French acts) to other purposes, such as mining, lumbering, etc.¹¹⁸ In view of the similarity to the French system, the experience under the French statutes would seem to offer considerable interest where these questions arise in this country.

7. Public administration is extensively treated in the French books. It seems to be confined to the ordinary administrative officers, with only occasionally a special office for water matters. In a number of American states water commissions have been created to pass upon permits for water uses, the erection of dams and canals, and general supervision.¹¹⁹

The scope of the French administrative activity will be indicated by extracting the following three articles from a set based upon a "model" or form of general regulations of the year 1878:

"Art. 4.—Every proprietor who wishes to undertake construction upon a watercourse or adjacent thereto must submit to the prefect the plans which he proposes to adopt. Within two months following the filing of this communication, the prefect, after having taken advice of engineers, will make known to the petitioner whether the proposed works appear

¹¹⁸ Upon this matter see WIEL, *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., §§ 221-226; 607-614; and compare the following among decisions more recent: *Inspiration, etc. Co. v. New Keystone, etc. Co.*, 16 Ariz. 257, 144 Pac. 277 (1914); *Gravelly Ford, etc. Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 Pac. 150 (1918); *Ibid.*, 36 Cal. App. 717, 178 Pac. 155 (1918); CAL. CONST. Art. XII, § 23; CAL. STAT. 1911, chap. 719; CAL. STAT. 1913, p. 1012, § 12; *City of Albuquerque v. Garcia*, 17 N. Mex. 445, 130 Pac. 118 (1913); *Stettler v. O'Hara*, 69 Ore. 519, 139 Pac. 743 (1914); *Tanner v. Beers*, 49 Utah, 536, 165 Pac. 465 (1917); *Monettaire, etc. Co. v. Columbus, etc. Co.*, 174 Pac. (Utah) 172 (1918); *Irwin v. J. K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911 (1918); *Grover, etc. Land Co. v. Lovella Ditch, etc. Co.*, 21 Wyo. 204, 131 Pac. 43 (1913); *Union Lime Co. v. Chicago, etc. Co.*, 233 U. S. 211, 34 Sup. Ct. Rep. 522 (1914).

¹¹⁹ See WIEL, *WATER RIGHTS*, 3 ed., chaps. 49, 50.

likely to impair the free flow of the waters, and whether, as a consequence, the administration is opposed to their execution. After waiting this period, if he has received no reply, the petitioner may proceed, without prejudice, however, to the rights of third persons and the rights of the Administration.

Art. 5.—No dam, no foundation, no permanent or temporary work of a nature to change the régime of the waters may be established or reconstructed upon a watercourse without the authorization of the prefect.

Art. 6.—It is forbidden to use cuts in the banks or other means of diversion without having obtained the authorization of the prefect."

Thus permission in advance is required for takings of water for industrial, agricultural, and for all works to be established in the bed of streams.¹²⁰

It is held that the necessity of securing a permit applies to works of riparian owners as well as others. Attention in this regard is called by the commentators to section 645 of the Civil Code, which requires the courts to respect local rules. Administration regulations are considered to be local rules within this provision.¹²¹ Works

¹²⁰ "Art. 4. — 'Tout propriétaire, qui veut opérer une construction au-dessus des cours d'eau ou les joignant, doit soumettre au préfet les dispositions qu'il se propose d'adopter. Dans les deux mois qui suivront le dépôt de cette communication, le préfet, après avoir pris l'avis des ingénieurs, fera connaître au pétitionnaire si les ouvrages projetés paraissent devoir nuire au libre écoulement des eaux, et si, en conséquence, l'Administration s'oppose à leur exécution. Après ce délai, s'il n'a reçu aucune réponse, le pétitionnaire pourra passer outre, sans préjudice toutefois des droits des tiers et de ceux de l'Administration.'

"Art. 5. — 'Aucun barrage, aucune plantation, aucun ouvrage permanent ou temporaire de nature à modifier le régime des eaux ne peut être établi ou réparé sur un cours d'eau sans l'autorisation du préfet.'

"Art. 6. — 'Il est interdit de pratiquer dans les berges des coupures et autres moyens de dérivation sans avoir obtenu l'autorisation du préfet.'

"Ainsi les prises d'eau industrielles ou agricoles et tous les ouvrages à établir dans le lit des cours d'eau nécessitent une permission préalable. Pour les ouvrages supérieurs, l'Administration se contente d'exiger une communication qui la mette à même d'exercer son droit de veto." 2 PICARD, *TRAITÉ DES EAUX*, 2 ed., 27, 28.

¹²¹ "La seule difficulté est de savoir s'il faut au riverain une autorisation de l'Administration. Il a été jugé que le riverain ne peut, alors même qu'il est propriétaire des deux rives, construire un barrage sans autorisation. Dans l'espèce, il y avait un règlement local (Arrêt de cassation de la chambre criminelle du 15 novembre 1838 (Daloz, au mot *Eaux*, n° 581, 3°)), et l'article 645 veut que les règlements locaux soient observés." 7 LAURENT, *PRINCIPES DE DROIT CIVIL*, 339.

"Les riverains ont-ils besoin d'une autorisation pour faire soit des travaux de défense, soit des ouvrages destinés à faciliter l'usage des eaux? S'il y a un règlement qui prescrit l'intervention de l'administration, il va sans dire que les riverains doivent l'observer, car la loi fait un devoir aux tribunaux d'en assurer l'exécution (art. 645).

constructed by riparians without permission may be ordered suppressed.¹²²

The regulative power does not extend to granting concessions to nonriparian appropriators so as to be valid against riparian owners; the latter may always have recourse to the courts against the administrative action. One French minister of public works declared that he had never attempted to make any such concessions against riparian rights, and a law proposing to give him such power was rejected and never got passed.¹²³ The actions of the administrative officers are always subject to vested rights, the commentators agree, and an infringement of them may still be judicially redressed.¹²⁴ "The general regulations never have the effect of cutting off private claims to rights of use, so far as their provisions allow such rights to exist. The users remain free to submit these claims to judicial determination."¹²⁵ The same ruling is made in

Même en l'absence de règlement, on décide, en France, qu'aucun barrage ne peut être établi sans une autorisation préalable, et cette jurisprudence a été sanctionnée par le décret du 25 mars 1852 (Demolombe, t. XI, p. 214 n° 272, et les autorités qu'il cite. Il faut ajouter un arrêt de rejet du 11 mai 1868 (Dalloz, 1868, 1, 468)). En Belgique, un arrêté royal du 28 août 1820 a décidé la question dans le même sens." 7 LAURENT, *PRINCIPES DE DROIT CIVIL*, 351.

¹²² "Il arrive souvent que des travaux sont exécutés par les riverains sans l'autorisation de l'autorité administrative: l'administration reste toujours libre d'ordonner la suppression de ces travaux sans indemnité." 5 LABORI, *RÉPERTOIRE DU DROIT FRANÇAIS*, 417-418.

But the same author intimates that this is the rule only where a regulation against unauthorized work has been specially made. "L'exécution de travaux sans autorisation ne constitue pas à elle seule une contravention; pour que le fait soit susceptible de répression, il faut, en outre, qu'un règlement soit venu défendre toute construction non autorisée." 5 LABORI, *RÉPERTOIRE DU DROIT FRANÇAIS*, 418.

¹²³ 3 AUBRY ET RAU, 4 ed., 19, note 22.

¹²⁴ "Les mesures individuelles prises par l'administration doivent respecter les droits acquis; les actes administratifs contiennent en général toutes réserves à cet égard. Si le règlement d'eau porte atteinte aux droits d'usage conférés par l'art. 644 ou acquis par titre ou prescription, les particuliers lésés sont en droit de se pourvoir devant l'autorité judiciaire." 5 LABORI, *RÉPERTOIRE DU DROIT FRANÇAIS*, 417.

"Or, la loi n'accorde qu'aux riverains le droit de se servir des eaux; l'administration ne peut pas étendre ce droit aux non-riverains. Elle enlèverait par là aux riverains le volume d'eau qu'elle concéderait à un non-riverain; ce serait, en un certain sens, une expropriation sans indemnité et dans un intérêt particulier; ce qui serait en définitive une violation de la propriété." 7 LAURENT, *PRINCIPES DE DROIT CIVIL*, 328.

¹²⁵ "Les règlements généraux n'ont jamais pour effet de trancher les contestations d'intérêt privé sur les droits d'usage, tels que leurs dispositions les laissent subsister. Les usagers demeurent libres de soumettre ces contestations à l'autorité judiciaire." 2 PICARD, *TRAITÉ DES EAUX*, 2 ed., 79.

America with respect to water commissions.¹²⁶ There is thus a mingling of administrative and judicial authority in water matters, which one French commentator refers to as "unique under our law."¹²⁷

The administrative permit is thus no defense to a judicial action to abate the permitted act at the suit of the owner of a vested right infringed by it. But it seems that damages against the permittee will not be granted,¹²⁸ unless he has broken the regulations.¹²⁹ *Query*, whether there is such distinction between injunction and damages in this respect in American law.¹³⁰

The permits are revocable by the administrative authority grant-

¹²⁶ WIEL, *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., §§ 410, 411, 1192-1194, 1211. See also subsequently *Youngs v. Regan*, 20 Idaho, 275, 118 Pac. 499 (1911); *King v. Chamberlin*, 20 Idaho, 504, 118 Pac. 1099 (1911); *Gard v. Thompson*, 21 Idaho, 485, 123 Pac. 497 (1912); *Marshall v. Niagara, etc. Co.*, 22 Idaho, 144, 125 Pac. 208 (1912); *Washington State Sugar Co. v. Goodrich*, 27 Idaho, 26, 147 Pac. 1073 (1915); *Gearhart v. Frenchman, etc. Irr. Dist.*, 97 Neb. 764, 151 N. W. 323 (1915); *Knox v. Kearney*, 37 Nev. 393, 142 Pac. 526 (1914); *Owens v. Snider*, 52 Okla. 772, 153 Pac. 833 (1915); *Gay v. Hicks*, 33 Okla. 675, 124 Pac. 1077 (1912); *Pringle Falls, etc. Co. v. Patterson*, 65 Ore. 474, 128 Pac. 820, 132 Pac. 527 (1912); *St. Germain, etc. Co. v. Hawthorne Ditch Co.*, 32 S. Dak. 260, 143 N. W. 124 (1913); *Chandler v. Utah, etc. Co.*, 43 Utah, 479, 135 Pac. 106 (1913); *Peterson v. Eureka, etc. Co.*, 176 Pac. (Utah) 729 (1918).

¹²⁷ "... nous rencontrerons même certaines difficultés de droit dans lesquelles s'exerce concurremment la juridiction de l'une et de l'autre autorité, circonstance peut-être unique dans notre droit." 5 *LABORI, RÉPERTOIRE DU DROIT FRANÇAIS*, 400.

"Du pouvoir qui appartient à l'administration de fixer la hauteur à laquelle doivent être tenues les eaux des moulins et usines on a parfois conclu que, dans certains cas, les tribunaux devaient se refuser à statuer, et renvoyer les parties devant l'autorité administrative; Cass. 28 dec. 1830 (S. 31.1.44) — Ce point de vue n'a pas paru exact; on a fait remarquer, en effet, que les tribunaux ne devaient surseoir à statuer qu'autant qu'une question de police des eaux était soulevée, et qu'ils devaient statuer dans toute autre hypothèse: Cass. 5 mars 1833 (S. 33.1.479) — *Aubry et Rau, loc. cit.*" 5 *LABORI, RÉPERTOIRE DU DROIT FRANÇAIS*, 418.

¹²⁸ "... les riverains, auxquels la réglementation nouvelle porte un préjudice, ne sauraient réclamer aucune réparation de ceux qui l'ont causé par leur obéissance aux prescriptions de l'autorité compétente." 5 *LABORI, RÉPERTOIRE DU DROIT FRANÇAIS*, 417.

¹²⁹ "Toutefois l'observation des règlements ne peut, en aucun cas, donner lieu à une action de la part des tiers, alors même que ceux-ci seraient atteints dans leur jouissance antérieure et subiraient un préjudice: nul n'est tenu à une réparation pour avoir obéi à la loi. Inversement, les contraventions aux règlements peuvent servir de base à une action en réparation du dommage qui en résulterait pour les tiers." 2 *PICARD, TRAITÉ DES EAUX*, 2 ed., 79.

¹³⁰ See authorities *supra*, note 123. Compare *Cason v. Florida Power Co.*, 76 So. (Fla.) 535 (1917).

ing them, and without compensation.¹³¹ In America, the revocability has been a subject of contention for some years.¹³²

Comparison of these and of many similar matters as discussed in the French books with the rules and regulations of our water boards and commissions and of the federal departments having to do with reservoirs and canals built upon public lands or upon navigable rivers will suggest many points of common interest.

8. In the same connection, our public-service commissions have taken over the regulation of charges and conditions of distribution of water by distributors to their consumers, which step (unless recently) has apparently not yet been definitely taken in France. The companies are required to publish their charges and regulations, but it seems to be still treated as arguable whether these rates and regulations can be publicly controlled, and whether they need necessarily be followed.

As indicating public control the following statement is quoted from Labori:

"The waters of irrigation canals are considered, with their laterals, as 'res nullius,' whose use is reserved to all, and which for that reason are insusceptible of private appropriation. Consequently, while the bed of an irrigation canal or ditch may be the subject of a private property right, it is otherwise with the water which fills it; the agreements of the parties cannot prevail against the declared policy of the public authority which has distributed this water with a view to the common interest." ¹³³

¹³¹ "La concession règle l'exercice d'un droit préexistant; elle n'en confère aucun au concessionnaire. Il est certain que celui-ci ne peut pas s'en prévaloir comme d'un droit acquis à l'égard de l'administration; l'autorité administrative intervient toujours dans un intérêt public, et l'on ne peut jamais opposer un droit, pour mieux dire un intérêt privé à l'intérêt public; bien moins encore peut-on fonder un droit sur un acte administratif. Les autorités qui agissent dans l'intérêt public, le pouvoir exécutif aussi bien que le pouvoir législatif, peuvent toujours revenir sur ce qu'elles ont fait, en abrogeant leurs actes ou en les modifiant; il n'y a pas de droit acquis contre l'État. De là le principe que les concessions en matière de cours d'eau sont essentiellement révocables, et la révocation se fait, comme nous l'avons déjà dit, sans que le concessionnaire ait droit à une indemnité, du moins en vertu de la concession. S'il a des droits préexistants contre un co-riverain, il peut les faire valoir en justice (Ordonnance du conseil d'État du 18 novembre 1842 (Dalloz, au mot *Eaux* n° 470, 1^{re})). Car il résulte encore de la nature des concessions qu'elles ne sauraient donner ni enlever un droit." 7 LAURENT, PRINCIPES DE DROIT CIVIL, 394-395.

¹³² See WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., §§ 432, 434, 437.

¹³³ "Les eaux des canaux d'irrigation sont considérées avec leurs ramifications, comme des 'res nullius,' dont l'usage est réservé à tous, et qui, à ce titre, sont insusceptibles d'appropriation privée. Si par suite le lit des canaux ou fossés d'irrigation peut

On the other hand, against public regulation of the distribution of irrigation water, another commentator says:

"Irrigation canals are not part of the public domain. The definition of this domain by article 538 of the Civil Code: 'the portions of French territory which are not susceptible of private property,' does not apply to these canals; for an irrigation canal may perfectly well belong to an individual. Their use is never public. Without doubt, the large canals are established in the general interest of the region which they serve. But there is no right for every one, nor even for all of the riparians, to use them free or to take water from them at will; it is only by virtue of private contracts that certain proprietors make use of them to irrigate their lands. The character of private property of these canals has been recognized several times in judicial decisions."¹³⁴

The same writer (the date of the work is 1896) discussed the matter further in the same vein. The schedule of rules and charges of irrigation canals, he says, requires contracts of service to conform to a pattern prescribed by the administration; but departure therefrom is allowed. The contract, and not the schedule of rates, governs. This has not been adjudged by the Council of State or by the Court of Cassation, but follows from the principle of freedom of contract. Where it does not exist, as in railways, owing to special legislation nullifying individual contracts, the latter are enforceable in all provisions not contrary to the public order. The contract of service, and not the schedule of rates, is looked to by the courts in suits between the canal owners and the irrigators.¹³⁵

être l'objet d'un droit de propriété privée, il en est autrement de l'eau qui le remplit; les conventions passées entre les parties ne sauraient prévaloir contre la destination de l'autorité publique qui a distribué cette eau au mieux des intérêts communs: Paris, 8 mars 1887 (D. 88. 2. 247)." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 459.

¹³⁴ "Les canaux d'irrigation ne font pas partie du domaine public. La définition donnée de ce domaine par l'article 538 du Code civil: 'les portions du territoire français qui ne sont pas susceptibles de propriété privée,' ne s'applique pas à ces canaux; car un canal d'irrigation peut parfaitement appartenir à un particulier. Leur usage n'est jamais public. Sans doute, les grands canaux sont établis dans l'intérêt général de la contrée qu'ils desservent. Mais il n'appartient pas à tout le monde, ni même à tous les riverains, d'en user librement et d'y puiser de l'eau à volonté; c'est seulement en vertu de contrats privés, que certains propriétaires s'en servent pour irriguer leurs terres. Le caractère de propriété privée de ces canaux a été reconnu à diverses reprises par la jurisprudence (C. C., civ. 1^{er} avril 1884, Compagnie générale des canaux et des travaux publics c. l'Administration de l'Enregistrement)." 4 PICARD, TRAITÉ DES EAUX, 2 ed., 27, 28. This author is Inspecteur Général des Ponts et Chaussées, Président de la section des Travaux Publics, de l'Agriculture, du Commerce et de l'Industrie au Conseil d'État.

¹³⁵ 4 PICARD, TRAITÉ DES EAUX, 2 ed., 54, 55.

This subject has been much debated in the irrigation cases in America, and of recent years the voidability of private contracts has come to be generally acknowledged, wherever they conflict with public rulings or with the requirement of equal service upon equal terms and at reasonable rates and subject to reasonable regulations. The present writer has not read sufficiently upon this matter in the more recent French writers to say whether the passage represents the present French point of view. It is quoted here to show that the form of contention is identical with the stand taken in American irrigation cases until the recent acceptance of the public service doctrines.¹³⁶

In conclusion, it is hoped that among those specially interested in the subject of waters this paper may stimulate a little curiosity to see what else these sources of information contain.¹³⁷

If they disclose a different system than ours, casual attention satisfying curiosity would be as much as they merited. But if found to be the system which we have, only more completely worked out than with us, they seem to offer practical value of marked extent; an available fund of information which can bring considerable light to a region of private law where there has been much groping and puzzling. It cannot, of course, be authority, nor would I wish it to be. I question the advisability of creating foreign authority even over public affairs in excess of judicial requirements. But the French learning can advance our knowledge upon this subject to-day without being authority, as it did when our law went to it for the fundamental principles in the beginning.¹³⁸

Samuel C. Wiel.

SAN FRANCISCO.

¹³⁶ See WIEL, *WATER RIGHTS IN THE WESTERN STATES*, 3 ed., chap. 56.

¹³⁷ The following French books are recommended. They are in the larger law libraries, and copies can be bought from N. A. Phemister Co., 42 Broadway, New York. Their main shortcoming is the uniform lack of proper indexing in French law books.

PARDESSUS, *TRAITÉ DES SERVITUDES*; DAVIEL, *TRAITÉ DE LA LÉGISLATION ET DE LA PRATIQUE DES COURS D'EAU* (1845); DEMOLOMBE, *TRAITÉ DES SERVITUDES*; PICARD, *TRAITÉ DES EAUX*, 2 ed. (1896); BOULÉ ET LESCUEUR, *CODE DES COURS D'EAU*, 2 ed. (1900); FABREGUETTES, *TRAITÉ DES EAUX* (1911); 3 AUBRY ET RAU, *DRIT CIVIL FRANÇAIS*, 5 ed., 5 LABORI, *RÉPERTOIRE DU DROIT FRANÇAIS*; 7 LAURENT, *PRINCIPES DE DROIT CIVIL*; BAUDRY-LACANTINÉRIE ET CHAUVEAU, *TRAITÉ DE DROIT CIVIL, DES BIENS*, 3 ed. (1905).

¹³⁸ Acknowledgment is made to Mr. Richard C. Harrison, San Francisco, for assistance in translating the French passages herein quoted.

LEGAL PREPARATION TESTED BY SUCCESS IN PRACTICE

"THINGS are to be determined, not by arguing, but by trying," said the great lawyer-philosopher, Francis Bacon, in laying the foundation for modern scientific research. In the spirit of that suggestion the effectiveness of different modes of legal preparation should be determined, not so much by *a priori* argument as by observation of what sort of preparation produces the greatest success in actual practice.

The question at once arises, "What is success in practice?" In the opinion of clients, success in practice means success in court. In the opinion of the bar, success in practice means success in court. With success in court follows abundance of clients, lucrative consultation practice, and financial success. With failure in court, clients vanish, consultation practice disappears, and financial returns fade away.¹ Granting that success in court is not an ideal test of a lawyer's success, since it ignores the larger social aspects of the question, yet success in court and no other is the practical test of success applied to the lawyer in the actual world. How far

¹ General agreement that success in court is the proper standard by which to measure a lawyer's success is hardly to be expected. It will be objected by some that success in court is at least sometimes, if not often, won by questionable means. It will be objected, further, that success in court bears no relation to that important but unadvertised part of every honest lawyer's practice in which he guides the affairs of clients to keep them out of litigation, and in which, when controversies arise, he procures adjustments and brings about settlements without resort to court proceedings. This feature will be especially emphasized in connection with the practice of law in the larger commercial centers, where the lawyers generally accounted the most successful are frequently office lawyers who but rarely appear in the court room.

Conceding full weight to such objections, success in court must still be recognized as one of the most important tests of success that can be applied to a member of the legal profession. It is a test of success the accuracy of which depends, in any given situation, upon the relation obtaining between court-room and office practice. As applied to general practice, at least outside of the larger centers, it is believed to be fairly representative. Even in the case of the larger centers it is admitted by some, but will no doubt be denied by others, that successful office practice is usually built upon the foundation of already achieved success in the court room.

legal preparation is reflected in success in court is therefore of great practical consequence, not only to the world of legal education, but also to the community at large, the concerns of which depend largely upon order and justice.

There are differences in aptitudes as well as differences in preparation. The greater inborn ability with which the more capable are often endowed enables them to forge ahead of their less fortunate brethren, even in spite of deficient preparation. The "personal equation" will therefore continue to play a large part in the individual lawyer's chances of success, even after the last word has been spoken regarding effectiveness of preparation. Since with "other things being equal," however, some sorts of preparation produce greater success in court than others, it is instructive to all concerned to observe how differences in legal preparation are reflected in later success in actual practice.

The estimates here submitted² on the questions involved are based on the facts stated in applications for admission to the bar and on the court records of North Dakota. All the candidates admitted to the bar by examination from 1902 to 1913, inclusive, are included in the estimates, and the measure of their success is based upon the complete state Supreme Court record from the beginning of that period till the present time,³ supplemented by a cross-section view of district court work for one term of court covering nearly

² Acknowledgments for much valuable assistance in the preparation of this study are due to a host of friends and helpers. Without the kindly interest of Justices Birdzell and Bruce of the Supreme Court of North Dakota in facilitating my access to the records of qualifications, this study could never have been undertaken. Mr. Howard E. Newton, Clerk of the Supreme Court, should also be mentioned in this connection. Justice Bronson, recently a member of the State Board of Bar Examiners, also assisted with several valuable suggestions. My colleague, Professor Hugh E. Willis, now Acting Dean of the University of North Dakota Law School, by his friendly interest in the subject afforded me constant encouragement. On questions of local information, identification, etc., I have had the most generous assistance from various members of the local bar. Acknowledgment should also be made for the responses by district judges, clerks of district courts, and men in other schools, to inquiries put to them from time to time in the course of this investigation. Further, acknowledgment is due to William H. Greenleaf, former Registrar of the University of North Dakota, for his courtesy in putting the material University records at my disposal when wanted. Lastly, acknowledgment for very welcome assistance in examination of records and recording of computations is due to my small but resourceful better half, my wife.

³ NORTH DAKOTA REPORTS, Vols. 14-36.

every county in the state. It is to be emphasized, therefore, that the estimates of success in practice here submitted are actual totals of results, not merely specimen observations on the basis of which to guess at relatively corresponding totals.

In order to avoid attaching undue weight to any single feature of success in court, such success is viewed from eight different angles in the making of each group comparison. Thus the proportion of any group reaching court is taken as one indication of success, the proportion of cases for each lawyer is taken as another indication of success, and the proportion of winnings in court is taken as a third indication of success. Some weight is also attached to the proportion in any group attaining to such distinction in practice as to have numerous cases. With this process of comparison on all four points for each group carried separately through the whole record of practice in the Supreme Court and through the available record of practice in the District Court, eight percentages of success are obtained for each group. Such percentages are then averaged together for a "final grade" of success for each group as compared with each other group, and this final grade is reduced to the scale of one hundred for convenience in comparison. This method of computation is systematically followed through the following distinct lines of inquiry: 1. Law-school marks. 2. Law-school and office preparation. 3. Time devoted to legal preparation. 4. Prior college education. 5. Age of applicants at the time of admission. 6. Previous occupation. 7. Records of the judges themselves.

I. LAW-SCHOOL MARKS

Some years ago President Lowell published a convincing set of figures showing that the scholarship attained by students in the Harvard Law School followed very closely the record of scholarship made in the preceding collegiate work. Excellent students in college were likely to be good students in the law school. Poor students in college were practically always poor students in the law school. Statistics of similar import have been worked out frequently in recent years, as between different stages in the process of education. The last link in the chain of argument based on such figures has been hard to find, however, since so little statistical information of any reliable character has been at hand to demonstrate

that academic success, as shown by scholarship records, bears any tangible relation to the elusive quantity which we call success in life. So far, no better test of general success has been found than mention in the compilation called "Who's Who." Studies based on "Who's Who" strongly confirm the conclusion that there is a very close correspondence between scholarship in preparation and success in later life.

So far as success in the practice of law is concerned, a far more definite guide than "Who's Who" is available in the reports of decided cases. Given the individual lawyer's scholarship record,⁴ as indicated in his application for admission to the bar, the determination of his success in practice is only a matter of careful observation of the data at hand,⁵ while the proportionate success of his scholarship group becomes merely a matter of careful computation. The figures for the North Dakota bar, based on grouping according to law-school marks as certified at the time of admission to the bar, are as follows:

⁴ It is appropriate to suggest to the men in charge of the various law schools the desirability of reporting grades in detail instead of merely certifying to a general statement of satisfactory work. For inquiries such as the present the details of grades are indispensable. The study herewith presented has been embarrassed a little by the absence of such details in the records of qualifications of an appreciable number of candidates for admission to the bar in North Dakota.

⁵ A suggestion must here be made to reporters of cases, and to the judges or other parties who may speak with authority to correct such matters, that the names of counsel ought always to appear individually and in full, and that the names of the judges from whose courts cases are appealed ought always to appear in the reports of decided cases. Without the names of counsel appearing individually instead of by abbreviated firm names in the reports of cases it becomes difficult to take minutely accurate observations of the results. For example, there are in North Dakota several attorneys named Johnson, now engaged in active practice. In the report of one case O'Connor and Johnson are mentioned as counsel. In another report Grimson and Johnson are mentioned as counsel. Similarly with regard to attorneys bearing the name of Murphy. Thus, when the names Lawrence and Murphy, Fisk, Murphy, and Linde, or Murphy and Toner appear in the reports, only personal knowledge of the parties can enable any one to identify the Murphy or the Johnson meant. The same remark might be duplicated for various other names in the references to counsel in North Dakota. Doubtless the same general situation in this respect exists in nearly every state. It is within the power of court reporters and judges of supreme courts to correct this obstruction to accurate observations and estimates by having inserted in the reports the individual names in full. The same consideration applies for identifying the district judges from whose decisions appeals are made, instead of referring to such appeals merely as coming from such and such a district or county court.

TABLE I

Law-School Grades	General Standing ⁶	Reduced to Scale of 100
90 or better	48.19	86.50
85-89	55.94	100.00
80-84	44.89	80.60
75-79	28.85	51.57
below 75	39.21	70.09

SUPREME COURT PRACTICE

Law-School Grades	No. in Group	No. in Court	Per Cent in Court	No. of Cases in Court	Av. No. per Man	Per Cent of Normal for all Cases in Court	No. Won	No. Lost	Per Cent Won
90 or better	50	23	46	121	5.26	81.81	69	51	57.50
85-89	121	57	47	468	8.21	127.70	218	248	46.78
80-84	117	40	34	157	3.92	60.97	71	86	45.22
75-79	60	12	20	39	3.25	50.55	20	19	51.28
below 75	14	4	28	19	4.75	73.88	4	15	21.05

DISTRICT COURT PRACTICE ⁷

Law-School Grades	No. in Group	No. in Court	Per Cent in Court	No. of Cases in Court	Av. No. per Man	Per Cent of Normal for all Cases in Court	No. Won	No. Lost	Per Cent Won
90 or better	50	14	28	131	9.35	106.23	14	19	42
85-89	121	33	27	335	10.15	115.07	36	34	51
80-84	117	22	19	228	10.36	117.46	34	16	68
75-79	60	12	20	54	4.50	51.02	3	6	33
below 75	14	8	57	54	6.75	76.53	3	4	43

⁶ The original averages for general standing, shown in this column throughout the study, are obtained by taking the several percentages, eight in all, appearing in the detailed tables immediately following, and averaging them together. Thus, the general average of success for any group depends on the average of the group's success as shown by its proportion of participating members, its proportion of the business handled, its proportion of winnings, and its proportion of distinction earned, observations being taken on these four matters separately for supreme-court and for district-court litigation.

⁷ To avoid the possibility of confusion in the understanding of these figures it should be stated that the number of cases actually tried in the district courts by no means equals the number of cases noted for trial on the court calendars. Many cases are settled or abandoned before trial, or continued to a subsequent term of court. Such cases therefore figure in the estimates of the number of cases handled without figuring in the estimates of cases won or lost. A slight discrepancy may for similar reasons also be found between the number of cases in the Supreme Court and the numbers won and lost there.

TABLE I—*Continued*REACHING DISTINCTION IN PRACTICE⁸

SUPREME COURT PRACTICE								DISTRICT COURT PRACTICE							
	No. having over 10 Cases	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	No. having over 10 Cases	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	
90 or better	3	6.00	1	2.00	1	2.00	10.00	5	10.00	2	4.00	0	0	14.00	
85-89	13	10.74	6	4.96	3	2.48	18.18	11	9.09	6	4.95	1	0.82	14.86	
80-84	4	3.41	1	0.85	1	0.85	5.11	5	4.27	3	2.56	3	2.56	9.39	
75-79	0	0	0	0	0	0	0	3	5.00	0	0	0	0	5.00	
below 75	0	0	0	0	0	0	0	2	14.28	0	0	0	0	14.28	

Several features are at once manifest on examination of this table. In the first place, success in court has attended the men in the high-scholarship groups to an extraordinary degree as compared with the success in court of the men in the lower-scholarship groups. From the highest degree of success to the lowest degree of success, as found by comparison of scholarship groups, there is registered a difference of almost fifty per cent. This result will not appear startling to well-informed educators, but should be interesting to many people, including some members of the bar, who look upon academic scholarship with disdain as too "impractical" to have any effect toward reaching the goal of success in the intensely practical realm of workaday litigation.

The predominant success of the high-scholarship groups over the lower groups, when tried in the stern reality of actual litigation would seem to demonstrate that far from high scholarships being too theoretical, the "too theoretical" is largely on the part of the superficial observer, who bases his conclusions on some few isolated cases which he thinks point the other way, and reasons therefrom

⁸ The method employed for reaching an estimate of distinction earned in practice may perhaps need a word of explanation. For each group under observation the number of members having respectively over ten cases, over twenty cases, and over thirty cases, has been taken as the most tangible criterion of distinction. The individual percentages for each gradation of distinction have then been found by comparing the number of men to reach such distinction with the whole number of men in the group. The individual percentages for each gradation of distinction have next been added together to form the general percentage of distinction for that group in the practice of that court.

that success in practice depends primarily on connections and "settling down" after the formal preparation is finished. The fact would rather seem to be that, in the long run, the man who comes to the task of practice well prepared, on the average attains to a much greater degree of success than his competitor with poor preparation. The explanation seems simple. By doing well in preparation the well-prepared applicant for admission to the bar has not only acquired some highly desirable items of knowledge, but has also acquired the habit of doing well whatever he undertakes. This habit of doing well is even more important than the individual items of information, since it enables its possessor to do highly effective work when he wrestles with the new and peculiar problems arising in the details of his practice. On the other hand, the poorly prepared applicant for admission to the bar begins with the handicap of lacking some highly desirable items of knowledge which his better prepared competitor has acquired. This handicap he no doubt expects to overcome by "settling down" to the real work ahead of him. As it is not yet too late to learn he may still do so, looking up the law when the case calling for it arises in his practice and using his practical common sense in dealing with clients. By this process, let it be granted, success has from time to time been won. The greater difficulty remains, however, that the young lawyer who didn't learn to do well when he had the opportunity in his student days, now does his work poorly, according to his habit, when he tries to "settle down" for himself. The double handicaps of poorer initial preparation and slovenly mental working habits are so serious that it is only the exceptional person who is able to rise above them.

A further remark is called for,—an examination of the details of success in relation to scholarship groups. It will be observed that the proportion of success, while roughly corresponding with scholarship, varies from it both at the bottom and at the top of the scholarship scale. It may be a surprise to educators, but will be no surprise to "practical men," to learn that the so-called grinds, the men here whose scholarship has ranked as ninety per cent or better, have not had so great success in court as the group next below them in scholarship. It should be observed, however, that even the grinds have far surpassed every other scholarship group in success in practice, being themselves surpassed by but one group, and that

only by the group immediately below them. Let no one therefore conclude that because the most conspicuous grinds have not as a class made the best of all records in practice their record can be despised. Their record is far from equaled by that of any group whose members entertain the idea that a passing mark is all that is worth striving for during the period of preparation. The grinds have done well: so well that they are very hard to beat; so well that they can be beaten on the average only by men who also have a high degree of capacity, as shown by their scholarship in preparation. Further, whatever the difficulties encountered by the grinds in securing an extensive practice, they have been beaten by no group of men in the matter of winning their cases in the Supreme Court.

That the group of highest scholarship has been surpassed, in attaining success, by the next scholarship group, however, ought to serve as a warning to the present generation of grinds that there are some other things in practice as well as in life besides mere mastery of book knowledge and intellectual processes. Grinds have been more successful than the next scholarship group in handling Supreme Court litigation, where the issues depend largely on intellectual power; but they have been surpassed by the next scholarship group in the matter of securing cases, and in the matter of winning in the trial courts, instances where the so-called human qualities as opposed to mere intellectual power come more largely into play. This result would seem to point the moral that while good scholarship, evidencing or developing intellectual power, is well-nigh indispensable to success in practice, it should not, for the greatest degree of success, be allowed to become so one-sided as to exclude the ordinary human interests. This much should in justice be granted to the widely prevalent idea that a grind is too impractical to succeed. He is not too impractical to succeed, but his success is likely to be greater if he mixes his grinding with some independent human interests.

A passing remark ought also to be made on the fact that the lowest scholarship group surpassed the next lowest group when it came to the test of success in practice. This result is at first glance startling. It should be noted, however, that the generalizations for this lowest group rest on the achievements of so few members that absolute correctness as an average for the group is not to be ex-

pected. In partial explanation it may also be stated that of the eight men on whose achievements in both courts the generalizations are based, six were either business men or men of no particular occupation before entering practice. The generalizations for the lowest group, whose achievements are poor but not the poorest of all, rest, therefore, on the achievements of a very few men who had some capacity for securing business, their previous experience being such as to develop the quality of being good mixers. While the instances involved are too few to afford accurate tests, the details indicated in the table would seem to bear out this explanation of the relatively greater success of the lowest scholarship group over the next higher group. In both courts, men in this group secured a larger proportion of cases, while in the District Court men in this group also won a larger proportion of their cases than did the men in the next higher group. In the Supreme Court, however, men in this group fared very badly. It should further be noted that the men in this lowest scholarship group, while on this showing surpassing the next higher group, failed by a wide margin of even equaling the success attained in practice by the high scholarship groups.

As a general conclusion, then, on the relation between scholarship in preparation and success in the practice of law, the statement is justified that success in practice has been, on the average, roughly in proportion to the scholarship shown in preparation, with some slight variation from this order produced by other factors.

II. LAW-SCHOOL AND OFFICE PREPARATION

The figures for the North Dakota bar, based on grouping according to preparation in law schools, in offices, or in some combination of law school and office, are as follows:

TABLE II

	General Standing	Reduced to Scale of 100
Law school only.....	44.93	71.33
Law school and office combined.....	62.99	100.00
Office only.....	52.86	83.91

TABLE II—Continued
SUPREME COURT PRACTICE

	No. in Group	No. in Court	Per Cent in Court	No. of Cases	Av. No. of Cases per Man	Per Cent of Gen. Average per Man	No. Won	No. Lost	Per Cent Won
Law school only	405	145	35.80	836	5.76	89.71	405	427	48.67
Law school and office combined	105	57	54.28	473	8.29	129.12	231	239	49.14
Office only	36	18	50.00	105	5.83	90.81	57	48	54.28

DISTRICT COURT PRACTICE

Law school only	405	101	24.93	772	7.64	87.71	108	81	57.14
Law school and office combined	105	38	36.19	444	11.68	134.21	47	41	53.40
Office only	36	15	41.66	126	8.40	96.44	31	19	62.00

REACHING DISTINCTION IN PRACTICE

SUPREME COURT								DISTRICT COURT							
	No. having over 10 Cases	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	Over 10	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	
Law school only	18	4.44	7	1.72	4	0.98	7.14	23	5.67	8	1.97	3	0.74	8.38	
Law school and office combined	14	13.33	7	6.66	3	2.85	22.84	15	14.28	8	7.61	3	2.85	24.74	
Office only	3	8.33	0	0	0	0	8.33	5	13.88	2	5.55	0	0	19.43	

In preliminary explanation of these figures it should be noted that in this table men who have had half a year or less of office apprenticeship combined with a law-school course have been deliberately classified as if they were without office training. The reason for this classification may be seen in detail by reference to Table IV below. It appears that such men, usually law-school students filling in one summer with more or less definite office connection, have as a group acquitted themselves with almost precisely the same degree of success as their fellows with the same law-school training but without the ornament of a fleeting office connection. The rea-

sonable conclusion is that such fleeting office connection is for substantial purposes valueless. The law-school men whose records indicate such mere fleeting office connection, aggregating no more than half a year, have accordingly been classified as being without office experience.

The striking feature about the comparison of law-school and office preparation as reflected in success in practice is the strength of the combination of the two over either method when used alone. The advantage, moreover, would seem to lie not primarily in superior intellectual power in winning supreme court cases, nor even in tactical superiority in the trial of cases, but in the capacity, independently of these features, of being able to deal so satisfactorily with clients as to draw and hold their business, combining, as it were, agreeable personal associations with such power in the grasp of problems presented as to inspire clients with confidence. In the capacity to secure business, rather than in marked superiority as shown by losses or winnings in court, the lawyer who has come to his practice equipped with the double training of both law-school and office preparation has outdistanced his fellows who have come equipped with either form of preparation alone.

As between law-school training alone and office training alone, the figures on their face indicate a slight advantage for the office training. The decisiveness of any such advantage for office training as against law-school training is, however, open to question on several grounds. In the first place, the number of exclusively office-trained men, as such, is too small to furnish minutely dependable average results. In the second place, a qualification must be made as to the time element in preparation, which is discussed under the next table below. Since nearly all the office-trained men whose achievements figure in the attainments of the total office group have had either three or four years of training, as against two years of training for many men in the law-school group, the comparison is, in this broad grouping, not sufficiently apt to be dependable. This comment is supported, so far as the meager data on the point furnish any results, by the showing made by the separated group of two-year office-trained men, whose achievements, as a group, fall below the achievements of any other single group in the minute comparison as to time, law school, and office shown in Table IV below. In the third place, it must be remembered that the office-

trained applicant starts in practice with the advantages of achieved technical skill in the details of practice and with associations and connections already partly formed, advantages which enable him to get a quicker and better start in his first independent practice. Any superiority over the law-school trained applicant attributable to such advantages passes away with the lapse of time, however, as the law-school trained lawyer gets familiar with his local practice and community. On a period of observation covering only the limited time embraced in the present study it may be doubted whether the effect of lapse of time is in this respect fully reflected, since for a relatively large proportion of the total number of lawyers involved only a few years have elapsed since their admission to practice.

Law-school training, then, as it has been on the average in the past, is manifestly deficient. Office training, as a substitute for law-school training, is also deficient. The combination of the two produces a good deal better results, on the average, than either alone can produce. So much is demonstrated on the face of these figures. As between law-school work alone and office work alone, superiority either way is not proved, nor even broadly suggested. Apparently, then, each contributes something essentially important for the greatest degree of success in practice.

Is it too bold to assert that law-school training has tended to contribute power of analysis, reasoning, and general familiarity with the authorities, while office training has supplied technical proficiency with actual responsibility in the details of practice, and has developed the capacity for dealing with men? The office as a place for systematic study has long since become practically an impossibility. Some even question whether the office can be the best place for learning details of practice. For that purpose, even, the office lacks the advantage afforded in such law schools as offer practice work of systematic instruction and study in the learning process. On the other hand, practice that is studied and learned in law schools lacks the element of reality and personal responsibility inducing the most serious application which accompanies the taking of steps in actual litigation. However the question of the place to learn practice is resolved, the office retains a distinct advantage over the law school as a place in which to develop the capacity for dealing with men, while it lacks the law-school advantage of system-

atic study and instruction for the development of mental power. Since both the elements in preparation just referred to are required in order to win and maintain the confidence of clients, the readiest way to obtain them both, so far as formal preparation is concerned, would seem to be found, as these figures indicate, in a combination of the two sorts of preparation. This combination, needless to remark, ought not to make the two sorts of work contemporaneous. Attempting to carry on effective office work contemporaneously with regular law-school work effectually destroys the systematic regularity in preparation which is indispensable to good work in the law school. Similarly, if the duties involved in the office are of any consequence, the effectiveness of the office work will suffer if such work is neglected in favor of the requisite preparation for law-school classes.

The amount of time which should be devoted to the law-school work, as compared with the time devoted separately to office preparation, must be determined in the light of the further inquiry regarding the relation of time in preparation to success in later practice.

III. TIME SPENT IN PREPARATION

The figures for the North Dakota bar, based on grouping according to the time spent in preparation, are as follows:

TABLE III

	General Standing	Reduced to Scale of 100
Two years.....	48.64	66.66
Three years.....	42.78	58.63
Four years or more.....	72.96	100.00

SUPREME COURT PRACTICE

	No. in Group	No. in Court	Per Cent in Court	No. of Cases	Av. No. of Cases per Man	Per Cent of Gen. Av. per Man	No. Won	No. Lost	Per Cent Won
Two years	224	91	40.62	605	6.64	103.42	295	308	48.92
Three years	255	94	36.86	475	5.05	78.66	222	251	46.93
Four years	67	35	52.23	334	9.54	148.59	176	155	53.17

TABLE III—*Continued*
DISTRICT COURT PRACTICE

Two years	224	47	20.98	407	8.68	99.65	47	37	55.95
Three years	255	79	30.98	548	6.93	79.56	90	68	56.96
Four years	67	28	41.79	387	13.82	158.66	49	36	57.64

REACHING DISTINCTION IN PRACTICE

	SUPREME COURT							DISTRICT COURT						
	No. having over 10 Cases	Per Cent	Over 20	Per Cent	Over 30	Per Cent	Gen. Per Cent	Over 10	Per Cent	Over 20	Per Cent	Over 30	Per Cent	Gen. Per Cent
Two years	15	6.69	6	2.67	4	1.78	11.14	13	5.79	4	1.78	2	0.89	8.46
Three years	7	2.74	2	0.78	1	0.39	3.91	15	5.88	5	1.96	1	0.39	8.23
Four years	13	19.40	6	8.95	2	2.98	31.33	15	22.38	9	13.43	3	4.47	40.28

For convenience of comparison the figures are also here inserted, based on grouping by the double standard of time spent, as combined with law-school or office preparation, or both.

TABLE IV

	General Standing	Reduced to Scale of 100
A = 1 year law school, 1 year office.....	57.49	62.15
B = 1 year law school, 2 years office.....	48.56	52.49
C = 2 years law school, 1 year office.....	41.64	45.01
D = 2 years law school,	48.53	52.46
E = 3 years law school.....	42.78	46.24
F = 3 years law school, 1 year office.....	92.50	100.00
G = 2 years law school, ½ year or less office.....	48.42	52.34
H = 3 years law school, ½ year or less office.....	41.42	44.78
I = 2 years law school, 2 years office.....	66.68	72.08
J = 3 years law school, 2 years office.....	67.01	72.44
K = 1 year law school, 3 years or more office.....	55.46	59.95
L = 4 years office only.....	64.17	69.37
M = 3 years office only.....	47.65	51.51
N = 2 years office only.....	37.30	43.24

TABLE IV—*Continued*

SUPREME COURT PRACTICE

	No. in Group	No. in Court	Per Cent in Court	No. of Cases	Average No. of Cases per Man	Per Cent of General Average per Man	No. Won	No. Lost	Per Cent Won
A	13	9	69.23	100	11.11	172.78	50	50	50.00
B	12	8	66.66	48	6.00	93.31	25	23	52.08
C	25	12	48.00	46	3.83	59.56	14	32	30.43
D	166	64	38.55	408	6.37	99.06	197	209	48.52
E	176	58	32.95	314	5.41	84.13	156	156	50.00
F	17	9	52.94	118	13.11	203.88	62	54	52.54
G	38	15	39.47	84	5.60	87.09	40	44	47.61
H	25	8	32.00	30	3.75	58.16	12	18	40.00
I	18	8	44.44	66	8.25	128.30	34	32	51.51
J	11	7	63.63	75	10.75	166.56	36	38	48.64
K	9	4	44.44	20	5.00	77.76	10	10	50.00
L	12	7	58.33	55	7.85	122.08	34	21	61.83
M	17	8	47.05	37	4.62	71.85	15	22	40.54
N	7	3	42.85	13	4.33	67.34	8	5	61.53

DISTRICT COURT PRACTICE

	No. in Group	No. in Court	Per Cent in Court	No. of Cases	Average No. of Cases per Man	Per Cent of General Average per Man	No. Won	No. Lost	Per Cent Won
A	13	4	30.76	20	5.00	57.20	1	1	50.00
B	12	2	16.66	9	4.50	51.48	1	0	100.00
C	25	10	40.00	85	8.50	97.25	11	13	45.83
D	166	35	21.08	324	9.25	105.83	40	33	54.79
E	176	54	30.68	357	6.61	75.62	61	46	57.00
F	17	9	52.94	153	17.00	194.50	21	11	65.62
G	38	7	18.42	59	8.42	96.39	4	2	66.66
H	25	5	20.00	32	6.40	73.22	3	0	100.00
I	18	6	33.33	93	15.50	177.34	3	5	37.50
J	11	4	36.36	46	11.50	131.57	1	5	16.66
K	9	3	33.33	38	12.66	144.85	9	6	60.00
L	12	6	50.00	57	9.50	108.69	15	9	62.50
M	17	8	47.05	65	8.12	92.90	14	9	58.33
N	7	1	14.28	4	4.00	45.76	2	1	66.66

TABLE IV—*Continued*
 REACHING DISTINCTION IN PRACTICE

SUPREME COURT PRACTICE								DISTRICT COURT PRACTICE							
	No. having over 10 Cases	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	Over 10	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	
A	1	7.68	1	7.68	1	7.68	23.04	1	7.68	0	0	0	0	7.68	
B	1	8.33	0	0	0	0	8.33	0	0	0	0	0	0	0	
C	1	4.00	0	0	0	0	4.00	2	8.00	0	0	0	0	8.00	
D	11	6.62	5	3.01	3	1.80	11.43	10	6.02	3	1.80	2	1.20	9.02	
E	4	2.27	2	1.13	1	.56	3.96	10	5.68	3	1.70	1	0.56	7.94	
F	5	29.41	3	17.64	1	5.88	52.93	5	29.41	4	23.52	2	11.76	64.69	
G	3	7.89	0	0	0	0	7.89	2	5.26	1	2.63	0	0	7.89	
H	0	0	0	0	0	0	0	1	4.00	1	4.00	0	0	8.00	
I	2	11.11	1	5.55	1	5.55	22.21	4	22.22	2	11.11	1	5.55	38.88	
J	3	27.27	2	18.18	0	0	45.45	2	18.18	1	9.09	0	0	27.27	
K	1	11.11	0	0	0	0	11.11	1	11.11	1	11.11	0	0	22.22	
L	2	16.66	0	0	0	0	16.16	3	25.00	1	8.33	0	0	33.33	
M	1	5.88	0	0	0	0	5.88	2	11.76	1	5.88	0	0	17.64	
N	0	0	0	0	0	0	0	0	0	0	0	0	0	0	

By reference to Table III it will be seen that the time element in the course of preparation either is reflected in success in practice in a peculiarly inconsistent fashion, or its influence is merely secondary, yielding to more potent influences from other factors. As will be seen, the four-year group has won much greater success in practice than either of the other groups. This would seem to indicate that long-time preparation is more effective than the shorter periods. As between the two other groups, however, the figures indicate some slight superiority for the two-year group as against the three-year group. Without more this would seem to indicate that the time element in preparation was being overdone already in the three-year group, but such conclusion is effectually denied by the predominantly superior results achieved by the four-year group. The time element alone, therefore, is probably not in itself of decisive importance, more weight properly attaching to the quality of preparation than to its mere quantity. Such conclusion seems reasonable on the face of the figures in Table III.

The correctness of the conclusion that quality of preparation for the practice of law is more important than quantity would on

a priori considerations seem unimpeachable. Better results must be obtained, for example, both as to items of knowledge acquired and as to the value of the mental development produced, by two years of excellent work than by three years of mediocre work. The correctness of this conclusion is also borne out by the details appearing in Table IV. As will be seen by attention to Table IV, the men in the four-year groups, whether of office or combination preparation (no data being available for four-year law-school preparation alone), include the most successful of all groups of practitioners. To this statement must be added the remark that, during the period under observation, neither has the state required a four-year term of preparation nor have any of the law schools required four years of work for graduation. For a part of the period the state required but two years, and for the balance of the period three years have been required.

In explanation of the success of the four-year groups it may be said in the first place that the men in the four-year groups, the men whose achievements have so far surpassed any others, are frequently men who have deemed it worth while, in order to get the best sort of preparation, to do more than the minimum amount required for admission to the bar. The significance of this feature would then lie in the fact that such men have been men of higher than the average standards of achievement and persistence, as demonstrated by the extent of their voluntary course of preparation, and that these standards of achievement have justified themselves by excellent results in practice. The finality of this explanation may well be questioned, however, since in the four-year groups, together numbering a total of sixty-seven men, are also included eight of the men whose preceding work in preparation for the bar examinations was so poor as to result in failure at the first trial and the necessity of additional preparation. Since the four-year groups thus contain not only a large proportion of members of unusual ability, but also some members who have shown signs of mediocrity, it can hardly be said that the longer time involved has by the process of selection necessarily assured a distinctly superior average of quality. Moreover, mere lengthening of the time regularly required for preparation, it is evident, would not by the process of selection raise the average of quality to the degree now found in the four-year groups. It would, through the process of selection, tend to raise the quality

over what is now found in the two- and three-year groups, discouraging the impatient and unpersistent from undertaking the practice of law, but it would also bring into the four-year grouping many men of no unusual ability who merely try to fulfill the minimum requirements.

A better explanation of the predominant success of the four-year groups, apart from the mere element of time, is found in the fact that the best combinations of law-school and office preparation fall in these groups: Two years of law school and two years of office, or three years of law school and one or two years of office; the most successful combinations, as indicated by Table IV, all fall in the four-year groups. Thus a large proportion of the aggregate four-year group consists of men who have had the advantage of the best combination of work in preparation, as well as the advantage of additional time. That the combinations with the additional time have produced somewhat better results than the same combinations of work with only two or three years of preparation, may indicate some advantage distinctly traceable to the additional time involved. The difference in results, however, is not so striking when the mere matter of time is varied, nor does the difference in results so closely follow the extent of time variation as to warrant the conclusion that the time element as such is decisive. Within very elastic limits as to the time devoted to preparation the resulting success in practice seems rather to be dependent on other factors.

The final conclusion to be drawn from these figures is, therefore, that the best combination of work for effective preparation is excellent law-school work, followed by a substantial amount of genuine office apprenticeship. So far as any exact limits on these heads are concerned the question resolves itself largely into a personal one with each student, affected by such further considerations as age and means to sustain the long-continued course. So far as these figures indicate superiority in any one combination over all others it is interesting to notice that the favored one is the combination of three years of law-school work combined with a full year of office work.

IV. PRIOR COLLEGE EDUCATION

The figures for the bar of North Dakota, based on grouping according to the presence or absence of collegiate as distinguished from law-school training, are as follows:

TABLE V

	General Standing	Reduced to Scale of 100
College graduates	57.66	100.00
Less than two years of college.....	42.29	73.34
Two years or more of college.....	42.02	72.87
Noncollege.....	49.47	85.79

SUPREME COURT PRACTICE

	No. in Group	No. in Court	Per Cent in Court	No. Cases	Av. No. Cases per Man	Per Cent of Av. per Man	No. Won	No. Lost	Per Cent Won
College grad.	122	57	46.71	489	8.57	133.42	233	262	45.97
Less than two years of college	92	36	39.13	210	5.83	90.72	95	114	45.45
Two years or more of college	71	28	39.43	78	2.78	43.31	47	31	60.25
Noncollege	272	105	38.60	676	6.43	100.13	349	327	51.62

DISTRICT COURT PRACTICE

College grad.	122	36	29.50	393	10.91	123.69	22	26	45.83
Less than two years of college	92	25	27.17	149	5.96	67.57	31	21	59.61
Two years or more of college	71	23	32.39	182	7.91	89.68	38	24	61.29
Noncollege	272	73	26.54	661	9.05	102.60	97	83	53.88

REACHING DISTINCTION IN PRACTICE

SUPREME COURT PRACTICE								DISTRICT COURT PRACTICE							
	No. having over 10 Cases	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	Over 10	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	
College graduate	15	12.29	5	4.09	3	2.45	19.83	14	11.47	4	3.27	2	1.63	16.37	
Less than two years of college	2	2.17	1	1.08	0	.00	3.25	3	3.26	2	2.17	0	0	5.43	
Two years or more of college	1	1.40	0	0.00	0	.00	1.40	5	7.04	1	1.40	0	0	8.44	
Noncollege	16	5.88	7	2.57	3	1.10	9.55	20	7.35	11	4.04	4	1.47	12.86	

The most cursory examination of this table reveals at once the prominence of the college graduates over the less well-educated groups in the matter of success in the practice of law. Throughout the whole period under observation the state of North Dakota has never required more than a high-school education as preliminary to the professional preparation for law. A large number of lawyers have, however, secured further preliminary education; a considerable number of these have obtained their college degrees, and the college graduates among them have won the greatest measure of success in practice. College education would seem clearly to have justified itself in the actual result.

The startling fact is further revealed by these figures, however, that anything less than college graduation has, on the average, been rather worse than nothing. The men who have had some college education but have not had enough for graduation have in their practice fallen even below the men without any college education whatever. That this result is not a fortuitous circumstance, due to other specific factors, is also manifest from the fact that the number of nongraduate college men under observation is so large that other variant factors involved in the individual cases must substantially offset one another for the group as a whole. It thus appears that on the average college education, short of graduation, has not been worth while as a preparation for the practice of law.

That college graduates should be conspicuous successes, while college men without the degree are closer to failure than even the noncollege men, challenges an explanation. Unfortunately, the collegiate records of the men admitted to the bar in North Dakota are not available in sufficient detail to furnish any light as to the quality of the college work represented. Personal observation of the working out of college attendance, however, supplemented by some reflection and inquiry, suggests the following considerations: It is well known that many college students, for reasons to them appearing sufficient, leave college before graduation. Some come to college who have not the ability necessary to carry on excellent or even satisfactory college work. Many more, the sufficiency of whose mental powers cannot be questioned, fail to apply themselves to the college work with sufficient thoroughness and regularity to enhance their powers by the process. Instead they let themselves drift into the various diverting activities which are always at hand,

thereby earning poor or unsatisfactory grades in their college work. There follows the inevitable exodus from the college halls of men who "quit" because their grades were unsatisfactory or because they were "getting nothing out of" their college work. Further, so long as law schools do not require definite collegiate achievement as a prerequisite to the study of law, there is a constant tendency for such "failures" in college to drift into law work as a supposedly easier or shorter way to self-sustaining independence. That law-school work has appeared easier than collegiate work, startling though it be, must be admitted to have been true at various times and places. There is therefore a great likelihood that the law-school groups with some college education but without college graduation are composed to a very material extent of this class of college "failures," a conclusion confirmed by the count of a somewhat larger percentage of college graduates among the groups of high scholarship in their law-school work as compared with the lower scholarship groups.

If this explanation of the difference between the success in practice of the college graduates and the success of other college men is sound, the further explanation of the success of the non-college men over the college men who failed to graduate is easy. The noncollege group consists of men who have had to forego a college education. They have thereby lost the advantage of thorough college training enjoyed by college graduates, but they have thereby also avoided the disadvantage of learning to loaf while in college, — a habit which, if formed, would have had to be overcome again before success in the practice of law could be achieved.

The general conclusion to be drawn from these figures is, therefore, that a college education to be worth while as a factor in winning success in later practice of law must be a reality of substantial achievement, not merely an enlarged sort of playtime, principally filled with interesting experiences and diversions affording abundant opportunity for expanding the circle of acquaintance. The qualities of being a good mixer, however useful they may be as adjuncts to achieved excellence in the chosen line of work, cannot by themselves take its place in the struggle for success in the practice of law.

A word may be added regarding the two-year college requirement as a prerequisite to the study of law. As these figures indicate, the value of college work, so far as reflected in success in the practice of

law, lies not in the amount of time spent on a campus or in a university community, but on the achievement accomplished during the time of attendance. The mere two- or three-year college man, on the average, has done no better than the man with only a year of college work. The saving clause in the two-year college requirement now imposed by an increasingly large number of law schools is that two years of "satisfactory work" of college grade must have been completed. This requirement, therefore, approximates graduation standards of quality though not of quantity, and thereby largely eliminates the quitters and failures of the college world from the rolls of law-school attendance. In consequence, one may reasonably look for better results in practice to follow than is indicated in our present figures for two-year college men. Definite figures, however, for the achievements of two-year college men who have done satisfactory work as compared with the achievements of college graduates are not at present available.

V. AGE OF APPLICANTS AT THE TIME OF ADMISSION

The figures for the North Dakota bar, based on grouping according to the age of applicants at the time of admission, are as follows:

TABLE VI

Age	General Standing	Reduced to Scale of 100
21-23	48.97	90.56
24-26	54.07	100.00
27-29	50.92	94.17
30-32	42.44	78.49
33-35	37.37	69.11
36-	25.96	48.01

SUPREME COURT PRACTICE

Age.	No. in Class	No. in Court	Per Cent in Court	No. of Cases in Court	Av. No. per Man	Per Cent of Gen. Av. per Man	No. Won	No. Lost	Per Cent Won
21-23	103	42	40.77	303	7.21	111.60	134	166	44.66
24-26	171	68	39.76	486	7.14	110.52	236	248	48.76
27-29	137	66	48.17	378	5.72	88.54	191	183	51.06
30-32	64	22	34.37	146	6.63	102.62	73	73	50.00
33-35	32	9	28.12	36	4.00	61.91	19	17	52.77
36-	21	7	33.33	34	4.85	75.07	21	13	81.76

TABLE VI—*Continued*

DISTRICT COURT PRACTICE

Age	No. in Class	No. in Court	Per Cent in Court	No. of Cases in Court	Av. No. per Man	Per Cent of Gen. Av. per Man	No. Won	No. Lost	Per Cent Won
21-23	103	32	31.06	262	8.18	91.39	25	25	50.00
24-26	171	47	27.48	503	10.70	119.60	75	56	57.25
27-29	137	41	29.92	377	9.19	102.68	65	37	63.72
30-32	64	13	20.31	103	7.92	88.49	4	12	25.00
33-35	32	11	34.37	67	6.09	68.04	8	10	44.44
36-	21	3	14.28	5	1.66	18.54	0	2	0

REACHING DISTINCTION IN PRACTICE

SUPREME COURT							DISTRICT COURT							
Age	No. hav- ing over 10 Cases	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	Over 10	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent
21-23	7	6.79	3	2.91	2	1.94	11.64	7	6.79	3	2.91	1	0.97	10.67
24-26	15	8.77	5	2.92	1	0.58	12.27	17	9.94	9	5.26	3	1.75	16.95
27-29	7	5.11	4	2.91	2	1.45	9.47	11	8.02	6	4.37	2	1.45	13.84
30-32	4	6.25	2	3.12	1	1.56	10.93	5	7.81	0	0	0	0	7.81
33-35	1	3.12	0	0	0	0	3.12	2	6.25	0	0	0	0	6.25
36-	1	4.76	0	0	0	0	4.76	0	0	0	0	0	0	0

The most striking feature about these figures is the relatively insignificant part played by age as a factor in success in the practice of law. Though in the three groups, ranging in age from twenty-one to twenty-nine years, are found about four fifths of the men admitted to practice by examination during the period under observation, yet the differences in their averages of success range less than ten per cent. According to these figures the best age at which to begin the practice of law, other things being equal, is the age of twenty-five years. The difference in resulting success from a few years' variation either way from this point is so slight, however, that the mere matter of age, as such, can clearly, throughout the twenties, be said to be insignificant.

The figures further tend slightly to indicate that — at least as the practice has been conducted in North Dakota — law is a profession

for young men, rather than for more elderly men, to enter. While the matter of age as such plays a very minor part as between one year or another throughout the twenties, it seems to begin to count adversely as the age of thirty is passed. Men who were admitted in their early thirties have fallen somewhat below the men who were admitted in their twenties, while the men admitted during their later thirties have failed in even greater degree.

The details of these figures indicate, however, that the rather meager showing so far as the older men is concerned is not due to lack of ability. In proof one need only look at their record in the Supreme Court. Their showing is traceable rather to lack of cases handled and lack of participation generally. One may therefore hazard the conclusion that the older men have either been less adaptable to the new tasks of practice than the younger men, and have consequently had more difficulty in getting well started, or they have tended more strongly to give up their plans for a life of practice, turning instead to other more immediately profitable occupations open to them by reason of their wider experience and connections. In all probability both these considerations have been operative. While the distinctly young man's youth may be slightly against him at the start, any disadvantage arising therefrom is apparently easily overcome. On the other hand, the obstacles to successful change from other occupations to the practice of law seem to become all the more serious with advancing years.

VI. PRIOR OCCUPATION

The figures for the North Dakota bar, based on grouping according to the occupation of applicants at the time of admission, are as follows:

TABLE VII

	General Standing	Reduced to Scale of 100
No previous occupation	52.00	95.41
Teacher	40.81	74.88
Farmer	36.15	66.33
Business	54.50	100.00
Clerk	43.13	79.13

TABLE VII—*Continued*

SUPREME COURT PRACTICE

Prior Occupation	No. in Class	No. in Court	Per Cent in Court	No. of Cases in Court	Av. No. Cases per Man	Per Cent of Average per Man	No. Won	No. Lost	Per Cent Won
None	103	41	39.80	339	8.26	188.84	152	183	44.83
Teacher	60	21	35.00	149	7.09	102.01	84	65	56.37
Farmer	49	17	34.69	51	3.00	43.16	23	28	45.09
Business	184	81	44.02	504	6.22	89.49	266	236	52.77
Clerk	113	41	36.28	254	6.19	89.06	114	139	44.88

DISTRICT COURT PRACTICE

None	103	30	29.12	257	8.56	94.90	32	21	60.37
Teacher	60	14	23.33	44	3.14	34.81	8	4	66.66
Farmer	49	11	22.44	80	7.27	80.59	12	9	57.14
Business	184	52	28.26	632	12.15	134.70	94	76	55.29
Clerk	113	30	26.54	223	7.43	82.37	20	23	46.51

REACHING DISTINCTION IN PRACTICE

Prior Occupation	SUPREME COURT PRACTICE							DISTRICT COURT PRACTICE						
	No. having over 10 Cases	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent	Over 10	Per Cent	Over 20	Per Cent	Over 30	Per Cent	General Per Cent
None	13	12.62	3	2.91	1	0.97	16.50	8	7.76	3	2.91	1	0.97	11.64
Teacher	2	3.33	2	3.33	1	1.66	8.33	0	0	0	0	0	0	0
Farmer	0	0	0	0	0	0	0	3	6.12	0	0	0	0	6.12
Business	12	6.52	6	3.26	3	1.63	11.41	23	12.50	10	5.43	4	2.17	20.10
Clerk	6	5.30	3	2.65	2	1.76	9.71	7	6.19	4	3.54	0	0	9.73

It should be said in explanation of the grouping here presented that neither do such defined lines separate the different occupations, as this table would suggest, nor are the occupations so few as here tabulated. The grouping is an attempt to classify according to the general character of the particular occupation or job specified in the detailed information available. The single term "business" has therefore been used to cover a great variety of specially designated undertakings, all involving independent responsibility, while the

term "clerk" covers generally all instances where the applicant has been engaged in work under the immediate direction of a superior. The term "business" has also had to cover the cases where occupations were numerous, indicating a more or less extensive range of experience, even though some of the specific jobs included might have been classified under other heads.

The first conclusion to be drawn from these figures is that prior occupation, as such, is insignificant in its bearing upon success in the practice of law. The group classified under the term "business," the group having the largest range of general experience, heads the list in achievement in practice, but is followed very closely by the group, also considerable, of young men without any previous occupation. Engagement in any particular occupation as such, therefore, apparently contributes little that is affirmatively significant toward achieving success in the practice of law.

The somewhat less satisfactory results shown for the men who have come from certain occupations indicate, however, that their experience in such occupations needs to be supplemented in order to achieve the kind of development leading to the greatest degree of success in the practice of law. From the data at hand, moreover, a few suggestions may be made as to what, in such cases, the supplemental training ought to be.

By cross-sectional observation of the scholarship, collegiate work, and respective law-school and office preparation of the members in the different occupational groups it appears that there is practically no difference, as between occupational groups, in regard to scholarship, the group of teachers in this respect holding a narrow lead. In regard to graduation from college the teachers and the group without previous occupation hold a strong lead over the other named groups, which, among themselves, stand in this respect about equal. In the matter of combined law-school and office experience no very striking difference appears among the occupational groups, except in the case of the farmer group, whose members practically without exception are without office experience. On the basis of these facts one may therefore draw the conclusion that the obstacles to success in practice, if any, which appear on occupational grounds are largely susceptible of identification among the other factors already considered. The differences in winnings in court, as will be seen by attention to the details of the tables based on

occupation, are not in the aggregate nearly so striking as the differences in the proportionate number of cases handled by the men in each group. The fact is suggestive. With no very conspicuous differences in regard to scholarship among these groups, follow no very conspicuous differences in regard to success in court litigation. The intellectual element for success in practice thus appears to be present or attainable for every one, regardless of prior occupation.

The differences in the ability to get business, as between the different occupational groups, on the other hand, to some extent follow the lines suggested by the presence of differences in training for dealing with men. In this respect the group of business men, that is, the group composed of men of the widest range of experience and responsibility, easily leads all the others. Next to this group in ability to secure business comes the group of no prior occupation, largely consisting, as may be guessed, of men belonging to families of independent means. To such men a prior occupation has not been necessary, while their capacity as mixers has had ample opportunity for development. In contrast with these groups teachers and farmers, by reason of the requirements in their occupations, have had less opportunity for developing the ability to mingle easily with any crowd, and as lawyers this at the outset is to them a handicap which, unless removed, is likely somewhat to affect their chances of getting well started in practice, and which, unless counterbalanced by unusual ability in other respects, will continue to affect the amount of business they are able to secure. As it turns out with the groups here under observation, the teachers have shown some tendency to counterbalance or remove the handicap by completing a full course of collegiate work or by taking seriously to work in law offices. The men from the farms, as a group, have not gone further than the others with their college education. Practically without exception, moreover, they have taken no training in law offices after their law-school work was finished. They have thus missed the opportunity to acquire training needed for further developing their general ability to deal with men, and they have done nothing to counterbalance that disadvantage by securing superior training in other respects. As a result, the men who compose the farmer group of lawyers — as able intellectually as any others — have fallen below the other groups in practice for lack of ability to secure business, a

lack traceable not so much to the previous occupation as to a course of preparation for such instances too one-sided to secure the best results. The men who compose the group of teachers have suffered in the same way, for the same reasons, but their difficulties, in the aggregate, have been somewhat less and their success correspondingly greater, by reason of more all-rounded development in the course of preparation.

VII. RECORDS OF THE JUDGES THEMSELVES

Though scholarship records for the judges that have sat upon the bench in the different courts in North Dakota are not to any appreciable extent available, some other details in their formal preparation present an opportunity for comparison of results.

The figures for the judges of the district courts, covering sixteen of the nineteen district judges who have acted during the period under observation, are as follows:

	No. in Group	Per Cent of Affirmances in Supreme Court	Per Cent of Reversals in Supreme Court
College graduates and law-school graduates	3	69	31
College graduates but not law-school graduates	4	64	36
Law-school graduates but not college graduates	6	56	44
Neither college graduates nor law-school graduates	3	49	51

While the numbers in each group of judges are too small for reliable averages, it is at least suggestive that the correctness of the judicial acts of district judges, when tried in the process of appeal, is in direct proportion, on the average, to the thoroughness of their educational preparation. The striking showing of the same sort in regard to practice at the bar, combined with the fact that judges of to-day are merely lawyers of yesterday and lawyers of to-morrow, is convincing evidence that this showing on the part of judges in the test of appeal is not fortuitous. Thorough preparation makes itself felt in success on the bench as it does in success at the bar.

VIII. GENERAL CONCLUSIONS

Success in practice, as may be observed in the facts considered, is a complex result involving many interacting factors. Some of these factors, such as inborn ability or the fortune of the times in which we live, are beyond the control of the individual by his own efforts to change and improve. Other factors, involving matters of development through training, may be very materially affected for good or ill by efforts of the individual himself. The individual who is seeking preparation for the practice of law should therefore so arrange his course of preparation as to secure the development which will give him the greatest possible proficiency in practice. Only by so doing does he lay the securest foundation for his own personal achievement of success.

The first general conclusion to be drawn is, therefore, that on the face of the facts presented the most effective course of preparation for the practice of law consists of a completed college education, a law-school course, and an office apprenticeship. Age and prior occupation are of but secondary importance. In the course thus indicated by far the most effective detail in preparation is the doing well of the task in hand. As shown by figures upon each of these features, lack of a college education is a disadvantage but not insuperable, lack of law-school education is a disadvantage but not insuperable, and lack of office apprenticeship is a disadvantage but not insuperable. The disadvantage which is much more nearly insuperable than any other of these is that of poor work in preparation. The opportunity for success is thus open to every man through the doing of the highest possible quality of work throughout his course, carrying his programme through as much of the college, law-school, and office course as his circumstances permit.

May not a second general conclusion also be drawn from these figures, — that legislatures ought to raise the standard of education, general and professional, for admission to the bar? Incompetent lawyers, learning at the expense of their unfortunate clients, are no more to be desired than incompetent doctors, learning from their mistakes in killing their patients. More than twice as many men are admitted to the bar, the figures indicate, as ever actively practice law. Manifestly, then, the incompetent lawyer is not needed in order to take care of legitimate litigation. The ill-trained applicants, as has

been demonstrated, furnish the largest proportion of incompetent lawyers. By requiring better training for admission to the bar an appreciably higher degree of proficiency may be obtained, making the services of the legal profession much more useful to their clients, to the courts, and to the community as a whole.

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THE DELIVERY OF A LIFE-INSURANCE POLICY

WHERE a legal transaction is embodied in a written instrument the delivery of that instrument, by one party to the other has nearly always played an important, if not an indispensable rôle in the consummation of the legal transaction. The reasons are not far to seek. Not only does delivery of the writing supply the "deliverer" with the most satisfactory evidence of his right; it also marks the final stage in the series of inchoate acts of reflection, drafting, revision, etc., and thus manifests with certainty the final utterance of the deliveror.¹ Thus, the early common law made delivery of a sealed instrument indispensable, and delivery of a negotiable instrument is still a normal requirement. So, too, delivery of a formal written policy has been the customary mode of consummating an insurance contract. The demand for certainty, however, with its resulting formalism, must often yield to the desire for speed and flexibility; and thus the early rule as to delivery of a deed has been gradually whittled away² — the whittlings being often concealed under some such subtle verbiage as "constructive delivery." It was not to be expected that, in such a highly commercialized transaction as life insurance, the formality would maintain a hold which had been broken in the land law. Yet the demand for certainty does not yield without a struggle. Litigation involving questions as to the legal significance of delivery of a life-insurance policy has frequently come to appellate courts, who have more than once left the principles in doubt.

Before taking up these decisions, it seems well to indicate the steps of negotiation, reflection, drafting, etc., which take place in the usual life-insurance transaction: A soliciting agent of the insurance company, who has no power to conclude a contract of insurance,³ induces an individual to apply to the company for a

¹ WIGMORE ON EVIDENCE, § 2408.

² *Ibid.*

³ It is this which distinguishes the life-insurance cases, for our purposes, from fire insurance, in which it is customary to give the local agent power to approve risks and conclude contracts.

policy. The individual signs a formal "application," prepared by filling in a printed blank form provided by the insurance company, and prepared under the direction of its attorneys; the applicant has little opportunity to make changes in it. At about the same time, the applicant undergoes a physical examination by a physician appointed by the company, and pays the first premium to the solicitor,⁴ who gives him a receipt therefor upon a printed form provided by the company. The application and medical report are then sent to the home office of the company, where they are gone over carefully by the medical director and other officials having plenary powers. If they approve, the policy is prepared upon a printed form, and is signed and sealed by the highest executive officials, *e. g.*, the president and secretary. The policy is then taken by clerks and mailed to the local agent. The local agent hands the policy over to the applicant. The applicant may signify that the policy is acceptable to him. In some instances this routine is varied in that the application is sent by the local agent to a district agent under whom he works; and the policy is sent from the home office to the district agent, who transmits it to the soliciting (or local) agent.

The process is highly mechanical and systematic. The application mounts through a hierarchy of officials, and by the same route the policy comes back. Communication all the way along the line is, with rare exceptions, in writing, and a systematic record of each step is preserved. The volume of business done would in itself require a highly organized mechanism, aside from the distance.

In legal terms, this means that the applicant makes an offer, his application, of the premium money for the company's promise to insure him. More precisely, since the money paid to the local agent becomes the company's money, the applicant offers to extinguish the company's obligation (evidenced by the receipt) to repay this sum, in exchange for the company's insurance promise. The contract formed by the acceptance of this offer is a unilateral one, even if the premium is paid in the shape of a negotiable note.⁵ In determining whether and when the company is legally bound,

⁴ Cases in which the first premium has not been paid, as well as cases in which the applicant makes false statements as to his health, will be excluded from this discussion.

⁵ HARRIMAN, *CONTRACTS*, 11, 12 (1896). But see *Busher v. N. Y. L. Ins. Co.* 72 N. H. 551, 58 Atl. 41 (1904), where such a transaction is called bilateral.

one is not troubled by the perplexing parallelism between contractual and quasi-contractual liability, for insurance is an aleatory, as distinguished from a commutative, contract,⁶ and the company's obligation as insurer is never based upon unjust enrichment.⁷ The company's obligation is based upon contract; the policy is nothing if not a promise.⁸

The delivery of the policy, or the act of handing the policy to the applicant — for it is in this sense that the term will be used — may have legal significance in three ways: First, it may be a mere evidential fact; secondly, it may be an essential fact,⁹ a means of communication; thirdly, it may be a condition precedent to the commencement of the risk.

I

It is all but universally conceded by American courts that a contract of life insurance may be formed before the contemplated delivery of the policy. That is, it may be consummated by words or informal writings, and the policy is treated as evidence, merely, of the company's promise. This would hardly be true if, as Professor Langdell suggests, the policy is a mercantile specialty.¹⁰ In truth, there seems to be no recent judicial support for this view.¹¹ Occasionally one finds the delivery of a policy compared to the delivery of a deed,¹² but it is merely argument by analogy. Thus, the contract of insurance may be completed by letters or by conversations and may take effect before the policy is delivered,¹³ or even before the

⁶ VANCE, INSURANCE, 46.

⁷ The perplexity thus escaped will appear by comparing LANGDELL, SUMMARY OF CONTRACTS, § 17, with Ashley, "Formation of Contract *Inter Absentes*," 2 COL. L. REV. 1, 5.

⁸ A possible qualification of this statement is noticed *infra*, p. 216.

⁹ Based upon Austin's classification of titular facts. AUSTIN, JURISPRUDENCE, 5 ed., Campbell editor, 1885, LECTURE LVI, 887, 892; 4 ed. (1873), 919, 924.

¹⁰ LANGDELL, SUMMARY OF CONTRACTS, 63.

¹¹ See "Letters of Credit," Omer F. Hershey, 32 HARV. L. REV. 1, 10.

¹² *Heiman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 153 (1871); *American Trust Co. v. L. Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706 (1917); *Mass. Ben. Life Ass'n v. Sibley*, 158 Ill. 411, 42 N. E. 137 (1895).

¹³ *Kimbro v. N. Y. L. Ins. Co.*, 134 Iowa, 84, 108 N. W. 1025 (1906); *Sheldon v. Connecticut Mutual L. Ins. Co.*, 25 Conn. 207 (1856); *Union Central L. Ins. Co. v. Pauley*, 8 Ind. App. 85, 35 N. E. 190 (1893) (*semble*); *De Camp v. New Jersey Mut. L. Ins. Co.*, Fed. Cas. No. 3, 719, 3 Ins. L. J. 89 (U. S. Circ. Ct., 1873); *N. Y. L. Ins. Co. v. McIntosh*, 41 So. 381 (Miss. 1906) (for earlier appeal, see same case, 86 Miss. 236,

policy is executed by the company's officials.¹⁴ Thus, in *Kimbro v. New York Life Insurance Co.*, just cited, the local agent wrote the applicant: "I am pleased to advise you that your policy arrived this morning." In fact, the policy which had arrived was not the one applied for but a substantially less valuable one. The court, in affirming a judgment for the plaintiff for the full amount of the policy applied for, said that the agent's letter was an acceptance of the application. In some instances the court professes to draw its decision from the principle of estoppel — that handy judicial scrap bag. Thus, in *New York Life Insurance Co. v. McIntosh*¹⁵ the local agent wrote the applicant that his application (rejected but later renewed by the applicant) had been reconsidered and accepted (which was *true*) and that he (the agent) would send him the policy as soon as it arrived. The court said these facts gave the beneficiary a cause of action on the principle of estoppel.¹⁶ Clearly, contract, not estoppel, is the basis of liability here.

When the contract is thus completed, the applicant is said to be entitled to a policy;¹⁷ he may maintain replevin for the policy, if it has been executed;¹⁸ he may recover damages for breach of contract to deliver the policy;¹⁹ and he may obtain a decree for specific performance of the contract.²⁰ Conversely, the delivery of the policy to the applicant or to some one for him is not conclusive.

38 So. 775 (1905)); Preferred Accident Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986 (1899); Moulton v. Masonic Mutual Benefit Soc., 64 Kan. 56, 67 Pac. 533 (1902); Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30, 59 N. E. 873 (1901); Ray v. Security Trust & L. Ins. Co., 126 N. C. 166, 35 S. E. 246 (1900); Union Central L. Ins. Co. v. Phillips, 102 Fed. 19 (1900); Carter v. Bankers L. Ins. Co., 83 Neb. 810, 120 N. W. 455 (1909) (by conversation); Devine v. Federal L. Ins. Co., 250 Ill. 203, 95 N. E. 174 (1911) (by conversation); Amarillo Ins. Co. v. Brown, 166 S. W. 658 (Tex. Civ. App. 1914); RICHARDS ON INSURANCE, 3 ed., § 77.

¹⁴ N. Y. L. Ins. Co. v. McIntosh, *supra*, note 13; Preferred Accident Ins. Co. v. Stone, *supra*, note 13; Moulton v. Masonic Mut. Ben. Soc., *supra*, note 13; Carter v. Bankers L. Ins. Co., *supra*, note 13; Kennedy v. Mutual Benefit L. Ins. Co., 205 Fed. 677 (1913) (*semble*).

¹⁵ 41 So. 381, 86 Miss. 236 (1906).

¹⁶ To the same effect, Preferred Accident Ins. Co. v. Stone, *supra*.

¹⁷ Sheldon v. Conn. Mut. L. Ins. Co., *supra*, note 13.

¹⁸ See De Camp v. New Jersey Equitable L. Ins. Co., *supra*, note 13; N. Y. L. Ins. Co. v. Babcock, 104 Ga. 67, 30 S. E. 273 (1898).

¹⁹ Fried v. Royal Ins. Co. of Liverpool, 47 Barb. (N. Y.) 127 (1866), 50 N. Y. 243 (1872).

²⁰ Union Central L. Ins. Co. v. Phillips, *supra*, note 13.

The delivery may be only for the purpose of inspection,²¹ or it may be made before some essential condition has been performed,²² or under a mistake of fact.²³

It must not be thought, however, that the delivery of the policy is a fact of no consequence. Possession of the policy by the applicant raises a presumption that the contract of insurance has been consummated,²⁴ and it is even more emphatically declared that the fact that no policy has been delivered is *prima facie* evidence that no contract has been made.²⁵

Delivery of the policy has lost much of its peculiar evidential value for two reasons: The contract has become so highly standardized by business custom and by statute that the terms of the insurer's contract may be ascertained from the application and policy forms without the necessity of producing the completed policy;²⁶ and again, the highly systematic manner in which the business is carried on makes it comparatively easy to find out just what has been done in reference to a particular application, without the formal issuance and delivery of a policy.

II

Thus far the cases considered have been those in which some means of communication, aside from the delivery of the policy, was employed to consummate the contract. In a majority of the cases where delivery has been a vital issue, however, no other means of communication was used; and the question of the nature or necessity of a delivery of the policy has thus been a question of

²¹ *Markey v. Mutual Benefit Ins. Co.*, 103 Mass. 78 (1869); *Heiman v. Ins. Co.*, *supra*, note 12.

²² *Markey v. Ins. Co. supra*, note 21.

²³ *Newcomb v. Provident Fund Society*, 5 Colo. App. 140, 38 Pac. 61 (1894).

²⁴ *Mass. Ben. Life Ass'n v. Sibley*, *supra*, note 12; *Grier v. Mutual L. Ins. Co.*, 132 N. C. 542, 44 S. E. 28 (1903); *Rayburn v. Pennsylvania Casualty Co.*, 138 N. C. 379, 50 S. E. 762 (1905); *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146, 73 S. W. 978 (1903); *Waters v. Security Life & Annuity Co.*, 144 N. C. 663, 57 S. E. 437 (1907); *American Trust Co. v. Life Ins. Co. of Virginia*, 92 S. E. 706, 173 N. C. 558 (1917) (the court said here that delivery of the policy was "conclusive").

²⁵ *Union Central L. Ins. Co. v. Pauley*, 8 Ind. App. 85, 35 N. E. 190 (1893); *Heiman v. The Phoenix Mutual L. Ins. Co.*, 17 Minn. 153 (1871); *Paine v. Pacific Mutual Ins. Co.*, 51 Fed. 689 (1892).

²⁶ See *De Camp v. New Jersey Mut. L. Ins. Co.*, Fed. Cas. No. 3, 719, 3 Ins. L. J. 89 (1873).

the nature or necessity of communication of the insurer's acceptance. In these cases the inquiry is: At what moment in the process of negotiation, drafting, reflection, etc., outlined above²⁷ is the insurer's obligation as insurer complete and irrevocable, and the applicant's right to the premium money extinguished?²⁸

In only two states, it seems, is the formation of the contract postponed until the delivery of the policy by the local agent to the applicant, and in those states, the conclusion is supported upon the theory that the insurer's acceptance of the applicant's offer must be actually communicated to the latter; not until then is a contract formed.²⁹ On the other hand, the decided weight of authority is that the contract comes into existence before this final step takes place. Considerable uncertainty exists as to where the line of demarcation is to be drawn between that which is preliminary and inchoate, and that which is final. It is generally agreed that the contract is complete when the policy, duly executed, has reached the local agent, and that the beneficiary may recover the face amount of the policy if the *cestui que vie* dies at that time, if all conditions have been complied with, even though the policy is never delivered but is returned to the home office.³⁰ In a number

²⁷ Pages 198, 199, *supra*.

²⁸ The view that one party, as the offeror, may be bound before the other, the acceptor, seems not to have found favor in American law. But *cf.* WINDSCHIED, PANDEKTEN., § 306; POLLOCK'S INDIAN CONTRACT ACT, § 4; J. KOHLER, UEBER DEN VERTRAG UNTER ABWESENENDEN, I ARCHIV FÜR BÜRG. RECHT (1889), § 13.

²⁹ *Horton v. N. Y. L. Ins. Co.*, 151 Mo. 604, 52 S. W. 356 (1899) (point arose on a question of conflict of laws; court held the place of delivery was the *locus contractus*); *Kilcullen v. Metropolitan L. Ins. Co.*, 108 Mo. App. 61, 82 S. W. 966 (1904) (the case of *Bowman v. Northern Accident Co.*, 124 Mo. App. 477, 101 S. W. 691 (1907) is in conflict with the *Horton* case); *Busher v. N. Y. L. Ins. Co.*, 72 N. H. 551, 58 Atl. 41 (1904). *Accord*: *Lee v. Guardian L. Ins. Co.*, Fed. Cas. 8, 190, 2 Cent. L. J. 495 (U. S. Circ. Ct., 1875); *Paine v. Pacific Mutual Ins. Co.*, 51 Fed. 689 (1892); also, *dictum* in *Alabama Gold L. Ins. Co. v. Herron*, 56 Miss. 643 (1879).

³⁰ *Payne v. Pacific Mutual L. Ins. Co.*, 141 Fed. 339 (1905); *Yonge v. Equitable Life Ass'n Soc.*, 30 Fed. 902 (1887); *N. Y. L. Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899 (1911); *N. Y. L. Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273 (1898) (based on Code); *Mass. Mut. L. Ins. Co. v. Boswell*, 20 Ga. App. 446, 93 S. E. 95 (1917) (same); *Metropolitan L. Ins. Co. v. Thompson*, 20 Ga. App. 706, 93 S. E. 299, Ga. App. 706, (1917) (same); *Williams v. Atlas Ass'n Co.*, 97 S. E. 91, 22 Ga. App. 661 (1918) (same); *Rose v. Mutual L. Ins. Co. of New York*, 240 Ill. 45, 88 N. E. 204 (1909); *Mulligan v. Metropolitan L. Ins. Co.*, 149 Ill. App. 516 (1909); *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96 (1854); *N. Y. L. Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101 (1908) (*semble*); *Michigan Mut. L. Ins. Co. v. Thompson*, 56 Ind. App. 502, 105 N. E. 780 (1914) (s. c.), 44 Ind. App. 180, 86 N. E. 503 (1908); *Neff v. Metropolitan L. Ins. Co.*

of instances, the courts have declared that the contract is made as soon as the policy, duly executed, is placed in the mails, addressed to the company's local or district agent, for delivery by the latter to the applicant.³¹ Indeed, judicial support is not wanting for the view that the contract is made as soon as the policy has been executed by the officials at the home office,³² and some courts seem

73 N. E. 1041, Ind. App. (1905); *Unterharnscheidt v. Missouri State L. Ins. Co.*, 160 Iowa, 223, 138 N. W. 459 (1913); *Sutton v. Wright*, 94 Kan. 499, 147 Pac. 62 (1915) (action on premium note); *Mutual L. Ins. Co. v. Thomson*, 94 Ky. 253, 14 Ky. L. Rep. 800, 22 S. W. 87 (1893) (but see *contra, dictum* in *Smith v. Commonwealth L. Ins. Co.*, 157 Ky. 146, 162 S. W. 779 (1914)); *Schwartz v. Germania Ins. Co.*, 18 Minn. 448 (1872) (S. C.), 21 Minn. 215 (1875); *Bowman v. Northern Accident Co.*, *supra*, note 29; *Cooper v. Pacific Mut. L. Ins. Co.*, 7 Nev. 116 (1871); *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268 (1857), *aff'd* 27 N. J. L. 645 (a fire insurance case but same point involved); *Birch v. Manufacturers Liability Ins. Co.*, 88 N. J. L. 655, 96 Atl. 1003 (1916) (liability insurance but same point involved); *Fried v. Royal Ins. Co.*, 47 Barb. (N. Y.) 127 (1866), *aff'd* 50 N. Y. 243 (1872) (see *infra*, note 103); *Gallagher v. Metropolitan L. Ins. Co.*, 67 Misc. 115, 121 N. Y. Supp. 638 (1910); *Waters v. Security Life & Annuity Co.*, 144 N. C. 663, 57 S. E. 437 (1907) (*semble*); *Prudential Ins. Co. v. Shively*, 1 Ohio App. 238, 248 (1913); *Williams v. Philadelphia L. Ins. Co.*, 105 S. C. 305, 89 S. E. 675 (1916); *Lombard v. Columbia L. Ins. Co.*, 168 Pac. 269 (Utah, 1917); *Porter v. Mutual L. Ins. Co.*, 70 Vt. 504, 41 Atl. 970 (1897); *Fitzgerald v. Metropolitan L. Ins. Co.*, 98 Atl. 498, 90 Vt. 291 (1917) (*semble*); *Hartwig v. Aetna L. Ins. Co.*, 164 Wis. 20, 158 N. W. 280 (1916). Additional cases cited in the next seven notes would seem *a fortiori* to sustain this view.

³¹ *N. Y. L. Ins. Co. v. Pike*, *supra*, note 30; *Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861 (1906); *Shattuck v. Mutual L. Ins. Co.* (U. S. Circ. Ct., Mass., 1878) Fed. Cas. No. 12, 715, 4 Cliff. 508 (question arose on conflict of laws); *Yonge v. Equitable Life Ass'n Soc.*, 30 Fed. 902 (1887); *Harrington v. Home L. Ins. Co.*, 128 Cal. 531, 58 Pac. 180 (1899) (on conflict of laws question); *Mutual Reserve Fund Life Ass'n v. Farmer*, 65 Ark. 581, 47 S. W. 850 (1898); *Bowman v. Northern Accident Co.*, *supra* (*semble*); *Waters v. Security Life & Annuity Co.*, *supra*, note 30 (*semble*); *Francis v. Mutual L. Ins. Co. of N. Y.*, 55 Ore. 280, 106 Pac. 323 (1910) (mailing to district agent); *Mutual L. Ins. Co. of N. Y. v. Reid*, 21 Colo. App. 143, 121 Pac. 132 (1912) (*semble*); *Unterharnscheidt v. Missouri State L. Ins. Co.*, *supra*, note; 30 *Prudential Ins. Co. v. Shively*, 1 Ohio App. 238, 34 Ohio Circ. Ct. Rep. 357 (1913); *Williams v. Philadelphia L. Ins. Co.*, 105 S. C. 305, 89 S. E. 675 (1916).

³² The most clear-cut decision on this point seems to be one involving hail insurance, where, however, the transaction was similar to life insurance: *Van Arsdale-Osborne Brokerage Co. v. Robertson*, 36 Okla. 123, 128 Pac. 107 (1912): — Action on the premium note given by the applicant; the defense, that the applicant had never been notified of the acceptance of his application. The court held defendant liable, saying the contract of insurance was completed as soon as the policy was executed at the home office of the insurance company. Statements of similar import may be found in: *Metropolitan L. Ins. Co. v. Thompson*, *supra*, note 30; *Dailey v. Preferred Masonic Accident Ass'n*, 102 Mich. 289, 57 N. W. 184 (1894); *Robinson v. United States Benevolent Society*, 132 Mich. 695, 94 N. W. 211 (1903); *Rose v. Mutual L. Ins. Co. of New York*, 240 Ill. 45, 88 N. E. 204 (1909); *N. Y. L. Ins. Co. v. Greenlee*,

to regard the contract as completed as soon as the application is approved.

Thus, in *Kohen v. Mutual Reserve Fund Life Ass'n*,³³ the application was received at the home office, was approved by the medical director, and was turned over to the "executive committee," whose duty, it seems, was to pass finally upon all applications. One member of this committee marked it "approved"; but later in the same day, having learned of the applicant's death, the chairman of the committee erased this notation and marked it "declined." The court declined to allow a recovery because of a clause in the application that the policy should not take effect until delivered; but Brewer, J., said (page 706):

"If that was all that there was in this case, under well-settled rules it would have to be held that the minds of the parties had come to a concurrence; that a contract was created between them, and the complainant entitled to relief."

In *Kentucky Mutual Life Insurance Co. v. Jenks*,³⁴ the court's decision was based on the following language:

" . . . the application reached the company on the 1st of October, 1850. Its approval or acceptance on that day, as shown by the books of the company, closed the contract."

In *McCracken v. Travelers' Insurance Co.*,³⁵ the court emitted the following *dictum*, which was taken from the opinion in *Van Arsdale v. Robertson*:³⁶

"The correct rule under such an application seems to be that the obligation of the insurer or insurance company depends on the fact of the acceptance or approval of the application for insurance, and not on notice of such acceptance to the insured."³⁷

42 Ind. App. 82, 84 N. E. 1101 (1908); *Hallock v. Commercial Ins. Co.*, *supra*, note 30; *Unterharnscheidt v. Missouri State L. Ins. Co.*, *supra*, note 30; *Stringham v. Mutual L. Ins. Co.*, 44 Ore. 447, 75 Pac. 822 (1904).

³³ 28 Fed. 705 (1886).

³⁴ 5 Ind. 96, 99 (1854).

³⁵ 156 Pac. 640, 642 (Okla., 1916).

³⁶ *Supra*, note 30.

³⁷ See also *Metropolitan L. Ins. Co. v. Thompson*, *supra*, note 30 ("A contract of life insurance is consummated upon the unconditional written acceptance of the application for insurance by the company to which such application is made"); *Cooper v. Pacific Mut. L. Ins. Co.*, 7 Nev. 116 (1871). Here the receipt stated the money paid

If, however, only the medical director has approved³⁸ or if the approval of the executive officials is based upon an error of fact, perhaps,³⁹ no contract exists. Finally, one finds a few statements that mere retention of the premium and failure to notify the applicant of the rejection of his application within a reasonable time, constitute the completion of a contract of insurance.⁴⁰ The weight of authority, however, is against this view, for it is generally held that mere delay in passing on the application does not subject the company to contractual liability.⁴¹ At the other extreme are occasional intimations to the effect that the contract is not complete until the policy has been delivered to the applicant *and accepted* by him — meaning that the applicant has, after delivery of the policy, the privilege of rejecting it. Upon examination, these cases will be found to rest upon facts differing from those described above, or to be clearly erroneous. Thus, where the applicant reserves the right to reject the policy after it has been issued and sent to him,⁴² or where the applicant effectively revokes his application before it has been accepted,⁴³ or where the company, unwilling

was to be applied as premium, provided the company "should conclude to take the insurance." The court held the contract was formed "the moment the company concluded to make the insurance" (7 Nev. 122).

³⁸ *Provident Savings* [L. A. Co. v. Elliott's Executor, 29 Ky. L. Rep. 552, 93 S. W. 659 (1906)].

³⁹ *Kennedy v. Mutual Benefit L. Ins. Co. of Newark*, 205 Fed. 677 (1913).

⁴⁰ *Preferred Accident Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986 (1899). ("The retention of the premium and its [the company's] failure to reject the application, and its holding of it while it took time to adjust a matter only of concern to itself, were tantamount to an acceptance of the application and an agreement to issue the policy"); *Richmond v. Travelers' Ins. Co.*, 123 Tenn. 307, 130 S. W. 790 (1910) (*semble*, delay in accepting or rejecting the application will subject the company to liability "where the party making the application has been misled into believing that the insurance would be accepted, and relying thereon, has refrained from obtaining other insurance"). See also *Duffie v. Bankers' Life Ass'n*, 160 Iowa, 19, 139 N. W. 1087 (1913), where, however, the recovery was based upon tort.

⁴¹ *VANCE ON INSURANCE*, 161; *Coker v. Atlas Accident Co.*, 31 S. W. 703 (Tex. Civ. App., 1895); *Alabama Gold L. Ins. Co. v. Mayes*, 61 Ala. 163 (1878); *Misselhorn v. Mutual Reserve Fund Life Ass'n*, 30 Fed. 545 (1887); *Steinle v. N. Y. L. Ins. Co.*, 81 Fed. 489 (1897); *Ross v. N. Y. L. Ins. Co.*, 124 N. C. 395, 32 S. E. 733 (1899).

⁴² *Dickerson's Administrator v. Prudential Savings & Life Assur. Soc.*, 21 Ky. L. Rep. 611, 52 S. W. 825 (1899); *Oliver v. Mutual L. Ins. Co.*, 97 Va. 134, 33 S. E. 536 (1899).

⁴³ *Crutchfield v. Dailey*, 98 Ga. 462, 25 S. E. 526 (1896) (here the court indulges in much mysterious talk about the contract being "executory" — meaning that the applicant had successfully revoked his offer); *Travis v. Nederland Ins. Co.*, 104 Fed. 486

to issue a policy of the kind applied for, sends a substantially different form of policy,⁴⁴ the policy issued is nothing more than an offer on the part of the company, and there is no contract until this offer is communicated to the offeree (insured) and accepted by him. In these cases it is not erroneous to say that acceptance of the policy by the applicant is necessary. But where the applicant's offer is accepted, it is too late for him to revoke after the policy has been delivered or tendered to him.⁴⁵

To one who believes with Professor Langdell that where the offeree makes a promise, the acceptance must be communicated to the offeror,⁴⁶ the authorities cited above,⁴⁷ to the effect that the contract may nevertheless be completed without such communication, will seem unorthodox. Yet the doctrine that a promissory acceptance must be communicated to the promisee has not been followed in the case of contracts by correspondence. It is generally held nowadays that a promissory acceptance by correspondence is complete as soon as the letter of acceptance is mailed.⁴⁸ The life-insurance cases follow this rule. The mailing of the policy directly from the home office to the insured,⁴⁹ or the mailing of the policy

(1900); *Ten Broek v. Jansma*, 161 Mich. 597, 126 N. W. 710 (1910); *Wheelock v. Clark*, 21 Wyo. 300, 131 Pac. 35 (1913).

⁴⁴ *Provident Savings L. Ins. Co. v. Elliott's Executor*, 29 Ky. L. Rep. 552, 93 S. W. 659 (1906); *Mohrstadt v. Mutual L. Ins. Co.*, 115 Fed. 81 (1902); *New York L. Ins. Co. v. Levy's Administrator*, 122 Ky. 457, 29 Ky. L. Rep. 6, 92 S. W. 325 (1906); *McNicol v. N. Y. L. Ins. Co.*, 149 Fed. 141 (1906); *Mutual L. Ins. Co. v. Jordan*, 111 Ark. 324, 163 S. W. 799 (1914); *McCracken v. Travelers' Ins. Co.*, 156 Pac. 640 (Okla. Sup., 1916); *Riordan v. Equitable Life Ass'n Soc.*, 31 Idaho, 657, 175 Pac. 586 (1918).

⁴⁵ *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146, 73 S. W. 978 (1903); *Waters v. Security Life & Annuity Co.*, 144 N. C. 663, 57 S. E. 437 (1907). *Contra*, *Citizens Nat'l L. Ins. Co. v. Murphy*, 154 Ky. 88, 156 S. W. 140 (1913), where the action was on the premium note, and the court held that the applicant might reject the policy when it was offered to him by the agent, though it conformed to the application. The case is clearly unsound in principle. Misleading *dicta* that delivery and acceptance are necessary are to be found in *Lee v. Guardian L. Ins. Co.*, Fed. Cas. No. 8, 190, 2 Cent. L. J. 495 (1875), *per* Sawyer, J., and in *Stringham v. Mutual L. Ins. Co.*, 44 Ore. 447, 75 Pac. 822 (1904), *per* Wolverton, J.

⁴⁶ LANGDELL, SUMMARY OF CONTRACTS, 15.

⁴⁷ Notes 30-37, *supra*.

⁴⁸ WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 39, and note 42; HOLLAND, JURISPRUDENCE, 10 ed., 262.

⁴⁹ *Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 86 (1906) (*semble*); *Busher v. N. Y. L. Ins. Co.*, 72 N. H. 551, 58 Atl. 41 (1904) (*semble*); *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439, 29 Atl. 629 (1894)

by the local agent to the applicant⁵⁰ completes the contract. It is important to note, however, that the foregoing decisions in which the contract was held to have been completed when the policy reached the local agent, or at some earlier stage in the process, represent a distinct advance in legal doctrine beyond the ordinary contract-by-correspondence cases.

Thus, two reasons commonly given for the latter decisions were: (1) that the offeror by using the mails to send his offer, made the post-office his "agent" and hence that mailing the acceptance was delivery to the offeror's agent for him;⁵¹ and (2) that the mailing of the letter was an "irrevocable" act signifying acceptance, which put the letter out of the acceptor's control.⁵² Neither of these reasons is applicable to these life-insurance cases. The courts have generally refused to treat the local agent as the agent of the applicant, and wisely, because of the embarrassing effect such a conclusion would have upon the questions of waiver, representations, etc.⁵³ Nor can it be said that mailing the policy to the local

(boiler insurance); *Dailey v. Preferred Masonic Mut. Accident Ass'n*, 102 Mich. 289, 57 N. W. 184 (1894); *Triple Link Indemnity Ass'n v. Williams* 121 Ala. 138, 26 So. 19 (1898); *Armstrong v. Mutual L. Ins. Co.*, 121 Iowa, 362, 96 N. W. 954 (1903); *Dupriest v. American Central L. Ins. Co.*, 97 Ark. 229, 133 S. W. 826 (1911).

⁵⁰ *Sutton v. Wright*, 94 Kan. 499, 147 Pac. 62 (1915); *Hartwig v. Aetna L. Ins. Co.*, 164 Wis. 20, 158 N. W. 280 (1916).

⁵¹ See, for example, BISHOP ON CONTRACTS (1887), § 328; note the curious play upon the word "agent" by which this author seeks to support his statement: "in the nature of things any power which a man employs is his agent" (page 124, note 3). See, also, *Horton v. N. Y. L. Ins. Co.*, 151 Mo. 604, 52 S. W. 356 (1899); *Charles Noble Gregory* "Completion of Contracts by Mail or Telegraph," 48 AM. L. REG. (O. S.) 354, 367.

⁵² See HOLMES, THE COMMON LAW, 306; *Marcy, J., in Mactier v. Frith*, 6 Wend. (N. Y.) 103 (1830). Cf. POLLOCK'S INDIAN CONTRACT ACT, § 4: "The communication of an acceptance is complete, as against the proposer, when it is put in course of transmission to him, so as to be out of the power of the acceptor;" . . . (Italics are the author's.)

⁵³ In a few cases, the courts have suggested this agency fiction as a solution: *Hallock v. Commercial Ins. Co.*, *supra*, note 30 (the word "trustee" used); *Payne v. Pacific Mutual L. Ins. Co.*, *supra*, note 30 ("his [the insurance agent's] possession was her [the applicant's] possession" of the policy); *Porter v. Mutual L. Ins. Co.*, *supra*, note 30 ("the custody of the latter [the insurance agent] must be treated as that of the insured"); *N. Y. L. Ins. Co. v. Babcock*, *supra*, note 30 ("the possession of the agent was the possession of the applicant"). In *Bowman v. Northern Accident Co.*, *supra*, note 29, and *Alabama Gold L. Ins. Co. v. Herron*, 56 Miss. 643 (1879), the application stipulated that the policy should be delivered to the local agent, and the courts held the latter was the applicant's agent for that purpose; but in *Robinson v. United States Benevolent Soc.*, 132 Mich. 695, 94 N. W. 211 (1903), the court said

agent is an "irrevocable" act, or one which puts the writing "beyond the control" of the insurance company, unless, indeed, the courts make a new rule of law whereby the company is deprived of its privilege of preventing the formation of the contract by recalling the policy. By settled rules of law and business custom a direction to an agent is revocable by the principal at any time before it has been acted upon,⁵⁴ and in the foregoing cases⁵⁵ the insurer often exercised his power of retaking the policy after it had reached the local agent.

Still a third possible construction is that the applicant's offer impliedly calls for acceptance by delivering the policy to the local agent. It is difficult to find the basis for such an implication in the terms of the application. In truth, the application (except in the cases hereafter discussed)⁵⁶ does not indicate the mode of acceptance, and it is the mode which "the law deems to be reasonable under the circumstances."⁵⁷ And what the law deems to be reasonable under the circumstances depends upon what the judges hold to be the theory of contracts. Not that the courts are given to much theorizing on the subject; on the contrary, they seem to proceed largely by intuition. Still, one can see three types of contract theory striving for recognition: The "meeting of minds" theory, the "communication" theory, and a rough working principle which may be designated the "significant act" theory.

A number of the courts whose decisions are cited in the preceding notes do real homage or lip-service to the "meeting of minds" view of a contract.⁵⁸ What does the phrase mean, and whence its

such a stipulation would be invalid. See *infra*, p. 219, as to cases where the offeror specifies the mode of acceptance.

⁵⁴ Cf. VANCE, INSURANCE, 169, where it is said that the insurer must put the policy "beyond his legal control, though not necessarily beyond his physical control." The word "legal" begs the question.

⁵⁵ Notes 30 and 31.

⁵⁶ See *infra*, p. 219.

⁵⁷ Professor A. L. Corbin, "Offer and Acceptance," 26 YALE L. J., 202.

⁵⁸ For example, *Hallock v. Commercial Ins. Co.*, *supra*, note 30; *Kohen v. Mut. Res. Fund L. Ass'n*, 28 Fed. 705 (1886); *Union Central L. Ins. Co. v. Pauley*, 8 Ind. App. 85, 35 N. E. 190 (1893); *Heiman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 153 (1871); *Fried v. Royal Ins. Co.*, *supra*, note 30, *per* Pothier, J., and *per* Church, J.; *Travis v. Nederland L. Ins. Co.*, 104 Fed. 486 (1900); *Dickerson's Administrator v. Prudential Savings & Life Assur. Soc.*, 21 Ky. L. Rep. 611, 52 S. W. 825 (1899); *Kennedy v. Mutual Benefit L. Ins. Co.*, 205 Fed. 677 (1913); *Bowen v. Prudential Ins. Co.*, 178 Mich. 63, 144 N. W. 543 (1913); *Marshall, J.*, in *Hartwig v. Aetna L. Ins.*

potency in judicial thought? In the first place, since "mind" does not possess the quality of extension in space, and "meeting" is predicated of tangible things, the phrase is either a metaphorical description of a real event, or a purely transcendental reality.⁵⁹ "Union of wills," the equivalent phrase of Vice-Chancellor Kindersley⁶⁰ and of Savigny⁶¹ must have the same meaning. This metaphysical conception of contract, which was fortified, if not created, by the speculative philosophers⁶² and supported by the prestige of Savigny, proved so impracticable in Germany, with its doctrine of unilateral error, that it was discarded for the teleological views of Jhering.⁶³ It is certainly no more satisfactory for determining the time when the contract is made.

Whether it be metaphorical or metaphysical, "meeting of minds" corresponds, in the view of those who use it, to some perceptible reality; and this reality, one may infer, is "co-existence of identical mental acts."⁶⁴ Thus, in *Travis v. Nederland Life Insurance Co.*,⁶⁵ the applicant notified the company's local agent that he withdrew his application, but the president of the company (Dubourcq), unaware of this withdrawal, afterward, on November 27, executed a policy. In holding that no contract was made, the court said (Sanborn, J.):

"When, on November 27, 1896, the mind of Dubourcq accepted and consented to the terms of the proposition contained in the original written application, the mind of Travis had receded and withdrawn its assent from those terms, and settled upon different terms, which no

Co., 164 Wis. 20, 158 N. W. 280 (1916). This list is not meant to be exhaustive. See also VANCE ON INSURANCE, 147, and RICHARDS, INSURANCE, 3 ed., § 78; BISHOP, CONTRACTS (1887), § 313.

⁵⁹ See 2 CAIRD, THE CRITICAL PHILOSOPHY OF KANT, 251, 253.

⁶⁰ In *Haynes v. Haynes*, 1 Dr. & Sm. 426, 433 (1861).

⁶¹ See HOLLAND, JURISPRUDENCE, 10 ed., 253, citing System III, 309.

⁶² For Kant's analysis of contract as a "union of wills," see 2 CAIRD, *op. cit.*, 328, 329. Cf. HEGEL, ENCYKLOPÄDIE, § 493, WALLACE, HEGEL'S PHILOSOPHY OF MIND (1894), 108.

⁶³ Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605, 610 (1908).

⁶⁴ Thus, BISHOP, CONTRACTS, § 313, who quotes Savigny's definition (§ 22, note), says: "... to constitute a contract in fact, the two or more parties must concurrently assent to exactly the same thing at the same instant of time. So that ... if the former consents at one time and the latter at another, by reason of which their wills do not at any instant coincide, they do not enter into a contract." For Kant's similar view, see 2 CAIRD, *op. cit.*, 328.

⁶⁵ 104 Fed. 486, 43 C. C. A. 653 (1900).

agent of the company ever accepted; so that there never was a time when the minds of the parties to this negotiation met upon, and they agreed to comply with, the same stipulations of any contract."⁶⁶

Realizing that this coexistence in point of time, however true it may have been of more primitive forms of bargaining between parties face to face,⁶⁷ is utterly unattainable in the case of contracts *inter absentes*,⁶⁸ the courts have modified the theory with a fiction that the offeror will be conclusively presumed to be repeating his offer (and thinking it) as long as the offeree's power to accept continues.⁶⁹ And when, as in the class of cases here discussed, one party is a corporation, the "mind" of the corporation can be conceived as existing in the mind of the executive official only by the aid of another fiction, "*qui facit per alium facit per se*." "Meeting of minds" is thus a misleading description of the formation of contracts *inter absentes*.

The identity of wills or of mental acts is no less fictitious than their coexistence in time.⁷⁰ The union, the harmony, does not exist, since the interests of two persons engaged in making a con-

⁶⁶ See, also, the language of Brewer, J., in *Kohen v. Mut. Res. Fund. L. Ass'n*, 28 Fed. 705, 706 (1886).

⁶⁷ It would seem that practically all contracts were concluded between persons face to face in early English law (2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Chap. V) and in the earlier Roman law (JHERING, GEIST DES RÖM. R., III, 47 d, IV, 53; cf. FRIEDLÄNDER, ROMAN LIFE AND MANNERS UNDER THE EARLY EMPIRE (Magnus, trans.), I, 305). For a clear statement of the inapplicability of the subjective or metaphysical theory to contracts by correspondence, see "Offer, Acceptance, and Withdrawal of Offer by Correspondence," 24 JOUR. OF JURISPRUDENCE, 337 (Edinburgh, 1880); BENJAMIN ON SALES, 3 Am. ed. by Bennett, § 69, note u; also Charles B. Elliott, "Contract by Correspondence," 16 WESTERN JURIST, 337 (1882). On the general tendency to regard the habitual and the simple as identical with the natural and the necessary, see KORKUNOV, GENERAL THEORY OF LAW, 134-41.

⁶⁸ It is here assumed that these life-insurance contracts are properly classed as "contracts *inter absentes*" (Kohler, *op. cit.*, 301, 302). But in *Busher v. N. Y. L. Ins. Co.*, 72 N. H. 551, 58 Atl. 41 (1904), the court distinguished these life-insurance contracts from contracts by correspondence on the ground that the former are *inter praesentes*.

⁶⁹ *Adams v. Lindsell*, 1 B. & Al. 681 (1818). Kant says that the acts which give rise to a contractual relation are, of course, successive in their performance; but we are to remember that "properly they must proceed from the united will of both parties in one moment." 2 CAIRD, *op. cit.*, 328.

⁷⁰ DUGUIT, MODERN FRENCH LEGAL PHILOSOPHY, 272. Kant is careful to state that "in this reciprocal relation of wills, what is taken into account is not the *matter* willed, *i. e.*, the end which each has in view in the object which he wills . . . but only the *form* of the relation of wills, regarded as on both sides a relation of freedom." 2 CAIRD, *op. cit.*, 320, 321.

tract are not identical, but opposed.⁷¹ Moreover, the particular mental act is legally irrelevant.⁷² Thus, in *American Home Life Insurance Co. v. Melton*,⁷³ the president of the company testified that, when he signed the policy, he intended it to take effect at once; yet the court enforced a stipulation in the policy itself that it should not take effect until delivered. The question is, after all, one of emphasis;⁷⁴ the degree of emphasis to be placed upon the mental act as compared with the outward expression will depend largely upon the circumstances of the particular class of transactions.⁷⁵ The "meeting of minds" conception tends to overemphasize the mental act, the subjective element, which is relatively unimportant for the highly systematized, standardized, mechanical, impersonal transactions of life insurance.

It is, indeed, not meant to be asserted here that courts make a practice of deducing their decisions from metaphysical principles. Yet the paucity of analysis, coupled with the undoubted fact that the trend of the decisions is to push the moment of consummation of the contract nearer and nearer to the moment of mental decision — a result to be expected from the metaphysical theory — leaves open the inference that they are intuitively relying upon it. The indictment against it is twofold: It places undue emphasis upon the mental act; and it gives a misleading description of what actually takes place.

That communication of a promissory acceptance is indispensable, is the orthodox view. Thus, Vice-Chancellor Kindersley in *Haynes v. Haynes*,⁷⁶ after declaring communication essential, says:

"Now this is not a mere theoretical disquisition, but a statement of sound practical principles of universal law, and of the law of England in particular."

Professor Langdell is equally emphatic that this is the law.⁷⁷ While communication is sometimes added as a requisite by those

⁷¹ I JHERING, *DER ZWECK IM RECHT* (1893), 125; *THE LAW AS A MEANS TO AN END*, 95.

⁷² HOLMES, *op. cit.*, 309.

⁷³ 144 S. W. 362 (Tex. Civ. App. 1912).

⁷⁴ "Without reference to the will, the inner intention, if one chooses, the expression of agreement would be meaningless. It must in the last resort be connected with the man, with the personality; . . ." — W. A. WATT in *ENCYCLOPEDIA OF RELIGION AND ETHICS*, sub tit., "Contracts."

⁷⁵ WIGMORE, *EVIDENCE*, § 2404.

⁷⁶ 1 Dr. & Sm. 426, 433 (1861).

⁷⁷ LANGDELL, *SUMMARY OF CONTRACTS*, 15. To the same effect, WILLISTON'S *WALD'S*

who avow the "meeting of minds" principle,⁷⁸ yet the ethical basis of this rule is essentially teleological. Austin says: "It the [promise] binds, on account of the expectation excited in the promisee."⁷⁹ The consequence of a broken promise is injury to the promisee who relies upon it. He cannot rely upon it unless he knows of it, hence, unless it be communicated to him, it can produce no harmful consequences.⁸⁰ In strict logic, therefore, the promisee must at all costs be made actually conscious of the promise. Thus, if the letter comes and he does not read it, there is no contract. Professor Langdell consistently adopts this view. It needs no citation of authorities to show that the courts do not apply this principle. The fact, for instance, that the insured has not read his policy is not fatal; the receipt of a writing setting forth the promise is always enough. Nor does the court inquire, where the promisee has read the promise, whether or not he has actively relied upon it.

Obviously, then, the teleological conception of contractual liability — or, if one prefers, the rule requiring communication — is nowhere carried out with rigorous logic. The law seeks to avert not alone the individual disappointment, but the social and economic consequences of broken promises and of the promise-breaking habit. The law might refuse to regard a breach of promise as harmful unless it were shown with absolute certainty that the promisee relied thereon. That it does not is due to the fact that man lives in a world of probabilities, not certainties.⁸¹

POLLOCK ON CONTRACTS, 37; 9 COL. L. R. 633; 7 AM. L. REV. 453-457; cases cited *supra*, note 29. *Contra*, HARRIMAN, CONTRACTS, 86; Holmes, J., in *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644 (1898). A summary treatment of the conflicting views of civil law writers on this question is given in 7 AM. L. REV. 443-453.

⁷⁸ See Vice-Chancellor Kindersley in the case cited above; Savigny (HOLLAND, JURISPRUDENCE, 10 ed., 252); *Alabama Gold L. Ins. Co. v. Herron*, 56 Miss. 643 (1879).

⁷⁹ *Op. cit.*, 5 ed., II, 906, also, I, 317; 4 ed., II, 939, I, 326. Cf. SIDGWICK, THE METHODS OF ETHICS, 3 ed. (1884), 303, where the distinction is clearly stated: "Thus the essential element of the Duty of Good Faith seems to be not conformity to my own statement, but to the expectations I have intentionally raised in others." To the same effect, PALEY, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY, 8 Am. ed., 1815, Chap. V; PAULSEN, SYSTEM OF ETHICS (Thilly's trans.), 613; WIGMORE, *op. cit.*, § 2413; HOLLAND, *op. cit.*, 253; WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 1, and Appendix, note A, where the learned author points out that he has abandoned Savigny's definition, used in previous editions.

⁸⁰ Arthur L. Corbin, "Offer and Acceptance," 26 YALE L. J. 169, 203.

⁸¹ "... practical life must be contented with probabilities." DEMOGUE, MODERN FRENCH LEGAL PHILOSOPHY, 361, note 15. Cf. JAMES, PRAGMATISM, Chap. VI.

The theory of communication becomes a theory of probability. Logic must compromise with experience.

"Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation."⁸²

The prevailing rule as to contracts by correspondence is thus a compromise. The same may be said of these life-insurance cases. Once it is conceded that the promise need not actually come to the consciousness of the promisee, the question, how far back in the sequence of events between the mental determination to accept and the delivery of the policy the decisive utterance is to be found, is to be answered with a view to the practical result attained. Where the applicant does not require a particular mode of acceptance,⁸³ the courts usually say that some "overt act," some "significant act," some "manifestation of intention" is necessary and sufficient for the formation of the contract.⁸⁴

⁸² Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605.

⁸³ See *infra*, p. 219.

⁸⁴ "The meeting of two minds, the *aggregatio mentium*, necessary to the constitution of every contract, must take place *eo instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party; everything else must be question of proof or of the binding force of the contract by matters subsequent." *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268, 281 (1857). "The contract is consummated when the company accepts the application, executes a policy and deposits it in the mail directed to its agent for delivery to the applicant." *Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861 (1906). "Contracts of insurance are completed when the proposals of the one party have been accepted by the other by some appropriate act signifying such acceptance." By executing the policy and mailing it to the local agent for delivery to the insured, the company "did signify the acceptance of the proposals by an appropriate act, if not by the only act adapted to make known their intention to insure the life of the applicant." *Shattuck v. Mutual L. Ins. Co.*, 4 Cliff. 598, Fed. Cas. No. 12, 715 (1878). "... The contract is completed when the proposals of the one party have been accepted by the other, by some appropriate act signifying the acceptance. . . ." MAY, ON INSURANCE, 71, quoted in *Yonge v. Equitable Life Assur. Soc.*, 30 Fed. 902 (1887). "When the insurer signifies his acceptance of it to the proposer, and not before, the minds of the parties meet and the contract is made." *Heiman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 153 (1871). "No doubt the mere mental assent of the officers of an insurance company to the terms of the application will not make a contract of insurance. There must be some outward manifestation of their assent. It is not the law that this manifestation must reach the insured

While the element of communicativeness, or communicative tendency, is not emphasized in the opinions, it seems clear that the act of acceptance must possess this characteristic in some degree. What considerations should determine the degree? In the first place, life insuring is a desirable social habit, which will not be encouraged if people learn that a slight delay in delivering the policy will defeat the beneficiary's (apparent) claim. Secondly, the company computes and charges a premium from the date of the application, as a rule, and hence, it is arguable, the risk should attach at the earliest possible moment.⁸⁵ Thirdly, certainty is highly desirable. Uncertainty as to the time when the policy takes effect leads to litigation, and litigation is nowhere more unfortunate than in life-insurance cases. The uncertainty of the rules laid down by the cases last cited is to be deplored. Yet the rule must be flexible, for formalism could not long survive. Fourthly, the systematic, mechanical, and impersonal way in which the transactions are carried on gives a communicative character to every act done subsequent to the mental determination of the proper official to accept the application. The insurance organism may be regarded as a huge machine for grinding out policies; once the machinery is set in motion by the act of approving the application and the policy (acceptance) is on its way to the applicant in much the same way that a letter (of acceptance), when mailed, is on its way to the addressee. True, the company may physically intercept the acceptance before it leaves the hands of its agents; but a mailed letter may be physically intercepted, too, though the interception of a letter of acceptance would be legally ineffective. It is arguable, then, that approval of the application — *a fortiori*,

person, so that he will be personally apprised that the company has acted favorably on his application." Goode, J., in *Bowman v. Northern Accident Co.*, 124 Mo. App. 477, 482 (1907). "... where ... such application has been unconditionally accepted, and the acceptance signified by some definite act of the company, the contract ... is then complete. ..." *Waters v. Security Life & Annuity Co.*, 144 N. C. 663, 669, 57 S. E. 437, 439 (1907). "The mailing of the policy ... manifests an intention on the part of the insurer to complete the negotiations for insurance." *Williams v. Philadelphia L. Ins. Co.*, 105 S. C. 305, 89 S. E. 675, 676 (1916). "The adoption in good faith of the ordinary method employed by the business world for the transmission of such articles was sufficient." *Sutton v. Wright*, 94 Kan. 499, 147 Pac. 62 (1915). See, also, HOLMES, *THE COMMON LAW*, 306.

⁸⁵ See *Unterharnscheidt v. Missouri State L. Ins. Co.*, 160 Iowa, 223, 138 N. W. 459, 464 (1912); *Duffie v. Bankers' Life Ass'n*, *infra*, note 92.

that mailing the policy to the local agent — creates a probability of communication. The law requires only a probability.

Finally, while mere inaction or silence cannot ordinarily be regarded as possessing a sufficiently communicative character, yet in one class of cases, at least, inaction is communicative, namely, in those cases where the offeror delivers something to the offeree when the offer is made, and the offeree consents to receive the thing, and agrees to return it if he does not accept the offer. In such cases, the offeree's omission to return the thing received is a sufficient communication of his acceptance,⁸⁶ because he is under a duty either to return the thing or accept the offer.⁸⁷ The life-insurance transaction falls under this head, and it is not surprising, then, that a few cases, albeit a distinct minority, have held that undue delay in notifying the applicant of the rejection of his application will constitute an acceptance of the policy.⁸⁸ *A fortiori*, perhaps, any manifestation of intention to accept would suffice.

It must be confessed, however, that with the "meeting of minds" theory discarded, these insurance cases put a considerable strain upon accepted theories of contract. It is submitted, therefore, that the law may well be coming to the point where these decisions will be explained, less with reference to principles of contract than to the principles governing a fixed status of insured and insurer. What objection is there to regarding the insurance corporation as a public service company, under a legal duty to insure upon reasonable terms all properly qualified applicants — just as a railroad company is under a similar duty to furnish transportation? The insurance business has been held to be impressed with a public use under statutes prohibiting discriminations in rates,⁸⁹ and the company's freedom of contract has been abridged by statutes curtailing its privilege of inserting stipulations against suicide⁹⁰ or fraud.⁹¹ It would not, therefore, be a very long step to the rule

⁸⁶ *Wheeler v. Klaholt*, 178 Mass. 141, 59 N. E. 756 (1901). Cf. *Ostman v. Lee*, 91 Conn. 731, 101 Atl. 23 (1917), 27 YALE L. J. 272; *Evans Piano Co. v. Tully*, 116 Miss. 267, 76 So. 833 (1917), 27 YALE L. J. 561.

⁸⁷ Holmes, J., in *Wheeler v. Klaholt*, note 86, *supra*.

⁸⁸ The cases are cited *supra*, note 40.

⁸⁹ *Equitable Life Assur. Soc. v. Commonwealth*, 113 Ky. 126, 67 S. W. 388 (1902).

⁹⁰ *Whitfield v. Aetna L. Ins. Co.*, 205 U. S. 489 (1907); *Head Camp Woodmen of the World v. Sloss*, 49 Colo. 177, 112 Pac. 49 (1910).

⁹¹ *Northwestern L. Ins. Co. v. Riggs*, 203 U. S. 243 (1906).

that the insurance company must give its service to all proper applicants.

The logical consequence of this view would be that every person who applied to a company for a kind of policy issued by that company, who paid the premium, and who submitted to a physical examination would be insured from that date if it could be subsequently demonstrated that he was, when he applied, an acceptable risk; or at least that the company would be under a duty to approve every acceptable application, and that the applicant would have to be regarded as insured from the date of his application if his application were subsequently approved by the company. No decisions have sustained the first of these propositions; but there is some authority for the view that the company is liable in tort for its failure to pass upon an application with diligent promptness,⁹² and that failure to reject the application within a reasonable time will constitute an acceptance thereof.⁹³ The company may well rest under a duty to notify the applicant promptly of the acceptance (as well as of the rejection) of the application. Such notice, however, not being essential to the completion of the transaction, could be waived by the applicant or beneficiary whom it would benefit, and hence absence of notice could not be urged by the company as a defense to an action on the policy.

That the company is under a duty to deliver the policy promptly after it has been executed, is the view encountered in several

⁹² *Duffie v. Bankers' Life Ass'n*, 160 Iowa, 19, 27, 28, 139 N. W. 1087, 1089, 1090 (1913), where the court says: "But it is said that a certificate or policy of insurance is simply a contract like any other, as between individuals, and that there is no such thing as negligence of a party in the matter of delay in entering into a contract. This view overlooks the fact that the defendant holds and is acting under a franchise from the state. The legislative policy, in granting this, proceeds on the theory that chartering such association is in the interest of the public to the end that indemnity on specific contingencies shall be provided those who are eligible and desire it . . . they [insurers] are bound either to furnish the indemnity the state has authorized them to furnish or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon or suffer the consequences flowing from their neglect so to do." The court further held that, if the applicant was an acceptable risk, the measure of damages would be the face amount of the policy which would have been issued. In *Misselhorn v. Mutual Reserve Fund Life Ass'n*, 30 Fed. 545 (1887), Brewer, J., said "receipt of the application may cast a moral duty upon the company to act promptly . . ."; but he declined to regard it as a legal duty. See, also, the *dictum* in *Northwestern Mut. L. Ins. Co. v. Neafus*, 145 Ky. 563, 140 S. W. 1026 (1911).

⁹³ See the cases cited *supra*, note 40.

opinions. For example, in *New York Life Insurance Co. v. Babcock*,⁹⁴ the local agent, who received the policy on November 30, failed to deliver it that day, and the applicant met a violent death the next day. In holding the company liable, the court said:

"That policy was received by its local agent, who, through negligence or in disregard of his obligations both to his company *and to the other contracting party*, failed, without excuse and without authority, to hand the policy to its real owner. In consequence of this failure and negligence the company contends it is not liable. It thus seeks to take advantage of the wrong of its own agent, by virtually pleading his negligence as a defense to this action."⁹⁵

It is submitted that if such a duty rests upon the agent, it arises, not out of a contract (even assuming one to have been formed) but out of the peculiar status of the insurer and applicant. Perhaps the existence of a public service duty is also back of the thought, frequently expressed by the courts, that the policy is in force as soon as executed and started on its journey to the applicant, because "nothing more remains to be done by the applicant."⁹⁶ At all events, indications are not wanting to show that the contract-to-status transition may ere long attain conscious and articulate recognition.

III

The insurance companies have endeavored to combat the prevalent tendency to dispense with delivery of the policy by inserting stipulations, either in the application, in the premium receipt, or in the policy, stating that the policy shall not "take effect," "be in force," "become operative," etc., unless and until the policy is delivered to the applicant.⁹⁷ The following clause from the

⁹⁴ 104 Ga. 67, 30 S. E. 273 (1898).

⁹⁵ 104 Ga. 67, 77, 30 S. E. 273 (1898). Italics are the author's. Similar statements occur in *Gallagher v. Metropolitan L. Ins. Co.*, *supra*, note 30; *Unterharnscheidt v. Missouri State L. Ins. Co.*, *ibid.*; *Williams v. Philadelphia L. Ins. Co.*, *ibid.*; *Bowen v. Prudential Ins. Co.*, 178 Mich. 63, 144 N. W. 543 (1913).

⁹⁶ *Duffie v. Bankers' Life Ass'n*, *supra*, note 92; *Kilborn v. Prudential Ins. Co.*, *supra*, note 31; *Yonge v. Equitable Life Ass'n Soc.*, *supra*, note 30; *Harrington v. Home L. Ins. Co.*, *supra*, note 31; *Unterharnscheidt v. Missouri State L. Ins. Co.*, *supra*, note 30; *N. Y. L. Ins. Co. v. Babcock*, *ibid.*; *Mass. Mut. L. Ins. Co. v. Boswell*, *ibid.*

⁹⁷ L. G. Fouse, president of a life-insurance company, has stated that of fifty-one companies whose applications and policy forms he examined, all inserted stipulations

application in *Misselhorn v. Mutual Reserve Fund Life Ass'n*⁹⁸ is typical:

" . . . This policy is not to be in force until it has been signed by the officers of the association and delivered to the applicant."

These stipulations raise two interesting questions: (1) Where the stipulation is contained in the offer (the application or the premium receipt, since the two are to be construed together), is it to be regarded as a condition of the offer, prescribing the mode of acceptance, or as a condition of the contract, fixing the time of commencement of the risk? (2) What is the effect to be given to such stipulations (aside from the first question)?

1. The offeror may, as a part of his offer, prescribe the mode of acceptance, and where he does so, no contract is made unless the acceptance is made in this manner.⁹⁹ In *Yount v. Prudential Life Insurance Co.*,¹⁰⁰ the court said:

"The provision that the policy should not take effect until its delivery is an agreement which the parties could lawfully make, and, having made it, there is no reason why it should not be enforced. . . . All that was done by either party to the proposed contract was merely preliminary to and dependent upon, its final consummation by delivery to Mr. Yount while he was in the good health he was enjoying at the time he made the proposal to defendant to be insured. No contract could come into existence until his proposal had been accepted upon the terms required, and notice of such acceptance conveyed to him: . . . Clearly a delivery of the policy to the applicant during his life-time and while he was in good health was required before the things done by the parties could ripen into a contract. It was a condition precedent to a completion of the contract."¹⁰¹

to the effect that the policy should not become binding until delivered during the life-time and good health of the applicant. YALE READINGS IN INSURANCE (1909), 219, 223; 26 ANNALS ACAD. POL. & SOC. SCI. 209-228.

⁹⁸ 30 Fed. 545 (1887).

⁹⁹ WILLISTON'S WALD'S POLLOCK, CONTRACTS, 29; Corbin, "Offer and Acceptance," 26 YALE L. J. 199. Cf. J. KOHLER, *op. cit.* 307, 308.

¹⁰⁰ 179 S. W. 749, 750 (Mo. App., 1915).

¹⁰¹ In the following cases the courts seem to have regarded the stipulations in this light, though there are frequently expressions which would support the other construction. *Kilcullen v. Metropolitan L. Ins. Co.*, 108 Mo. App. 61, 82 S. W. 966 (1904); *Paine v. Pacific Mutual L. Ins. Co.*, 51 Fed. 689 (1892) (answer denied making a contract); *Reserve Loan L. Ins. Co. v. Hockett*, 35 Ind. App. 89, 73 N. E. 842 (1905) (equivocal); *Goldstein v. N. Y. L. Ins. Co.*, 176 App. Div. 813, 162 N. Y. Supp. 1088 (1917); *American Home L. Ins. Co. v. Melton*, 144 S. W. 362 (Tex. Civ. App. 1912) (not clear).

It may be argued in support of such a construction that the applicant is not interested in having the contract consummated before the risk attaches; and that the company may lawfully refuse to consider offers which do not prescribe the mode of acceptance which it desires. The arguments in favor of the other construction seem more weighty, however. If the delivery is a condition of the offer, inserted by the applicant, it cannot be "waived" by the insurance company; whereas, if delivery is a condition precedent to the commencement of the risk, it may be "waived" by the company, for whose benefit, obviously, it is inserted — more precisely, the company may by its conduct elect not to enforce compliance with the condition. Moreover, since the applicant has little to say about these printed clauses in the application, and since delay in the commencement of the risk is to his disadvantage, it seems a strained construction to regard him as prescribing any such mode of acceptance. Accordingly, most courts have held that these stipulations fix a condition precedent to the commencement of the risk.¹⁰² The class of stipulations just discussed must be carefully distinguished from those sometimes inserted in the premium receipt to the effect that the receipt shall constitute a temporary contract of insurance, which may be terminated by rejection of the application.¹⁰³

2. These stipulations requiring a delivery of the policy to the

¹⁰² *Nat'l Life Ass'n v. Speer*, 111 Ark. 173, 163 S. W. 1188 (1914) (not clear); *Snedeker v. Metropolitan L. Ins. Co.*, 160 Ky. 119, 169 S. W. 570 (1914); *McClave v. Mutual Reserve Fund Life Ass'n*, 55 N. J. L. 187, 26 Atl. 78 (1893); *Provident Savings L. Ins. Co. v. Elliott's Executor*, 29 Ky. L. Rep. 552, 93 S. W. 659 (1906); *Ray v. Security Trust & L. Ins. Co.*, 126 N. C. 166, 35 S. E. 246 (1900); *Oliver v. Mut. L. Ins. Co. of N. Y.*, 97 Va. 134, 33 S. E. 536 (1899); *Michigan Mut. L. Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503 (1908); *Powell v. North State Mutual L. Ins. Co.*, 153 N. C. 124, 69 S. E. 12 (1910); *Rhodus v. Kansas City L. Ins. Co.*, 156 Mo. App. 281, 137 S. W. 907 (1911); *Bell v. Missouri State L. Ins. Co.*, 166 Mo. App. 390, 149 S. W. 33 (1912); *Pierce v. N. Y. L. Ins. Co.*, 174 Mo. App. 383, 160 S. W. 40 (1913); *Bowen v. Prudential Ins. Co.*, 178 Mich. 63, 144 N. W. 543 (1913); *Missouri State L. Ins. Co. v. Burton*, 129 Ark. 137, 195 S. W. 371 (1917); *Kohen v. Mutual Reserve Life Ass'n*, 28 Fed. 705 (1886); *Misselhorn v. Mutual Reserve Life Ass'n*, 30 Fed. 545 (1887).

¹⁰³ *Fried v. Royal Ins. Co.*, 50 N. Y. 243, 247 (1872) (*per Church, J.*); *Starr v. Mutual L. Ins. Co.*, 41 Wash. 228, 233, 83 Pac. 116 (1905); *Union Central L. Ins. Co. v. Phillips*, 102 Fed. 19 (1900); *Kempf v. Equitable Life Assurance Soc.*, 184 S. W. 133 (Mo. App. 1916), affirmed on this point, *State ex rel. v. Robertson*, 191 S. W. 989 (Mo., 1917). See, also, *Lombard v. Columbia Nat'l L. Ins. Co.*, 168 Pac. 269 (Utah, 1917).

applicant have been literally construed in most instances and it has accordingly been held by most of the courts which have passed upon the question that if the applicant dies before the delivery of the policy to him, no recovery on the policy can be had. Thus, in *Ray v. Security Trust & Life Insurance Co.*,¹⁰⁴ the application contained a stipulation that "no insurance shall be in force until the delivery of the policy." The court found there was no delivery and denied a recovery, Faircloth, C. J., saying:

"The proviso is not unreasonable. There is nothing in it illegal, nor does it contravene any feature of public policy. The applicant wants certainty and desires a certain day, when the agreement becomes absolute, and is stripped of all doubt. The defendant wants protection against unforeseen trouble that may arise after approval of the application and before delivery of the policy."

Adopting the traditional attitude toward "freedom of contract," a majority of the courts have strictly enforced such stipulations.¹⁰⁵ The advantage of certainty as to the time of commencement of the risk is not to be disregarded. On the other hand, the balance of advantage in such cases is clearly on the side of the insurer, for the premium is usually charged from the date of the application, and the stipulation requiring delivery, by postponing the commencement of the risk, deprives the applicant of a few days' insurance which he would otherwise have. While the insurer should

¹⁰⁴ 126 N. C. 166, 169, 35 S. E. 246 (1900).

¹⁰⁵ *McCully's Administrator v. Phoenix Mutual L. Ins. Co.*, 18 W. Va. 782 (1881); *Newcomb v. Provident Fund Society*, 5 Colo. App. 140, 38 Pac. 61 (1894) (*semble*) (condition required countersignature by local agent); *Noyes v. Phoenix Mut. L. Ins. Co.*, 1 Mo. App. 584 (1876) (same as last case); *McClave v. Mutual Reserve Fund Life Ass'n*, 55 N. J. L. 187, 26 Atl. 78 (1893); *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 85 N. W. 128 (1901); *Preferred Accident Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986 (1899) (*semble*); *Reserve Loan L. Ins. Co. v. Hockett*, 35 Ind. App. 89, 73 N. E. 842 (1905); *Oliver v. Mutual L. Ins. Co.*, 97 Va. 134, 33 S. E. 536 (1899); *Bowman v. Northern Accident Co.*, 124 Mo. App. 477, 101 S. W. 691 (1907) (*semble*); *Powell v. Prudential Ins. Co.*, 153 Ala. 611, 45 So. 208 (1907); *Michigan Mut. L. Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503 (1908); *American Home L. Ins. Co. v. Melton*, 144 S. W. 362 (Tex. Civ. App. 1912); *Bowen v. Prudential Ins. Co.*, 178 Mich. 63, 144 N. W. 543 (1913); *Smith v. Commonwealth L. Ins. Co.*, 157 Ky. 146, 162 S. W. 779 (1914); *Nat'l Life Ass'n v. Speer*, 111 Ark. 173, 163 S. W. 1188 (1914); *Snedeker v. Metropolitan L. Ins. Co.*, 160 Ky. 119, 169 S. W. 570 (1914); *John Hancock Mutual L. Ins. Co. v. McClure*, 218 Fed. 597 (1914); *Yount v. Prudential L. Ins. Co.*, 179 S. W. 749 (Mo. App. 1915); *Goldstein v. N. Y. L. Ins. Co.*, 176 App. Div. 813, 162 N. Y. Supp. 1088 (1917); *Missouri State L. Ins. Co. v. Burton*, 129 Ark. 137, 195 S. W. 371 (1917).

from every standpoint have ample time and opportunity to investigate fully the acceptability of the risk, the period of investigation need not be added to the period for which the applicant pays a premium; nor need the insurer execute a policy before it has completed its preliminary acts of reflection, investigation, etc. No hard and fast stipulation requiring delivery is necessary to protect the company, for if it acts with reasonable dispatch, it should be able to reject an undesirable applicant even under the most drastic rulings. Furthermore, "freedom of contract" rarely exists in these cases. Life-insurance contracts are contracts of "adhesion."¹⁰⁶ The contract is drawn up by the insurer and the insured, who merely "adheres" to it, has little choice as to its terms.

Accordingly, the onslaught of the insurance companies does not go unchallenged. While the consideration of public policy does not seem to have been strong enough in any case to induce the court to make a direct frontal attack, courts have in several cases executed successful flanking movements, as by finding that the insurance company had "waived" the benefit of the stipulation requiring delivery,¹⁰⁷ or by calling a delivery to the local agent, or a mailing of the policy, "delivery to the applicant" — thus straining the language out of its clear meaning.¹⁰⁸ Thus the battle between certainty and flexibility goes on.

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¹⁰⁶ This expressive term seems worthy of a place in our legal vocabulary. See RENÉ DEMOGUE in MODERN FRENCH LEGAL PHILOSOPHY, 472, 477; 2 M. PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, § 972. A similar usage occurs in international law. See I OPPENHEIM, INTERNATIONAL LAW, §§ 532, 533.

¹⁰⁷ *Rhodus v. Kansas City L. Ins. Co.*, 156 Mo. App. 281, 137 S. W. 907 (1911) (failure to repay premium a "waiver"); *Bell v. Missouri State L. Ins. Co.*, 166 Mo. App. 390, 149 S. W. 33 (1912) (*ibid.*); *Pierce v. N. Y. L. Ins. Co.*, 174 Mo. App. 383, 160 S. W. 40 (1913) (sending blanks for change of beneficiary).

¹⁰⁸ *Triple Link Indemnity Ass'n v. Williams*, 121 Ala. 138, 26 So. 19 (1898) (placing in mail); *Mutual Reserve Fund Life Ass'n v. Farmer*, 65 Ark. 581, 47 S. W. 850 (1898) (mailing policy); *Gallagher v. Metropolitan L. Ins. Co.*, 67 Misc. 115, 121 N. Y. Supp. 638 (1910) (delivery to solicitor); *N. Y. L. Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101 (1908) (*ibid.*); *Powell v. North State Mutual L. Ins. Co.*, 153 N. C. 124, 69 S. E. 12 (1910) (*semble*, delivery may be "actual or constructive"); *Unterharnscheidt v. Ins. Co.*, *supra*, note 30 (delivery to local agent); *Thompson v. Michigan Mut. L. Ins. Co.*, 56 Ind. App. 502, 105 N. E. 780 (1914) (*ibid.*); *Prudential Ins. Co. v. Shively*, 1 Ohio App. 238, 248 (1913) (*ibid.*); *Amarillo Ins. Co. v. Brown*, 166 S. W. 658 (Tex. Civ. App. 1914) (applicant told agent to keep policy for him). See, also, the *dictum* in *Preferred Acc. Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986, 988 (1899).

THE LIMITATIONS UPON THE AMENDING POWER

THE manner in which and the means by which the Constitution of the United States may be amended are prescribed in Article V. of the Constitution, which reads as follows:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided, that no Amendment, which may be made prior to the Year One thousand eight hundred and eight, shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article [relating to slavery]; and *that no State shall, without its consent, be deprived of its equal Suffrage in the Senate.*"

Until lately, it appears never to have occurred to any one in this country that there need be any fear that the Constitution could be too readily amended. On the contrary, the prevailing impression was that it was almost impossible to amend that great instrument, except by something in the nature of a revolution.

The events of the past few years, however, have revealed for the first time a danger to the American Union, and to the perpetuity of our institutions, based as those institutions are, to so great an extent, upon the right of local self-government, which the framers of the Constitution could not possibly have foreseen, else they might have taken more effective measures to guard against it.

If the framers of the Constitution had been told that the time would ever come in the United States when a comparatively small but highly organized and determined minority could cause the legislatures of numbers of states to ratify amendments to the Constitution of the United States contrary to the well-known sentiments and wishes of a vast majority of the people of those states, recently

manifested at the polls, the suggestion would probably have been received with absolute incredulity; and if the further suggestion had been made that the ratification of amendments could be secured in that way, which would strip the people of the states of an important part of their legislative powers, such as the right to determine who should be qualified to vote for state officers, or the right to regulate their own habits in regard to eating and drinking, that incredulity would have been still greater. Nevertheless, the American people are now witnessing exactly such a spectacle.

Even in so long-established and conservative a state as Massachusetts, within a few months after the people of the state had voted down a proposition to confer the right (and impose the corresponding duty) of voting upon their women, the legislature of the state adopts a resolution ratifying the Federal Woman's Suffrage Amendment; thereby seeking to deprive the people of Massachusetts, perhaps forever, of the power to regulate this matter for themselves, and to *change the law* in case it should prove unsatisfactory in its operation, and at the same time seeking to force the same condition upon other states whose legislatures may reject the amendment.

The same thing has occurred in a number of states in connection with the ratification of both the Woman's Suffrage and the Prohibition Amendments.

The means by which legislative bodies can be controlled in this manner, so as to cause them to vote contrary to the wishes of their constituents, and to deprive the states of one part of their legislative power after another, is not the subject of our present inquiry. We may not understand as yet, and it may be that we will never understand fully, how this thing is done, but we do know that it can be done, and is done.

Now it is obvious, of course, that if by amendments, or measures in the guise of amendments, to the Federal Constitution any part of its legislative territory, so to speak, may be taken away from a state and annexed to the federal government, it may be only a question of time when all the legislative powers of the state legislatures will be absorbed, so that the state will continue to exist only in name.

The question, therefore, naturally arises: Is there any limit to the right and power to amend the Constitution, which was con-

ferred upon the legislatures of three fourths of the states, by the people of the United States in adopting the article above quoted?

It must be frankly admitted that the idea seems to have generally prevailed, even among lawyers, in this country, that there is something sacred — immutable — about an amendment to the Federal Constitution, and that when once an amendment has been ratified by legislatures of three fourths of the states, its validity as a part of the Constitution is not open to question.

In this article it is proposed to point out, as briefly as may be, some of the considerations which ought to be taken into account before any such conclusion shall be finally adopted.

I

It may be safely premised that the power to “amend” the Constitution was not intended to include the power to *destroy* it. The purpose of “the people of the United States” in adopting this Constitution, as expressed in the preamble, was, “to form a more perfect Union” *of the States* — a Union more perfect than the “perpetual” Union which had been established under the original Articles of Confederation.

It is not conceivable that the people, when they conferred upon the legislatures of three fourths of the states the power to amend this Constitution, intended to authorize the adoption of any measures, under the guise of amendments, the effect of which would be to destroy, wholly or in part, any of the members of this perpetual Union.

It may be safely assumed that the scholarly men — the great lawyers — who constituted the Committee on Style of the Constitutional Convention of 1787 clearly understood the meaning and scope of the term which they employed:

“The term *Amendment* implied such an addition or change within the lines of the original instrument as will effect an improvement, or *better carry out the purpose for which it was framed.*”¹

Clearly, if the purpose of the framers of the Constitution was to establish a perpetual union of the states, it could not have been the purpose of the framers of that instrument, or of the people who adopted it, in authorizing the legislatures of three fourths of the

¹ *Livermore v. Waite*, 102 Cal. 113, 119, 36 Pac. 424 (1894). Italics are author's.

states to amend it, to adopt any amendment which would destroy the states, or any of them, by depriving them of all their local legislative powers.

If, for example, an amendment were adopted in this way whereby the New England states were deprived of the right to levy taxes for the support of their state governments, and that power transferred to the central government at Washington, it would not be seriously contended that such an amendment would be valid; and the reasons why it would not be valid have been made very clear by the Supreme Court of the United States in a number of cases dealing with other powers granted in the Constitution to the states, and especially in connection with the taxing power and the treaty-making power.

In Section 8 of Article I of the Federal Constitution the taxing power is conferred upon Congress in terms quite as broad as those by which the amending power is conferred upon the legislatures of three fourths of the states in Article V, above quoted. Under that section Congress is given the power "to lay and collect taxes, duties, imposts and excises, and to provide for the common defense and the general welfare of the United States." Nowhere in the Constitution is there any express limitation upon this taxing power.

Nevertheless, the Supreme Court held, in the case of *Collector v. Day*,² that an Act of Congress imposing a tax upon the salaries of state officials was void, because of the *tendency* of such laws to destroy the states, and thereby destroy the Union. In the course of the opinion of the court, as delivered by Mr. Justice Nelson in that case, it is said:

"The cases of *McCulloch v. Maryland*, 4 Wheaton, 316, and *Weston v. Charleston*, 2 Peters, 449, were referred to as settling the principle that governed the case, namely, 'that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers.'

"The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch v. Maryland*: 'If the states,' he observes, 'may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the gov-

² 11 Wall. (U. S.) 113 (1870).

ernment to an excess which would defeat all the ends of government. This,' he observes, 'was not intended by the American people.'

" . . . And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation?"³

Again, in the case of *Lane County v. Oregon*,⁴ the Supreme Court had to deal with the question of the validity *vel non* of an Act of Congress under which it was claimed that the state of Oregon was required to accept, as legal tender, notes of the United States in payment of state taxes. The right of Congress to provide for the issue of legal tender notes was not denied, but the act was held void, in so far as it might require a sovereign state to accept these notes in payment of its state taxes, because it would have the effect of taking away from the state, in some measure, its taxing power — a power without which it could not continue to exist as a state, within the meaning of the Constitution. To quote from the opinion of the court in that case:

"On the other hand, the people of each State compose a State, having its own government, and *endowed with all the functions essential to separate and independent existence*. The States disunited might continue to exist. Without the *States in union* there could be no such political body as the United States. . . .

" . . . Now, to the existence of the States, themselves *necessary to the existence of the United States*, the power of taxation is indispensable. It is an essential function of government. . . . If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered."⁵

In other words, the acts of Congress called in question in these cases were held by the Supreme Court to be void, for the reason that the court could not believe, notwithstanding the broad, general, and unqualified terms in which the power to levy taxes was conferred upon Congress, that it could have been the intention of

³ 11 Wall. (U. S.) 123, 125 (1870).

⁴ 7 Wall. (U. S.) 71 (1868).

⁵ *Ibid.*, 76, 77. Italics are the author's.

the framers of the Constitution of the United States, or of the people of the United States in adopting that Constitution, to confer upon Congress the right to destroy a state, by taking away, or crippling, in whole or in part, any of the functions essential to its existence as a state.

Now, as already observed, the language with which the taxing power is conferred upon Congress, in the Constitution, is no less broad and unqualified than the language in which the power to adopt amendments is conferred upon the legislatures of three fourths of the states by Article V, which provides for amendments. Both of these powers are *delegated* powers, pure and simple.

Congress has no inherent power to adopt, and the legislatures of three fourths of the states have no inherent power to ratify, any amendment to the Constitution of the United States, and make it binding upon nonassenting states. The power to do so is derived entirely from the grant in Article V of the Constitution itself.

If the grant, in general terms, of the power to levy taxes does not confer upon Congress the power to levy any taxes which would impair the integrity, the autonomy and independent existence of the states, and thereby destroy the Union, which cannot exist without the states, as a *perpetual Union of States*, it would seem clear, by a parity of reasoning, that the grant of the power to amend the Constitution cannot be deemed to have been intended to confer the right upon Congress, with the assent of the legislatures of three fourths of the states, to adopt any amendment, or any measure under the guise of an amendment, which would have the same tendency, that is, the tendency to destroy the states, by taking from them, directly, any branch of their legislative powers.

The result would be the same in both cases. As was said by Chief Justice Marshall, in *McCulloch v. Maryland*: "The power to tax involves the power to destroy."

A right to tax would do little harm, perhaps, if the tax were light, but there is no definite point at which the line can be drawn; hence the power to tax the instrumentalities of the state government is denied absolutely, though there is no express provision in the Constitution denying this right.

So with the amending power. A so-called amendment which takes from a state the right to legislate with reference to the drinking habits of its people might not seriously interfere with the

state's autonomy. It would leave a vast field of state legislation uninvaded.

But it would be the beginning of the end. The next thing to be taken away might be the right to regulate the domestic relations, the right to fix the devolution of estates, the right to dispose of property by will, the right to determine the kinds of property which the people of the states might be permitted to own, etc., *ad infinitum*, until the state would cease to exist; certainly in the sense in which the word "state" is used in the Constitution of the United States.

II

But, aside from all this, there is one express limitation placed upon the amending power in Article V of the Constitution which is still in force. It is provided in that article that no amendment shall be adopted which shall deprive any state of its equal representation in the Senate.

It would seem to be manifest that this prohibition could not be nullified, indirectly, by taking away from the state any of those functions which are essential "to its separate and independent existence" as a state. Certainly the legislative power, the right to make laws for its own government, must be deemed one of those functions.

If by successive amendments a state could be deprived of its legislative powers, it would cease to be *the* state, which is guaranteed, by this limitation upon the amending power, perpetual, equal representation in the Senate.

III

There is another view of this subject which has been suggested by one of the greatest legal minds of the country, and which, it is submitted, is entitled to the serious consideration of the legal profession.

That view is that Article V of the Constitution whereby power is conferred upon Congress, with the assent of the legislatures of three fourths of the states, to propose "amendments," was never intended to confer upon Congress the power to enact ordinary *legislation* in that way, and thus make it irrepealable by Congress and binding upon future generations of Americans.

In other words, the proposition is that even though it should be deemed competent, under Article V of the Constitution, to adopt amendments taking away from the states the right to legislate with reference to the ordinary subjects of state legislation, and transfer to Congress the power to legislate on those subjects, it by no means follows that any measure would be valid which, instead of conferring this power upon Congress, should constitute in itself *direct* legislation on these subjects.

The Constitution of the United States, together with the original amendments thereto, constitute a framework of government. It creates certain bodies through which the three great governmental functions — the legislative, executive, and judicial — shall be exercised, and, in addition to that, prescribes certain restrictions upon the exercise of these various powers, intended for the protection of the liberties of the individual and the integrity of the state.

It provides who shall legislate and how, and subject to what restrictions, but it does not itself legislate, and certainly not upon any subjects concerning which there was, at that time, any difference of opinion in the English-speaking world.

To have done so would have been to commit the gravest imaginable folly, for it is of the very essence of civil liberty that a people shall have the right to change their laws from time to time, and not be compelled to live under laws enacted in previous centuries by their ancestors which may have become totally unsuited to their changed conditions.

Hence it is that the framers of the Constitution, and of the amendments, the adoption of which, in the first instance, was necessary to secure the ratification thereof, were extremely careful to avoid embodying in it anything in the way of legislation.

IV

But it may be said that the arguments above adduced against the validity of the Woman's Suffrage Amendment, the Prohibition Amendment, or similar amendments, taking away the legislative powers of the states, and themselves taking the form of legislation of a practically irrepealable character, could be urged against the so-called War Amendments, that is the 13th, 15th, and possibly parts of the 14th Amendments.

As a practical matter, it must be conceded that unless this objection can be met, it could hardly be expected that the Supreme Court of the United States would give serious consideration to these arguments.

Now it must be admitted that if, at the time of the adoption of the so-called War Amendments, or within a reasonable time thereafter, their validity had been challenged on the above grounds, it might have been found that they were open to those very objections, and it will not be doubted but that the court which had the courage to go the lengths which the Supreme Court of the United States did in those days, in such cases as the Slaughter House cases, for example, to preserve the integrity of the *Federal Union*, would have given full and careful consideration to these objections.

But it is respectfully suggested that the objection in question may be met by the following considerations:

It will not be disputed that if the 13th, 14th, and 15th Amendments had been adopted in the same manner and by the same authority which adopted the original Constitution, there could be no question as to their validity, and a little consideration will serve to show that to all intents and purposes they have been so adopted, and now have the same indisputable sanction.

How then, and by whom, was the original Constitution adopted?

Let the answer be found in the language of Chief Justice Marshall, in delivering the opinion of the court, in the Supreme Court of the United States, in the great case of *McCulloch v. Maryland*:⁶

"In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

"It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a Convention of Delegates, chosen in each State by the

⁶ 4 Wheat. (U. S.) 316, 402 (1819). Italics are the author's.

people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States — and where else should they have assembled? *No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.* Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

"From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties."

Now, it will not be denied that if the people of the United States when they were adopting the original Constitution, in the manner thus described by Chief Justice Marshall, had seen fit to do so, they could, in the exercise of their ultimate sovereign powers and right to adopt any government or laws which they saw fit, have incorporated in it the same provisions which are substantially embodied in the so-called War Amendments.

And it will also be conceded that even though the state legislatures of fifty years ago had no right, power, or authority, under Article V, to adopt such amendments as these so-called War Amendments — such power not having been delegated to those legislatures by the people, in adopting Article V — nevertheless, if after these so-called War Amendments were thus adopted the people had assembled in convention, either in one national convention or in separate conventions held in each state, and ratified that action of the state legislatures, the validity of these amendments would have been put beyond question.

And have the people of the United States not done what amounts in effect to the same thing, when for fifty years they have deliberately acquiesced in the enforcement of those amendments?

For more than forty-five years the validity of not one of those amendments was ever challenged, although infinite opportunities to contest their validity had presented themselves.

After some forty-five years a question as to the validity of the 15th Amendment was raised in the case of *Myers v. Anderson*,⁷ and it may be — of course this can only be surmised — that the Supreme Court had some of the above considerations in mind when it refrained from expressing any opinion on this question, and let it pass *sub silentio*.

However that may be, by so doing, the court left itself free to deal with these considerations whenever they shall arise in future, under the class of amendments which have been discussed.

No matter what may have been the defects in the War Amendments — no matter how unauthorized might have been their adoption — it must be conceded that no court in the world could be blamed for declining to consider objections to their validity after such a long period of universal assent and implied ratification by the whole people of the United States. Therefore it would seem only reasonable to believe that when this question as to limitations to the Amending Power shall come before the Supreme Court, that great tribunal will deem itself free to deal with it on its merits.

Of course it can be urged with great force against the construction of Article V, herein suggested, that it would have the effect of narrowing the scope of the grant of power to amend, contained in that article, to such an extent as might result in grave inconvenience in the future.

Indeed, on first impression it might be thought that it would to a great extent render ineffective and valueless that grant.

So far as the first objection is concerned there can be no denial of the proposition that many and great inconveniences, and, it may be, hardships, may result to the people of the United States from time to time if that construction is adopted.

For instance, a vast majority of the people of three fourths, or perhaps nine tenths, of the states of the Union might be desirous

⁷ 238 U. S. 368, 35 Sup. Ct. Rep. 932 (1915).

of having an amendment providing for or permitting uniform laws for the regulation of child labor in factories, etc., so as to prevent one state from securing advantages over another in the matter of manufacturing, and, under the suggested construction of the Constitution, the people would be powerless for a long time to remedy these conditions. So with reference to the laws regulating divorce; and doubtless many other illustrations will suggest themselves.

If this should prove to be the case, however, it will only demonstrate the fact that the Union, which the framers of the Constitution provided for, had not proven, in actual operation, to be so perfect as they had hoped. Indeed, as the result of these causes, it may prove extremely imperfect; but if the views hereinabove expressed as to the dangers to be feared from sustaining the validity of amendments which take away one after the other the local legislative powers of the states be in any degree well founded, the choice then presented to the American people may be one between an imperfect Constitution and no Constitution at all.

A little consideration will show, on the other hand, that after excluding from the scope of the amending power such amendments as take away legislative powers of the states there is still left a very broad field for its operation.

All sorts of amendments might be adopted which would change the framework of the federal government, — the thing which the Constitution was created to establish, — which would change the distribution of power among the various departments of that government, place additional limitations upon them, or abolish old guarantees of civil liberty and establish new ones.

It may be that the Supreme Court, when this question shall be presented to it, in the future will consider itself obliged to take a different view of the limitations of the amending power than that which is here suggested.

In that event, the judgment of that great tribunal will, of course, be accepted by the country as finally disposing of the question, but it will mean that the framers of the Constitution of the United States have failed in their efforts to establish and secure to their posterity forever the benefits of a perpetual union of "indestructible states," by failing to clothe the Supreme Court of the United States with the power necessary to insure that perpetuity, by preserving the integrity of the states.

Of course no attempt has been made in this article to discuss this vast question exhaustively, or to present all the arguments which could be made against the validity of constitutional amendments of the character considered. The writer will be quite content if what has been suggested herein shall have the effect of arousing the good minds of the legal profession of the country sufficiently to provoke further discussion of the subject.

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BALTIMORE, MD.

THE PROGRESS OF THE LAW, 1918-1919

CIVIL PROCEDURE

FORM AND SOURCES OF PROCEDURAL LAW

AT common law the adjective law, like the substantive law, developed mainly through judicial decisions reached by a process of judicial reasoning in which the judges arrived at their conclusions chiefly by the aid of ancient custom and the employment of deductive logic, professing at least not to make but to discover the law. The result, it must be admitted, was that common-law procedure was a complex system in which too often the courts lost sight of the true end and purpose of the adjective law — the determination and enforcement with reasonable speed of the substantive rights of the parties. Occasionally, from time to time, the legislature interfered, so that a certain amount of procedural law was to be found in statutes. In the middle of the last century the legislatures of many states attempted entirely to make over the adjective law by statute. Many reforms were effected, but the high hopes of the codifiers were not fulfilled; procedure, instead of being the servant of the substantive law, too often remained its master, a more rigid master than ever.¹ Following the lead of England, several states have now attempted to cure the evils of the existing systems by leaving to the courts the regulation of procedure by rules of court. From early times the judges possessed, and to a limited extent exercised, this power of consciously enacting adjective law;² but the rules adopted related for the most part to the *minutiae* of practice, and not to its broader principles. To-day in some jurisdictions, as in New Jersey,³ there is a short Practice Act, and matters not covered by the Act are dealt with

¹ Mr. Root, at the meeting of the American Bar Association in 1919, said: "The legislatures are continually tying you up in threads, cords, ropes and chains of legislation about procedure. . . . One great trouble about the administration of law in the United States is that our legislative bodies will not permit the judges to do justice." 5 AMER. BAR ASS'N JOUR. 676, 677 (1919).

² In TIDD'S PRACTICE, a volume of great authority at the time of the American Revolution, will be found tables of rules of court reaching back to the time of Henry VI.

³ NEW JERSEY LAWS, 1912, c. 231.

by rules of court; in Colorado⁴ the courts are given power to prescribe rules of practice and procedure which shall supersede any statute in conflict therewith.⁵

During the last year a statute in South Dakota⁶ has given the Supreme Court of that state power to enact rules of practice in civil and criminal actions governing the mode of trial and instructing juries.

In New York the Board of Statutory Consolidation has recently published its third report, recommending the enactment of a short Civil Practice Act containing forty-two brief sections, conferring upon a convention, composed of delegates chosen from the justices of the Supreme Court and the Appellate Division, and from members of the bar, the power to make rules regulating procedure in all matters not regulated by the Civil Practice Act. On the other hand, the Joint Legislative Committee on the Simplification of Civil Practice in New York has submitted an elaborate report in which, as a substitute for the proposal of the board, there has been suggested a reduced and amended code of some fifteen hundred sections. It appears that the plan of the committee offers few advantages over the existing Code of Civil Procedure, except in matters of detail and arrangement.

The American Judicature Society has recently completed a draft of a set of rules of civil procedure,⁷ supplementary to the draft of a state-wide Judicature Act which it had previously published.⁸ This draft, although as yet in a tentative form, is very suggestive.

At a meeting of the American Bar Association in 1910 the suggestion was made that the United States Supreme Court should be given power by rule of court to regulate procedure on the law side of the federal courts. A Committee on Uniform Judicial Procedure was created by the Association in 1912, and ever since

⁴ COLO. LAWS, 1913, c. 121.

⁵ The regulation of procedure by rules of court is advocated in the following articles: Pound, "Regulation of Judicial Procedure by Rules of Court," 10 ILL. L. REV. 163 (1915); Hudson, "The Proposed Regulation of Missouri Procedure by Rules of Court," 17 U. MO. BULL. L. S. 13 (1916); Morgan, "Judicial Regulation of Court Procedure," 2 MINN. L. REV. 81 (1917). See also Mr. Root's remarks, 5 AMER. BAR ASS'N JOUR. 676 (1919).

⁶ STAT. 1919, pages 150, 346.

⁷ BULL. XIV (1919).

⁸ BULL. VII A (1917).

that time the proposed change has been actively pressed by it. At length there is a near prospect of its adoption by Congress.⁹ If the proposed bill is enacted and the rules promulgated by the Supreme Court work satisfactorily, it is not unlikely that a number of states will regulate their procedure on similar lines. This is one of the most important and most promising of proposed procedural reforms.¹⁰

ORGANIZATION OF THE COURTS

The courts have found it more and more difficult, as time has gone on, to dispose of the increasing mass of litigation with which they are confronted. Of late years the question of reorganizing the courts has been much mooted.¹¹ One of the evil effects of the prevailing rigid system of separate courts has been the waste of judicial power it entails; some courts have had little to do, while at the same time others are overwhelmed with business. An attempt has been made to stem the tide in some states by provisions giving more flexibility to the present system. In Oregon, for instance, a recent statute¹² confers upon the Chief Justice of the Supreme Court power to direct any circuit judge in the state to hold court in any county of any judicial district in the state. But in many states the remedy must be more sweeping, and a complete reorganization of the judiciary is necessary. Such a reorganization is advocated by the Bar Associations of Texas and Mississippi.¹³

SERVICE OF PROCESS

In a few states statutes purport to give the courts jurisdiction over nonresidents not personally within the state but doing business therein, either as individuals or as partners, by service upon the manager or agent or person in charge of such business in the state.

⁹ See the report of the committee presented at the meeting of the American Bar Association in 1919, 5 AMER. BAR ASS'N JOUR. 468.

¹⁰ Thomas W. Sheldon, Esq., Chairman of the Committee on Uniform Judicial Procedure, has recently published a book entitled *SPIRIT OF THE COURTS*, advocating the proposed reform.

¹¹ The matter has been taken up by the American Judicature Society. See BULL. IX (1915) and BULL. VII A (1917).

¹² GEN. LAWS, 1919, c. 242.

¹³ See Discussion of Proposed Amendment of Judiciary Articles of Constitution of Texas, 1918; REP. MISSISSIPPI BAR ASS'N, 1918, page 101.

In the case of *Flexner v. Farson*¹⁴ the Supreme Court of the United States held that a judgment rendered on such service is not entitled to full faith and credit in another state.¹⁵ In that case the service was made upon a person who at the time of service had ceased to act as agent in charge of the business; and the decision can be supported on that ground. The court, however, seemed to base its decision upon the broader ground that a state cannot by statute confer upon its courts jurisdiction over nonresidents not personally present within the state and not expressly consenting to the jurisdiction of the courts of the state, although engaged in business within the state. It is submitted that this broad proposition is unsound. Although citizens of other states are, under the "privileges and immunities" clauses of the federal constitution, entitled to carry on business in any state, yet the state may regulate in a reasonable way the carrying on of such business. The Supreme Court of the United States has upheld a state statute providing that a nonresident owner of an automobile should, as a condition precedent to his right to operate it on the highways of the state, appoint the Secretary of State as his agent, upon whom process might be served in any action arising out of its operation within the state.¹⁶ The same court has also held that a state statute providing that a corporation as a condition precedent to doing business within the state should appoint an agent or authorize a public official to accept service of process, applies even to corporations which seek to do within the state only interstate business.¹⁷ It cannot be said, therefore, as is to be inferred from the opinion of the court in *Flexner v. Farson*, that the power of a state to require submission to the jurisdiction of the courts of the state is limited to cases where the state has power to exclude altogether. And it would seem, therefore, that a state may forbid a nonresident to do business within the state unless and until he has consented to the jurisdiction of the courts of the state as to

¹⁴ 248 U. S. 289 (1919).

¹⁵ Such a judgment was likewise held invalid in the recent case of *Knox Bros. v. E. W. Wagner & Co.*, 209 S. W. (Tenn.) 638 (1919). And see *Cabanne v. Graf*, 87 Minn. 510, 92 N. W. 461 (1902), SCOTT, CASES ON CIVIL PROCEDURE, 24. On the other hand, the opposite result was reached in *Victor Cornille & De Blonde v. R. G. Dun & Co.*, 79 So. (La.) 855 (1918).

¹⁶ *Kane v. New Jersey*, 242 U. S. 160, 37 Sup. Ct. Rep. 30 (1916).

¹⁷ *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. Rep. 944 (1914).

causes of action arising within the state out of the business there carried on. And if this is so, it may well be held that even in the absence of actual consent a nonresident subjects himself to the jurisdiction by doing business in a state in which there is such a statute.¹⁸

THEORY OF THE PLEADINGS

By the first section of the original New York Code of Procedure the distinction between actions at law and suits in equity, and the forms of those actions and suits, was abolished; and this provision was incorporated in the codes of other states. It was felt by David Dudley Field and his disciples that this marked a great step forward in the procedural law. Unfortunately, however, some courts have limited the operation of this provision. The idea that the plaintiff should recover if he states sufficient facts to constitute a cause of action, and proves those facts or enough of them to constitute a cause of action, has been defeated in New York and several other states by decisions to the effect that the plaintiff cannot recover except on the theory of law on which his complaint is founded.

In *Jackson v. Strong*¹⁹ the plaintiff brought an action in New York alleging that he had entered into a contract with the defendant to prosecute an undertaking for their joint benefit, sharing equally as partners in the expenses and in the receipts, and he asked for an accounting and for recovery of the amount to be found due. The defendant denied the agreement to share, but alleged that he had agreed to employ the plaintiff as his assistant and to pay him the reasonable value of his services. The case was tried before a referee, who reported that there was no agreement to share, but found that the defendant had agreed to pay the plaintiff the reasonable value

¹⁸ See Scott, "Jurisdiction over Nonresidents doing Business within a State," 32 HARV. L. REV. 871. Compare Beale, "Progress of the Law, 1918-1919 — Conflict of Laws," 33 HARV. L. REV. 1, 9.

As to what constitutes "doing business" within a state there have been as to corporations, many recent decisions. *Gen. Inv. Co. v. Lake Shore, etc. Ry. Co.*, 250 Fed. (C. C. A. 6) 160 (1918); *Golden Belknap & Swartz v. Connersville Wheel Co.*, 252 Fed. (D. C. E. D. Mich. S. D.) 904 (1918); *Atchison, etc. Ry. Co. v. Weeks*, 254 Fed. (C. C. A. 5) 513 (1918); *Empire Fuel Co. v. Lyons*, 257 Fed. (C. C. A. 6) 890 (1919); *Vicksburg, etc. Ry. v. De Bow*, 148 Ga. 738, 98 S. E. 381 (1919); *Pembleton v. Illinois, etc. Ass'n*, 124 N. E. (Ill.) 355 (1919). See also *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 Sup. Ct. Rep. 233 (1918); *Kliver v. Midwest Grain Co.*, 173 N. W. (N. D.) 468 (1919); *Williams v. J. F. Ball, etc. Co.*, 182 Pac. (Kan.) 552 (1919).

¹⁹ 222 N. Y. 149, 118 N. E. 512 (1917).

of his services, which he found to be something over \$1,000. Judgment was given for the plaintiff for that sum. The Court of Appeals held that the judgment should be reversed, because in his complaint the plaintiff had proceeded on the theory of a partnership and his complaint was in the nature of a bill in equity, whereas the judgment was based upon a contract and was in the nature of a judgment at law.²⁰

In Massachusetts, forms of action have not been entirely abolished, but have been reduced to three; *viz.*, tort, contract, and replevin. In *Ash v. Childs Dining Hall Co.*²¹ the plaintiff brought an action of tort, alleging that the defendant corporation conducted a dining hall and that the plaintiff while eating a meal there as a customer was injured by swallowing a nail in a piece of pie, and that the defendant had negligently permitted the nail to get into the pie. The answer was a general denial. At the trial there was no evidence that the defendant was negligent. The judge refused to order a verdict for the defendant; and the Supreme Judicial Court held that this ruling was erroneous. It was conceded that if the plaintiff had sued on an implied warranty, she could have recovered; indeed it was so decided by the same court on the same day in a similar case,²² in which the plaintiff, whose teeth had been injured by stones in a plate of beans served by the same defendant, sued in "tort or contract" on an implied warranty and recovered.²³ The mere fact, therefore, that the plaintiff in the *Ash* case made and failed to prove the unnecessary allegation of negligence, prevented his recovery, although he had alleged and proved enough facts to constitute a cause of action.²⁴

How much simpler and more sensible is the practice in Ontario. In a recent address before the Judicial Section of the American Bar

²⁰ For a criticism of the decision, see 31 HARV. L. REV. 166 (1918).

²¹ 231 Mass. 86, 120 N. E. 396 (1918).

²² *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407 (1918).

²³ In Massachusetts the form of action to recover on an implied warranty may be tort or contract. See *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481 (1908).

²⁴ For recent decisions taking the same view on the general question of the theory of the pleadings, see *Nave v. Dieckman*, 208 S. W. (Mo. App.) 273 (1919); *Deyo v. Hudson*, 123 N. E. (N. Y.) 851 (1919). For cases taking the opposite view, see *Knapp v. Walker*, 73 Conn. 459, 47 Atl. 655 (1900), SCOTT, CASES, 103; *Bruheim v. Stratton*, 145 Wis. 271, 129 N. W. 1092 (1911), SCOTT, CASES, 105; *Cockrell v. Henderson*, 81 Kan. 335, 105 Pac. 443 (1909).

Association, Mr. Justice Riddell of the Supreme Court of Ontario, in speaking of civil practice in that province, said:

"Amendments of pleadings are allowed almost as of course at any stage even in the Appellate Division. Our rules in that regard are imperative not permissive — 'shall' not 'may.' . . .

"These amendments may be made in the proceedings before trial, they may be made at the trial, they may be made in the Appellate Division. Over and over again, in the Appellate Division in which I have the honor to sit, the objection has been taken, 'The judgment does not follow the pleadings,' and the answer made: 'Very well; we will amend the pleadings to agree with the facts.' There may be other facts which would require to be proved under the amended pleadings or other evidence which a party might desire to adduce. If so, we call the witnesses before us in the Appellate Division, and have them examined there; or sometimes facts are allowed to be proved on affidavit.

"If the facts are all before the court, we have little care for the pleadings and we care nothing for the 'state of the record.' . . . We care so little about the record that, in a great many cases, the amendments which are ordered to be made are not made in fact." ²⁵

AMENDMENT OF PLEADINGS

In *Friederichsen v. Renard* ²⁶ the plaintiff brought suit in a federal court alleging fraud in an exchange of lands, and seeking cancellation of the contract and deeds. The defendants denied the fraud. A master reported that the plaintiff had been induced to enter into the contract by fraud, but that the plaintiff after having notice of the fraud had cut timber upon the land which he had received from the defendants under the contract. The court held that the plaintiff was not entitled to equitable relief, because by cutting the timber he had ratified the contract, and that his remedy was at law for damages; and it was ordered that the cause be transferred to the law side of the court and that the parties "file amended pleadings to conform with an action at law." ²⁷ The plaintiff thereupon filed an amended petition on the law side of the court, stating the facts

²⁵ 5 AMER. BAR ASS'N JOUR. 646, 647 (1919).

²⁶ 247 U. S. 207, 38 Sup. Ct. Rep. 450 (1918).

²⁷ This transfer was authorized under Federal Equity Rule 22. A transfer from the law side to the equity side of the federal courts is permissible under the provisions of the Law and Equity Bill of March 3, 1915, 38 STAT. AT L. 956, amending Judiciary Code, § 274a.

which he had stated in the original bill in equity, and praying for a judgment for damages for deceit. The defendants pleaded the Statute of Limitations. At the time when the original bill was filed the period of limitations had not yet run, but it had run at the time when the amended petition was filed. A verdict was directed for the defendants and a judgment entered thereon, which was affirmed by the Circuit Court of Appeals. The case was carried to the Supreme Court of the United States on a writ of *certiorari*, and that court reversed the judgment, holding that the filing of the amended petition was not the commencement of a new action, and that the plaintiff was not barred by the Statute of Limitations. The decision seems sound;²⁸ the plaintiff was still relying on the same wrong, although the relief sought was different. The result of course could never have been reached at common law, where suits in equity and actions at law could not be entertained by the same court, nor in jurisdictions where it is impossible to transfer a case from the equity side to the law side of a court administering both law and equity.

There have been several other recent cases in which the question has arisen whether an amendment states a new cause of action which would be barred by the Statute of Limitations. In *Nash v. Minneapolis, etc. R. R. Co.*²⁹ the plaintiff brought suit in Minnesota for damages under the federal Employers' Liability Act for the death of her intestate in Iowa. After the period of limitations had expired she amended her complaint so as to base her action upon an Iowa statute. It was held that the Statute of Limitations was no bar.³⁰ The opposite result was reached in the converse case in *Carpenter v. Central Vermont Ry. Co.*,³¹ where the plaintiff originally based his action upon the law of a state and amended his declaration so as to base his action upon the federal Employers' Liability Act.³²

²⁸ See *Schurmeier v. Conn. Mut. Life Ins. Co.*, 171 Fed. (C. C. A.) 1 (1909), *Smith v. Butler*, 176 Mass. 38, 57 N. E. 322 (1900); *Reynolds v. Mo., etc. Ry. Co.*, 228 Mass. 584, 117 N. E. 913 (1917).

²⁹ 169 N. W. (Minn.) 540 (1918).

³⁰ *Baltimore & O. R. R. Co. v. Branson*, 104 Atl. (Md.) 356 (1917), *contra*. See 3 MINN. L. REV. 132 (1919).

³¹ 107 Atl. (Vt.) 569 (1919).

³² In *Breen v. Iowa Central Ry. Co.*, 168 N. W. (Iowa) 901 (1918), the court refused to allow the defendant after the statutory period to amend his answer or to introduce evidence to the effect that the defendant was engaged in interstate commerce. The

PLEADING — AIDER OF DEFECTS

If the plaintiff omits from his complaint a necessary allegation, and the defendant in his plea supplies the missing allegation, the defect in the declaration is cured.³³ In *Auxier v. Auxier*³⁴ it was held that a missing allegation in the plaintiff's complaint might be supplied in the plaintiff's reply. A decision to the same effect has been rendered in New Jersey.³⁵ These cases show a growing tendency toward requiring less formality in the pleadings, when the rights of the parties are not adversely affected thereby.³⁶ At common law it would appear that if the plaintiff has omitted an allegation in his declaration, it is not proper to supply it by inserting it in one of his subsequent pleadings, but he should amend his declaration.³⁷

PLEADING — ALLEGATIONS IN THE ALTERNATIVE

In several states it is permissible for a party in his pleadings to allege facts disjunctively or in the alternative.³⁸ At common law such pleadings were regarded as uncertain and indefinite.³⁹ In *Macurder v. Lewiston Journal Co.*⁴⁰ it was held that a declaration in which the plaintiff alleged that the defendant published or caused to be published a certain libel was open to a general demurrer.⁴¹

plaintiff therefore recovered without amending his complaint. See 3 MINN. L. REV. 59 (1918).

³³ *Brooke v. Brooke*, 1 Sid. 184 (1664), SCOTT, CASES, 192. Similarly, a plea may be aided by an admission in the replication. *United States v. Morris*, 10 Wheat. (U. S.) 246 (1825).

³⁴ 182 Ky. 588, 205 S. W. 684 (1918).

³⁵ *Marine Trust Co. v. St. James A. M. E. Church*, 85 N. J. L. 272, 88 Atl. 1075 (1913).

³⁶ It is not permissible for a plaintiff to supply a new cause of action in his reply; that would be a departure. Nor is it permissible to do so by filing a counterclaim to the defendant's answer. *Smith v. Caster*, 170 N. W. (S. D.) 156 (1918).

³⁷ *Kearney County Bank v. Zimmerman*, 5 Neb. (Unoff.) 556, 99 N. W. 524 (1904).

³⁸ Similarly also in some states parties may be named alternatively. See R. S. C. 1883 (England), Order XVI, Rules 1 and 4; CONN. PRACTICE BOOK, 1908, page 238; N. J. LAWS, 1912, p. 378, Rules 4 and 6. See *Crouse v. Perth Amboy Pub. Co.*, 85 N. J. L. 476, 89 Atl. 1003 (1914); *Phenix Iron Foundry v. Lockwood*, 21 R. I. 556, 45 Atl. 546 (1900). But see *Casey Pure Milk Co. v. Booth Fisheries Co.*, 124 Minn. 117, 144 N. W. 450 (1913), 51 L. R. A. (N. S.) 640, SCOTT, CASES, 154.

³⁹ STEPHEN, PLEADING, *426.

⁴⁰ 104 Me. 554, 72 Atl. 490 (1908), SCOTT, CASES, 203.

⁴¹ *King v. Brereton*, 8 Mod. 330 (1725) (motion in arrest of judgment), *accord*. The

This was an extreme instance of the severity of the common-law rule. In *Adams Express Co. v. Heagy*⁴² it was held that an allegation that the defendant knew, or by the exercise of reasonable care would have known, of a certain fact, was sufficient. Even where disjunctive allegations are regarded as uncertain, such allegations as those contained in the two cases above mentioned can hardly be so regarded. If one of the alternatives stated is insufficient to maintain the action, then of course no cause of action is stated and the pleading is demurrable.⁴³

TRIAL BY JURY

Trial by jury is becoming an increasingly expensive luxury. In many states the legislatures have, during the past year, increased the fees of jurors. In England the tremendous drain upon the manpower of the country induced Parliament to pass a statute⁴⁴ whereby it was provided that during the continuance of the war, and for six months thereafter, issues in legal actions should be tried without a jury except in certain classes of actions, such as libel, slander, malicious prosecution, and the like, unless otherwise ordered by the court or a judge. The number of jurors required at coroners' inquests had been reduced by a statute of the previous year.⁴⁵

INSTRUCTIONS TO THE JURY

In 1918 a bill was introduced in Congress providing that it should be reversible error for the judge presiding in a federal court to express his personal opinion as to the credibility of witnesses or the weight of testimony; and that the judge, where requested by either party, should reduce to writing his charge to the jury, and should deliver his charge before the argument of counsel, except when the court is sitting in states in which a trial judge is permitted to deliver his charge after argument of counsel. Fortunately this attempt to impair the power of the federal judges was unsuccessful;

better view is that the defect is open only to special demurrer or motion. See *Anderson v. Minn., etc. Ry. Co.*, 103 Minn. 224, 114 N. W. 1123 (1908).

⁴² 122 N. E. (Ind. App.) 603 (1919).

⁴³ *Hoffman v. City of Maysville*, 123 Ky. 707, 97 S. W. 360 (1906); *Anderson v. Minn., etc. Ry. Co.*, 103 Minn. 224, 114 N. W. 1123 (1908), *Hanford v. Duchastel*, 87 N. J. L. 205, 93 Atl. 586 (1915).

⁴⁴ Juries Act, 1918, 8 & 9 GEO. V, c. 23.

⁴⁵ Coroners (Emergency Provisions) Act, 1917, 7 & 8 GEO. V, c. 19.

and although the bill was favorably reported by the Judiciary Committee of the House of Representatives, it was never brought to a vote in the House and was not introduced in the Senate.⁴⁶

MOTIONS FOR DIRECTED VERDICT

There have been several decisions during the past year reaffirming the rule prevailing in some states that if both parties move for a directed verdict, the case is taken from the jury and the determination of facts submitted to the court, whose decision will not be set aside unless a verdict by the jury to the same effect would be set aside.⁴⁷ It seems, however, that it is a strange perversion of the intention of the parties to turn a contention by each of them that there is no disputable question of fact, into a consent to allow the court to determine disputed facts. In some jurisdictions, accordingly, if there is a real dispute the court must deny both motions and submit the case to the jury.⁴⁸

JUDGMENT NOTWITHSTANDING THE VERDICT

No trial by jury should be necessary when there is no disputable question of fact to be tried, and no new trial should be necessary when there is no disputable question of fact left undetermined. If on the evidence there is no room for dispute, a compulsory nonsuit may be ordered or a verdict directed by the trial judge. But if on such a state of evidence the judge refuses to grant a compulsory nonsuit or to direct a verdict, the only remedy thereafter in the trial court or in the appellate court at common law is the granting of a new trial.⁴⁹ It would seem unnecessary, however, to grant a new trial. The parties have had their day in court and there is no reason why they should be allowed another. In an increasing

⁴⁶ For a criticism of this bill, see 31 HARV. L. REV. 1011.

⁴⁷ *La Crosse Plow Co. v. Pagenstecher*, 253 Fed. (C. C. A. 8) 46 (1918); *Sampliner v. Motion Picture Patents Co.*, 259 Fed. (C. C. A. 2) 152 (1919); *Hall v. Harrel*, 206 S. W. (Ark.) 435 (1919); *Bank of Benson v. Gordon*, 172 N. W. (Neb.) 367 (1919); *Rugh v. Soleim*, 180 Pac. (Ore.) 930 (1919); *Brush v. Rothschild*, 174 N. Y. Supp. (App. Div.) 589 (1919). See *Share v. Coats*, 29 S. D. 603, 137 N. W. 402 (1912), SCOTT, CASES, 334. Before the rendition of the verdict either party may ask that the issues be submitted to the jury. *Brown Paint Co. v. Reinhardt*, 210 N. Y. 162, 104 N. E. 124 (1914). But cf. *Sampliner v. Motion Picture Patents Co.*, 259 Fed. (C. C. A. 2) 152 (1919).

⁴⁸ *Second Nat. Bank v. Smith*, 91 N. J. L. 531, 103 Atl. 862 (1918).

⁴⁹ *Wallace v. Oregon, etc. Co.*, 90 Ore. 31, 175 Pac. 445 (1918).

number of states,⁵⁰ as in England,⁵¹ the trial court or the appellate court may order judgment to be entered notwithstanding the verdict. In the federal courts, unfortunately, it has been held, erroneously it is submitted, that the Seventh Amendment requires a new trial and that it is unconstitutional to order judgment to be entered notwithstanding the verdict.⁵² In the case of *Banbury v. Bank of Montreal*,⁵³ recently decided by the House of Lords (Lord Finlay, L. C., and Lord Shaw dissenting), it was held that where the plaintiff failed to offer sufficient evidence to go to the jury but a verdict was rendered for the plaintiff, the Court of Appeal might order judgment to be entered for the plaintiff notwithstanding the verdict, although the defendant had failed at the trial to move for a directed verdict. Lord Atkinson in his opinion thus tersely stated the *ratio decidendi*:

"It seems hardly just or right that a verdict which never should have been found should be allowed to stand simply because the judge was not asked to prevent its being found."⁵⁴

This, it is submitted, is a sound principle.⁵⁵ The opposite result, however, was reached in New York in the case of *Ernst Zobel Co. v. Canals*.⁵⁶

Of course, as all the judges in *Banbury v. Bank of Montreal* admitted, if by accident or mistake or because of surprise the plaintiff's failure to introduce evidence on some point was due to accident, mistake, or surprise, it would be proper to grant a new trial rather than to enter judgment for the defendant. It was so held in *Alink v. Chicago, etc. Ry. Co.*⁵⁷ Even though the court has power to give

⁵⁰ See *Kiess v. Block & Kuhl Co.*, 205 Ill. App. 167 (1917); *Cahn v. N. W. Mut. Life Ins. Co.*, 208 Ill. App. 317 (1917); *Keynolds v. Searle*, 186 App. Div. 202, 174 N. Y. Supp. 137 (1919); *Anderson v. Phillips*, 169 N. W. (N. D.) 315 (1918) (*semble*); *Thress v. Zemple*, 174 N. W. (N. D.) 185 (1919); *Feeney v. Maryland Casualty Co.*, 107 Atl. (Pa.) 320 (1919); *Searles v. Boorse*, 107 Atl. (Pa.) 838 (1919). See also *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14 (1900), SCOTT, CASES, 489.

⁵¹ Order 58, Rule 4. See *Witherbotham & Co. v. Sibthorp*, [1918] 1 K. B. 625.

⁵² *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, 33 Sup. Ct. Rep. 523 (1913). Of course it is permissible to enter judgment on the pleadings notwithstanding the verdict.

⁵³ [1918] A. C. 626.

⁵⁴ *Banbury v. Bank of Montreal*, [1918] A. C. 626, page 675.

⁵⁵ See 32 HARV. L. REV. 711 (1919).

⁵⁶ 188 App. Div. 231, 176 N. Y. Supp. 537 (1919).

⁵⁷ 169 N. W. (Minn.) 250 (1918). See also *Marshall v. Kansas City Rys. Co.*, 205 S. W. (Mo. App.) 971 (1918); *Wallace v. Oregon, etc. Co.*, 90 Ore. 31, 175 Pac. 445 (1918).

judgment notwithstanding the verdict, it not infrequently happens that it is fairer to the parties, considering all the circumstances, to allow a new trial. In such a case, as was held in *Dubs v. Northern Pac. Ry. Co.*,⁵⁸ judgment will not be ordered but a new trial will be granted.

NEW TRIAL — EXCESSIVE AND INADEQUATE DAMAGES

In *Lisbon v. Lyman*⁵⁹ Chief Justice Doe of New Hampshire laid down "the general principle that when an error has happened in a trial, the party prejudiced by it has a right to the correction of the error, but has not a right to a new trial if the error can be otherwise corrected; and when it can be corrected only by a new trial, it is still the correction of the error, and not the new trial, to which he is primarily entitled." In accordance with this principle there are numerous decisions in this country to the effect that if the damages found by the jury are excessive, yet if the plaintiff is willing to remit the excess, the defendant cannot insist upon a new trial.⁶⁰ But this eminently reasonable principle was rejected by the House of Lords in *Watt v. Watt*.⁶¹ In that case the plaintiff brought an action for libel and the jury found a verdict for him for £5,000; the Court of Appeal, on the ground that the damages awarded were excessive and unreasonable, made an order for a new trial unless the plaintiff should consent to a reduction of the damages to £1,500. The House of Lords reversed this order, and ordered a new trial without giving the plaintiff an option of remitting part of the damages. It was admitted that the order of the Court of Appeal was in accordance with an established practice; and Lord Davey admitted that the practice was convenient and that such an

⁵⁸ 171 N. W. (N. D.) 888 (1919).

⁵⁹ 49 N. H. 553, 600 (1870).

⁶⁰ There have been many recent cases on this. See, for example, *Union Pac. R. R. Co. v. Hadley*, 246 U. S. 330, 38 Sup. Ct. Rep. 318 (1918); *Rederiaktiebolaget Amie v. Universal Transp. Co.*, 250 Fed. (C. C. A. 2) 400 (1918), 38 Sup. Ct. Rep. 425 (1918) (*certiorari* denied); *Louisville & N. R. R. Co. v. Frank*, 80 So. (Fla.) 60 (1918); *Todden v. Stephenson*, 169 N. W. (Iowa) 34 (1918); *Bothe v. True*, 103 Kan. 562, 175 Pac. 395 (1919); *Emerick v. Jones Motor Car Co.*, 178 Pac. (Kan.) 399 (1919); *Schwartz v. Chatham, etc. Bank*, 172 N. Y. Supp. (App. Div.) 762 (1918); *Di Vona v. Lee*, 107 Atl. (R. I.) 77 (1919). See also *Detzur v. B. Stroh Brewing Co.*, 119 Mich. 282, 77 N. W. 948 (1899), *SCOTT, CASES*, 469, and a collection of cases in 39 L. R. A. (N. S.) 1064.

⁶¹ [1905] A. C. 115.

order would in most cases do substantial justice and save expense; but it was thought that the practice involved an encroachment upon the province of the jury. But it seems that there is no such encroachment; the defendant is not compelled to pay more than the jury might properly award and did in fact award. Accordingly the Supreme Court of the United States has held that this practice does not violate the constitutional guaranty of the right to trial by jury.⁶² Of course, if the amount of damages found by the jury shows such bias or passion or prejudice as would presumably affect their determination of the issues as well as the question of damages, the defendant may insist upon a new trial.⁶³ But the mere fact that the damages are excessive does not evince such bias, passion, or prejudice.

In the recent case of *Lionel Barber & Co. v. Deutsche Bank (Berlin) London Agency*,⁶⁴ the plaintiffs brought an action for libel. The court erroneously instructed the jury that a certain item of £460 might be included in the damages to be awarded. The jury assessed the plaintiffs' damages at £3,000. The plaintiffs consented to a deduction of £460. It was held by the House of Lords (Lord Atkinson and Lord Phillimore dissenting) that the defendant was not entitled to a new trial. In other words, apparently the English law requires a new trial where the excess is due to a fault of the jury, but allows a *remittitur* instead of a new trial if the excess is due to an erroneous instruction by the court.

PARTIAL NEW TRIALS

At common law a verdict or judgment was regarded as inseverable; and if a new trial was granted, the new trial extended to all the issues, although the ground for granting the new trial may have affected only a single issue.⁶⁵ But Chief Justice Doe in the famous

⁶² *Gila Valley, etc. Ry. Co. v. Hall*, 232 U. S. 94, 34 Sup. Ct. Rep. 229 (1914), SCOTT, CASES, 473.

⁶³ *Floody v. Great Northern Ry. Co.*, 102 Minn. 81, 112 N. W. 875 (1907). Similarly the awarding of inadequate damages may show an improper compromise by the jury on the issues, vitiating the whole verdict and requiring a new trial. *Donnatin v. Union, etc. Co.* 175 Pac. (Cal. App.) 26 (1918) (\$1 awarded for personal injury); *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102 (\$100 for loss of eye).

⁶⁴ [1919] A. C. 304.

⁶⁵ *Parker v. Godin*, 2 Str. 813 (1729), SCOTT, CASES, 479; *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. Rep. 307 (1882), SCOTT, CASES, 430.

case already mentioned ⁶⁶ said: "The general principle of the correction of errors which occur in judicial proceedings, preserves, as far as possible, what is good, and destroys only what is erroneous when the latter can be severed from the former." In several jurisdictions this principle has been adopted by statute.⁶⁷ In an increasing number of others it has been adopted without statutory authority.⁶⁸ This practice of allowing partial new trials is clearly just and expedient, saving time and expense. If the issues are not severable, if the ground for granting a new trial extends to all the issues, it is obvious that a new trial should be granted as to all the issues; and the determination of the question whether a partial or complete new trial should be granted is left to the sound discretion of the court.⁶⁹

PREJUDICIAL ERROR

In February, 1919, section 269 of the federal Judicial Code was amended by the addition of the following provision:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."⁷⁰

Of course all courts go so far as to deny a new trial if the error *could not* have been prejudicial; and all would grant a new trial if it is affirmatively shown that the error *must* have been prejudicial. Under the prevailing rule in this country, in the absence of a statute, it is held that a new trial will be granted if the error *might* have been prejudicial.⁷¹ In jurisdictions where a more liberal rule prevails,

⁶⁶ *Lisbon v. Lyman*, 49 N. H. 553, 583 (1870).

⁶⁷ Such a statute does not violate the constitutional provision for trial by jury. *Opinion of the Justices*, 207 Mass. 606, 94 N. E. 558 (1911).

⁶⁸ For recent cases see, for example, *Schroeder v. Edwards*, 205 S. W. (Mo.) 47 (1918); *Davis v. So. Ry. Co.*, 175 N. C. 648, 96 S. E. 945 (1918). Cf. *Empire Fuel Co. v. Lyons*, 257 Fed. (C. C. A. 6) 890, 897 (1919).

⁶⁹ *Gaines v. Baldwin*, 104 Atl. (Vt.) 825 (1918). See also *Norfolk So. R. R. Co. v. Ferebee*, 238 U. S. 269, 35 Sup. Ct. Rep. 781 (1915).

⁷⁰ 40 STAT. AT L. 1181.

⁷¹ This rule is founded on the decision of the Court of Exchequer in *Crease v. Barrett*, 1 Cr., M. & R. 919, 5 Tyrw. 458 (1835), and the decision of the Court of King's Bench in *Baron de Rutzen v. Farr*, 4 Ad. & El. 53 (1835), SCOTT, CASES, 454, which rejected the earlier doctrine of the Court of Common Pleas laid down in *Doe v. Tyler*, 6 Bing. 561 (1830), SCOTT, CASES, 451.

where the court considers whether on the whole record it appears that the substantial rights of the parties have been affected by the error,⁷² there is a difference as to the burden of proof; in some, as in England, the party resisting the new trial must convince the court that the alleged error was probably not prejudicial;⁷³ in others, as in California, the burden is on the party seeking a new trial to convince the court that the alleged error was probably prejudicial.⁷⁴ The language of the federal statute is not so clear or positive as that of the amendment recommended by the American Bar Association, but a liberal construction of it by the courts will put an end to the evil of setting aside verdicts and judgments in cases where the error does not affect the merits of the controversy.⁷⁵

The length to which some courts are willing to go in awarding new trials is illustrated by a recent case⁷⁶ in Arkansas, where evidence of the good character of a witness was improperly admitted. This error could hardly be regarded as prejudicial, since in the absence of contrary evidence a witness is presumed to be of good character. But the court ordered a new trial. Such a decision should be impossible under any view.⁷⁷

In the case of *King v. Twiss*⁷⁸ it appeared that a jurymen had conversed with important witnesses, but it also appeared that what was said would have no tendency to influence him. Accordingly the court declined to grant a new trial. Similarly in *Collins v. Splane*,⁷⁹ where it appeared that a juror on his own initiative took a view of the premises where the personal injuries for which suit was brought had occurred, but it appeared that no prejudice probably resulted from this, it was held that no new trial need be granted.

Ordinarily if the judge erroneously instructs the jury on a vital

⁷² A majority of the states have enacted statutes going at least as far as this federal statute. For a summary of these statutes, see Wheeler, "Procedural Reform in the Federal Courts," 66 U. PA. L. REV. 1, 12. To the list there given should be added MASS. STAT., 1913, c. 716, § 1.

⁷³ *Anthony v. Halstead*, 37 L. T. 433 (1877); *White v. Barnes*, [1914] W. N. 74, both cited in *Lionel Barber & Co. v. Deutsche Bank (Berlin) London Agency*, [1919] A. C. 304, 323.

⁷⁴ See CAL. CODE CIV. PROC. § 475.

⁷⁵ See the Third Report of the Committee to Suggest Remedies and Propose Laws relating to Procedure, 5 AMER. BAR ASS'N JOUR., 455 (1919).

⁷⁶ *Lockett v. State*, 136 Ark. 473, 207 S. W. 55 (1918).

⁷⁷ For a criticism of the decision see 17 MICH. L. REV. 406 (1919).

⁷⁸ [1918] 2 K. B. 583.

⁷⁹ 230 Mass. 281, 120 N. E. 66 (1918).

question, a new trial must follow. Ordinarily, also, if it appears that the jury has failed to follow the instructions of the judge, a new trial must follow. It may happen both that the instructions of the judge are erroneous and that the jury fails to follow them, with the result that a proper verdict is reached. In such a case it has been held in some states that a new trial is necessary.⁸⁰ The ground for this holding is that the jury were guilty of "trampling upon the authority of the court," and that to allow their verdict to stand even though it is correct on the law and on the facts, would be to give "some countenance to their assumption."⁸¹ It is a harsh rule, however, which sacrifices a party who is entitled to his verdict on the law and facts, in order to discipline the jury. Moreover, the disciplinary effect upon the jury is practically negligible. Accordingly, in the recent case of *Public Utilities Co. v. Reader*,⁸² it was held that under these circumstances no new trial should be granted. This view seems to accord with justice and common sense.

A somewhat similar problem arises where the judge gives correct instructions but in an improper manner. In *Fillipon v. Albion Vein Slate Company*⁸³ the jury, while deliberating, sent to the judge a written inquiry, to which the judge replied by sending a written instruction to the jury-room in the absence of the parties and their counsel and without their consent. The Supreme Court of the United States thought that the instruction was somewhat misleading, and on that account a new trial was rightly ordered. Pitney, J., in delivering the opinion of the court, said that even if the instruction was correct a new trial should be granted. The opposite result was reached in *Oates v. Maxcy*.⁸⁴ In the absence of prejudice to either party it would seem that the only justification for granting a new trial would be the disciplinary effect upon the judge. It seems unfair, however, to make the parties suffer in order to discipline the judge.

⁸⁰ See *Penticost v. Massey*, 81 So. (Ala.) 637 (1919).

⁸¹ *Savery v. Busick*, 11 Iowa, 487 (1861), SCOTT, CASES, 456.

⁸² 122 N. E. (Ind. App.) 26 (1919). The decision is approved in 17 MICH. L. REV. 592 (1919).

⁸³ 250 U. S. 76 (1919).

⁸⁴ 206 S. W. (Tex. Civ. App.) 535 (1918). If the judge had gone into the jury-room it would usually be impossible to say how far by his manner and tone of voice he might have influenced the jury; and a new trial would therefore be granted. See *State v. Samaha*, 92 N. J. L. 125, 104 Atl. 305 (1918); *State v. Murphy*, 17 N. D. 48, 115 N. W. 84 (1908), SCOTT, CASES, 385.

DECLARATORY JUDGMENTS

At common law an action at law lay only to redress a wrong committed before the action was brought. A court of equity might grant injunctions against threatened wrongs and might entertain bills *quia timet*. In many states statutes have given the courts power to quiet title to land, to construe wills, and to give directions to trustees. In England the courts are given much wider power to give relief in anticipation of possible future controversies. It is provided by a rule of court ⁸⁵ that

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

The subject of declaratory judgments has recently received considerable discussion in this country. Professor Sunderland of the University of Michigan has written an illuminating article on "A Modern Evolution in Remedial Rights, — The Declaratory Judgment," ⁸⁶ and Professor Borchard of Yale University has dealt with the same subject in an article on "The Declaratory Judgment — A Needed Procedural Reform." ⁸⁷ In Michigan, as a result of Professor Sunderland's activities, the legislature has enacted a statute along the lines of the English rule, ⁸⁸ and in Florida a similar statute, somewhat narrower in its provisions, has been passed. ⁸⁹ In the proposed rules of civil procedure drafted by the American Judicature Society and recently published in its latest bulletin, ⁹⁰ there are several proposed rules dealing with this subject, and a discussion of the problems involved.

JUSTICE FOR THE POOR

One of the most important of recent contributions on procedural law is a bulletin on "Justice and the Poor" by Reginald Heber Smith, Esq., of the Boston Bar, recently issued by the Carnegie

⁸⁵ Order 25, Rule 5.

⁸⁶ 16 MICH. L. REV. 69 (1917).

⁸⁷ 28 YALE L. J. 1, 105 (1918).

⁸⁸ MICH. STAT., 1919, p.000. See 17 MICH. L. REV. 688 (1919).

⁸⁹ FLORIDA LAWS, 1919, No. 75.

⁹⁰ BULL. XIV, 53. (1919) This matter is reprinted in the MASS. LAW QUART., May, 1919, pp. 251-258. •

Foundation for the Advancement of Teaching.⁹¹ Mr. Smith has had several years of experience at the head of the Boston Legal Aid Society and has investigated the work of legal aid societies throughout the United States. The bulletin has immediately received widespread and favorable comment in the daily press. Mr. Smith shows that the traditional machinery provided for the conduct of litigation is too cumbersome to effect justice in small causes, too slow, and especially too expensive. The result is practically the closing of the doors of the courts to the poor, with the result that the unscrupulous, whether rich or poor, are enabled to prey with impunity upon them. Special agencies must be employed if justice is to be administered in small causes. Mr. Smith discusses the agencies which to some extent have been employed — small claims courts, conciliation, arbitration, domestic relations courts, administrative tribunals, administrative officials, assigned counsel, public defenders, and legal aid organizations. There is no branch of the law of procedure which more urgently requires the attention of all who have at heart the administration of justice and the well-being of the nation.

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⁹¹ BULL. XIII (1919).

BILLS AND NOTES

A VERY important addition to the textbooks on this topic is the third edition of Joseph D. Brannan's *Negotiable Instruments Law*, which has just been published. This annotates the statute with all the decisions through volumes of the reports which are specified in the preface, and contains very valuable discussion of ambiguous sections of the Act and of erroneous cases. It will be reviewed at length in an early issue of this REVIEW.

Interesting light on the origin of the Uniform Act is thrown by the *Central Law Journal*,¹ which reprints a circular letter sent out on August 20, 1886, by the Committee on Correspondence of the Alabama State Bar Association, suggesting uniform state legislation, beginning with the law of negotiable instruments. The letter suggested the adoption of the English Bills of Exchange Act with changes in formal matters.

During the year, no state has enacted the Negotiable Instruments Law, but it is to be hoped that it will soon be adopted by the remaining two states, Texas and Georgia. When the Act has become general law in this country, perhaps courts will take judicial notice of its existence in other states, following the excellent example of the Connecticut Supreme Court a few years ago;² but at present the tendency is to presume that the common law is in force until the existence of the Act is proved by evidence.³ This odd determination of our judges to remain in official ignorance of what every lawyer knows is strikingly illustrated by a recent Indiana case,⁴ which held that a note made and payable in Georgia to the order of a named payee was non-negotiable, because it was not alleged in the complaint that the Statute of Anne was adopted in Georgia, and hence it must be assumed that all promissory

¹ 88 CENT. L. J. 329, 330 (1919), contributed by Frederick G. Bromberg, chairman of the committee mentioned.

² Gleason v. Thayer, 87 Conn. 248, 87 Atl. 790 (1913).

³ Demelman v. Brazier, 193 Mass. 588, 79 N. E. 812 (1907); Bank of Laddonia v. Bright-Coy Commission Co., 139 Mo. App. 110, 120 S. W. 648 (1909).

⁴ Crume v. Brightwell, 122 N. E. (Ind. App.) 230 (1919).

notes were non-negotiable as under "the customary law merchant." The same judicial trust that the common law exists everywhere led a New York judge to say of drafts governed by the laws of the Argentine Republic,⁵ "Presumably those laws are in accord with the law merchant as recognized in this jurisdiction, but it may be that the law of Argentina is different from our law."

CONFLICT OF LAWS

In the New York case just cited,⁶ bills were drawn upon a New York bank in Argentina by its Buenos Aires branch and delivered to the payee in good faith, but in return for money which he had obtained from various persons by fraud. The Court of Criminal Proceedings of Buenos Aires, having jurisdiction over the particular crime and the defendant, issued an order enjoining the bank from paying the drafts anywhere in the world, unless presented by *bona fide* holders for value. The bank pleaded this injunction as a defense to an action brought in New York by an indorsee, but the defense was held demurrable as not binding the plaintiff, even if not a holder for value. The defendant had leave to plead the actual facts of the alleged fraud, which the court intimated would be a good defense, but this seems doubtful in an action at law in view of the doctrine of *Prouty v. Roberts*,⁷ which is followed in New York cases,⁸ that a maker, drawer, or acceptor cannot set up in a law court the equities of other persons. If, however, the defense can be raised, it would seem that the Argentina adjudication of the payee's equitable rights should be conclusive on the plaintiff if not a holder in due course, because he would be privy to the payee.

A difficult question of priority in property securing several notes is raised by a Mississippi decision.⁹ A, a Louisiana corporation, made ten notes to its own order, payable in Mississippi, indorsed them in blank, and delivered them to B, a Mississippi bank, with

⁵ *Scura v. National City Bank of New York*, 107 N. Y. Misc. 93, 177 N. Y. Supp. 75, 79 (1919), per Lehman, J.

⁶ See note 5, *supra*.

⁷ 6 Cush. (Mass.) 19 (1850).

⁸ *Warren v. Haight*, 65 N. Y. 171 (1875); *City Bank v. Perkins*, 29 N. Y. 554 (1864); *Brown v. Penfield*, 36 N. Y. 473 (1867). *Contra*, *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999 (1892). See 31 HARV. L. REV. 1141, notes 122, 123.

⁹ *Couret v. Conner*, 79 So. (Miss.) 230 (1918).

a vendor's lien and mortgage on Louisiana lands as blanket security for all ten notes. B was indebted to C, a Louisiana bank, and wrote offering to substitute some of A's notes for other collateral of B's held by C. C mailed its acceptance of this offer in New Orleans, and B accordingly sent three of A's notes without further indorsement to C, but retained the mortgage. A and B both became insolvent, and the mortgaged property was insufficient to cover all the notes. B's receivers contended that B and C should share *pro rata* in the proceeds of the land under Mississippi law, while C claimed priority under Louisiana law, by which if the holder of a claim secured by lien assigns a part of it, he will not be permitted to compete with his assignee in the proceeds of the property if insufficient to pay both in full. It was held that Louisiana law governed on the ground that the offer to give collateral was accepted there, but there is a vigorous dissent favoring the application of Mississippi law on the ground that the notes were payable in Mississippi. It would seem that Mississippi law should govern, since the *lex fori* determines questions of distribution.

A recent article in the *Central Law Journal* by O. C. Brown deals with this same question, — "Rights to Priority in Distribution of Proceeds of Mortgaged Property Among Assignees of Notes Secured by One Mortgage."¹⁰

Professor Ernest G. Lorenzen of Yale University has published a treatise on "The Conflict of Laws Relating to Bills and Notes, Preceded by a Comparative Study of the Law of Bills and Notes,"¹¹ and also an article on "Moratory Legislation Relating to Bills and Notes and the Conflict of Law."¹²

FORMAL REQUISITES OF NEGOTIABILITY

It is usually desirable that commercial instruments understood by business men to be negotiable should be held so by the courts. Certificates of deposit have usually been recognized as negotiable, and a recent Michigan case¹³ adopts this view. The limitation,

¹⁰ 88 CENT. L. J. 446 (June 20, 1919).

¹¹ New Haven: Yale University Press. 1919. pp. 337. Reviewed in 32 HARV. L. REV. 983.

¹² 28 YALE L. J. 324-386 (February, 1919).

¹³ *White v. Wadhams*, 170 N. W. (Mich.) 60 (1918); noted in 17 MICH. L. REV. 419.

"subject to the rules of the savings department," was held not to render the promise payable out of a particular savings department fund or otherwise conditional. The Uniform Acts as to bills of lading and warehouse receipts have made those documents negotiable, though not payable in money, and a similar statutory extension has been made in Kentucky as to tobacco warehouse receipts. Such instruments are not, however, within the Negotiable Instruments Law.¹⁴

A bill or note must be unconditional, and it is often difficult to determine whether a memorandum on the instrument constitutes a condition. A note, otherwise unobjectionable, stated that it was given to reimburse the payee for a specified certificate of deposit maturing with the note. The Supreme Court of Alabama¹⁵ held that this made the payment of the note conditional on the payment of the certificate of deposit. Three out of seven judges dissented, on the ground that there was only "a statement of the transaction which gives rise to the instrument" under section 3, subsection 2 of the Negotiable Instruments Law. It has been suggested¹⁶ that this same subsection of the Act validates chattel notes, which provide that the title of a chattel shall remain in the payee until payment, and this view is taken by a recent case in Oklahoma.¹⁷ Probably, however, a state like Massachusetts, which held chattel notes conditional at common law,¹⁸ would not regard this clause of the Uniform Act as sufficiently specific to change the local law.

A negotiable instrument must be payable in money, for since it is intended to serve as a substitute for money, the holder must be able at maturity to convert it into a medium of exchange with which he can go at once into shops or elsewhere and buy what he wishes. It is obvious that an instrument payable in goods would

¹⁴ *Kirkpatrick v. Lebus*, 211 S. W. (Ky. App.) 572 (1919), construing KY. STAT., section 4814 a, subsection 3. *Vannett v. Reilly-Herz Automobile Co.*, 173 N. W. (N. D.) 466 (1919).

¹⁵ *Sacred Heart Church Building Committee v. Manson*, 82 So. (Ala.) 498 (1919). One of the majority concurred partly on the ground that the plaintiff was not a holder in due course even if the note was negotiable.

¹⁶ By Judge Lyman D. Brewster. See his article in *BRANNAN'S NEGOTIABLE INSTRUMENTS*, 3 ed., 437, and comments by Dean Ames and Charles L. McKeehan, on pages 421, 447, 477.

¹⁷ *Welch v. Owenby*, 175 Pac. (Okla.) 746 (1918).

¹⁸ *Sloan v. McCarty*, 134 Mass. 245 (1883).

not have that advantage, although persons might be found who would be willing to accept the goods in barter for commodities or services. In the same way, an instrument payable in foreign coin is not negotiable,¹⁹ although some persons might consent to take it in payment. However, it is immaterial that the money is foreign at the forum or the place of making if it circulates as legal tender or with equivalent freedom at the place of payment.²⁰ Foreign paper money, in which a government promises its own coin to pay bearer in its own country, falls within the same principle, and has recently been held negotiable in New York.²¹ The decision goes largely on the unnecessary and incorrect ground that foreign money is money in this country. The limited and uncertain willingness to receive it takes it out of that category. An interesting question arises — Is foreign specie, though neither money nor negotiable paper, a chattel current, so that a *bona fide* purchaser thereof from a thief will be protected? The New York case so holds, and this seems correct. It is probable that coins cease to be current when they no longer circulate anywhere, and that the *bona fide* purchaser of a Cyzicene stater on an Attic obolus would be obliged to return it to the victim of theft.

Certainty of time is clearly violated by a note reading "One day after date I promise to pay . . . to be paid at my death."²² It has been suggested²³ that the note might have been construed as valid by the insertion of "or," but such a method would throw commercial paper into the vague realm of testamentary interpretation, and mislead prospective purchasers into buying freak instruments with the hope of a liberal judicial construction which might not be given. Whatever the hardship in individual cases it is much more just in the end to brand all uncertain instruments as bad. Furthermore, a note payable "one day after date or at my death" is also uncertain,²⁴ for which is its maturity for purposes of presentment and notice, letting in equities, etc.?

¹⁹ *Thompson v. Sloan*, 23 Wend. (N. Y.) 71 (1840); *contra*, *St. Stephen Branch Ry. Co. v. Black*, 2 Hannay (N. B.), 139 (1870); *Hogue v. Williamson*, 85 Tex. 553, 22 S. W. 580 (1893).

²⁰ *Black v. Ward*, 27 Mich. 191 (1873).

²¹ *Brown v. Perera*, 176 N. Y. Supp. 215 (1918).

²² *Zimmerman v. Zimmerman*, 262 Pa. 540, 106 Atl. 198 (1919).

²³ In 17 MICH. L. REV. 702 (1919).

²⁴ Such a note was, however, held negotiable in *Conn v. Thornton*, 46 Ala. 587 (1871).

The most unsettled portion of the law of formal requisites relates to acceleration provisions in time paper by which maturity is hastened by some specified contingency. A recent article on this topic²⁵ takes the position that such provisions do not impair negotiability if there is an ultimate definite maturity and payment can be accelerated only by the performance of an act regularly incident to the collection of the paper. This view may be illustrated by several late cases. A note payable "on demand . . . or at the settlement of my mother's estate" is not negotiable, since the ultimate maturity, the settlement, is not definite.²⁶ On the other hand, bonds payable February 1, 1952, which may become due at once in the option of the bondholders upon default in the payment of interest are held negotiable.²⁷ It is worth noting that § 2(3) of the Negotiable Instruments Law validates installment instruments accelerated by default of interest, but does not specifically mention such provisions in non-installment instruments. Yet the Supreme Court of California²⁸ has taken advantage of the Act to hold an instrument with such a provision negotiable, and has declared its intention to disregard decisions under the California Code which took a hostile attitude toward acceleration provisions in general.²⁹ Another important decision in Oregon³⁰ holds negotiable a note payable in five years, "due if ranch is sold or mortgaged." This is construed to give the holder an option to accelerate if the contingency occurs. The court distinguished earlier Oregon cases³¹ of chattel notes, declared non-negotiable because of a provision for acceleration "if the holder deems himself insecure,"³² on the ground that the acceleration

²⁵ "Acceleration Provisions in Time Paper," Z. Chafee, Jr., 32 HARV. L. REV. 747 (1919).

²⁶ *McQuesten v. Spalding*, 120 N. E. (Mass.) 850 (1918).

²⁷ *Higgins v. Hocking Valley Ry. Co.*, 177 N. Y. Supp. 444, 452 (1919).

²⁸ *Utah State Nat. Bank v. Smith*, 179 Pac. (Cal.) 160 (1919). See 7 CAL. L. REV. 263 (1919), which interprets the case as forecasting a liberal construction of the California Negotiable Instruments Law, although the court is construing the Utah Uniform Act.

²⁹ An example of the narrow view is *Crocker National Bank v. Byrne*, 173 Pac. (Cal.) 752 (1918). See 6 CAL. L. REV. 444 (1918). A more recent case is *Mathews v. Wilson*, 175 Pac. 647 (Cal. App. 1918).

³⁰ *Nickell v. Bradshaw*, 183 Pac. (Ore.) 12 (1919).

³¹ *Reynolds v. Vint*, 73 Ore. 528, 144 Pac. 526 (1914); *Western Farquhar Machinery Co. v. Burnett*, 82 Ore. 174, 161 Pac. 384 (1916).

³² See an argument for the negotiability of such notes in 32 HARV. L. REV. 773-777.

clauses were there "entirely under the control of the holder and completely dependent upon his whim or caprice independent of any act of the maker."³³ This justification of the earlier cases does not seem valid, since an ordinary demand note is even more under the control of the holder and yet is negotiable. It is to be hoped that the recent decisions mark a more liberal attitude in the West toward acceleration provisions.

Other decisions support the views of the article just mentioned,³⁴ that a purchaser who knows that an act of acceleration has taken place is a purchaser of dishonored paper subject to equities;³⁵ that one who is ignorant of such act is a holder in due course if he buys before the ultimate maturity;³⁶ and that in the absence of acceleration the Statute of Limitations runs from the ultimate maturity.³⁷ The statement, frequent in acceleration instruments, that certain collateral is pledged for the payment of the particular note and all other liabilities, is properly held in a Louisiana case not to impair negotiability.³⁸ Dawkins, J., summed up this whole topic well:

"The tendency of modern jurisprudence is to get away from the rigid rules of interpretation which seem to have prevailed when the famous expression of Chief Justice Gibson that 'a negotiable bill or note is a courier without luggage' — was coined. The law of negotiable instruments, as a part of the law merchant, is based upon the necessities, usages, and customs of business, and must develop with it. Whenever the additional stipulations are merely in aid of the collection of the note, and do not constitute an undertaking to give or do something else foreign to that end, they do not destroy negotiability."

³³ Nickell v. Bradshaw, 183 Pac. (Ore.) 12, 18 (1919).

³⁴ See 32 HARV. L. REV. 747, 757, and *passim*.

³⁵ Marion Nat. Bank v. Harden, 97 S. E. (W. Va.) 600 (1918), series of notes. See 32 HARV. L. REV. 764-770.

³⁶ Citizens' Nat. Bank of Glenwood Springs v. First Nat. Bank of Portland, Ore., 182 Pac. (Colo.) 12 (1919), unknown dishonor of check. See 32 HARV. L. REV. 761.

³⁷ McCarty-Goodsman, 167 N. W. (N. D.) 503 (1918), series of notes, annotated in L. R. A. 1918 F, 169; McQuesten v. Spalding, 120 N. E. (Mass.) 850 (1918), due at a time accrued or on demand. See also Gaston v. Boston Penny Savings Bank, 123 N. E. (Mass.) 101 (1919), as to liability for interest accruing after the act of acceleration.

³⁸ Farmers' & Merchants' Bank v. Davies, 80 So. (La.) 713 (1919), not an acceleration case. See 32 HARV. L. REV. 780. Cf. Hibernia Bank v. Dresser, 132 La. 532, 543, 61 So. 561 (1913).

Additional references to recent annotations on formal requisites are given in a footnote.³⁹

LIABILITY OF INDORSERS

The great diversity of rules at common law as to the obligation of an anomalous indorser was supposedly ended by the Negotiable Instruments Law.⁴⁰ Nevertheless, some jurisdictions⁴¹ have thrown the law back into its old confusion by treating the Act as stating only a presumptive liability, which can be rebutted by parol evidence that the indorser intended to be liable in the same capacity as he used to be at common law in that locality. Thus Alabama has lately impaired the uniformity of the Act by holding the indorser a co-maker.⁴² However, Michigan has refused to vary the obligation of the Act by parol evidence which was offered to prove that the indorser was not to be liable at all,⁴³ and Illinois⁴⁴ and Missouri⁴⁵ show a strong inclination toward the rejection of extrinsic proof.

Notice of dishonor need not be given to an accommodated indorser, but if two men buy a chattel, and one of them makes a note which the other indorses, the latter is not accommodated;⁴⁶ and there is no presumption that an officer of a corporation who indorses a note made by it is accommodated.⁴⁷ The question to whom notice of protest or of dishonor should be given in the event of the party entitled thereto has lately been annotated.⁴⁸

The extent of the liability of an indorser without recourse has been recently discussed,⁴⁹ and it has been held that an indorser

³⁹ Negotiability as affected by provision in relation to interest or discount, 2 A. L. R. 139; 87 CENT. L. J. 339. Validity of instrument for payment of money as affected by mere fact that payment is postponed until death, 2 A. L. R. 1471.

⁴⁰ §§ 63, 64.

⁴¹ *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 85 N. E. 682 (1908); *Hunter v. Harris*, 63 Ore. 505, 127 Pac. 786 (1912); *Mercantile Bank of Memphis v. Busby*, 120 Tenn. 652, 113 S. W. 390 (1908).

⁴² *Long v. Gwin*, 80 So. (Ala.) 440 (1918).

⁴³ *Cooper v. Sonk*, 201 Mich. 655, 167 N. W. 842 (1918); annotated in 87 CENT. L. J. 119; 28 YALE L. J. 187.

⁴⁴ *Tucker v. Mueller*, 287 Ill. 551, 122 N. E. 847 (1919).

⁴⁵ *Overland Auto Co. v. Winters*, 210 S. W. (Mo.) 1 (1919); accord, *Stephens v. Bowles*, 206 S. W. (Mo. App.) 589 (1918).

⁴⁶ *Tucker v. Mueller*, *supra*, note 44.

⁴⁷ *Overland Auto Co. v. Winters*, *supra*, note 45.

⁴⁸ 1 A. L. R. 474.

⁴⁹ 29 YALE L. J. 102; 2 A. L. R. 216.

"without recourse in any way" nevertheless warrants the maker's signature to be genuine,⁵⁰ a result seriously open to question.

TRANSFER OF LEGAL TITLE

The natural inference from the language of a negotiable instrument is that any person within the terms of the promise or order is owner thereof. Hence, if the promise runs to bearer, any bearer would seem to be the promisee, however bad his moral character. If this view be right, notwithstanding frequent statements to the contrary in cases and textbooks, a thief may have legal title.⁵¹ A Massachusetts case tends to support this proposition. Bonds were stolen and delivered to innocent brokers, who sold them and paid over the proceeds to the thief. The brokers were held not to be liable to the former owner for conversion.⁵² If the thief has merely a power to give title to a *bona fide* purchaser, it is hard to see why the brokers should have been protected, any more than if they had made a similar sale of a stolen chattel.⁵³ They themselves could not claim immunity as holders in due course. It is true that the former owner's right to recover the bonds was here cut off by a purchase in good faith, but it is not likely that the result would have been different if the brokers had sold to a buyer who had notice of the theft.

A dummy indorsee is a common device to avoid publicity in litigation for the real owner. He clearly has legal title, and is usually held entitled to sue even in code states.⁵⁴ A lower New York case seems wrong in holding that he is neither a real party in interest nor an express trustee.⁵⁵ Conversely, one who is not within the description of the instrument should not be allowed to sue. Yet a plaintiff who paid value for a negotiable note, payable to a third party, to whom the plaintiff expected to negotiate it

⁵⁰ *Miller v. Stewart*, 214 S. W. (Tex. Civ. App.) 565 (1919), not N. I. L. See also *Schmidt v. Pegg*, 172 Mich. 159, 137 N. W. 524 (1912).

⁵¹ See "Rights in Overdue Paper," Z. Chafee, Jr., 31 HARV. L. REV. 1104. An instance of the contrary view is *Brown v. Perera*, 176 N. Y. Supp. 215 (1918).

⁵² *Pratt v. Higginson*, 230 Mass. 256, 119 N. E. 661 (1918). See 28 YALE L. J. 175. *Accord*, *Spooner v. 8 Holmes*, 102 Mass. 503 (1869).

⁵³ *Coles v. Clark*, 3 Cush. 399 Mass. (1849); see also 50 L. R. A. (N. S.) 52, note.

⁵⁴ 1 AMES, CASES ON BILLS AND NOTES, 323, 324.

⁵⁵ *Clark v. Dada*, 183 App. Div. 253, 171 N. Y. Supp. 205 (1918).

but failed, was allowed to recover from the maker on the note.⁵⁶ An action in money had and received was the only proper remedy.

DEFENSES

It has already been stated⁵⁷ that a defendant in an action at law on a negotiable instrument should not be allowed to set up the equity of another person. He should either get express authority from that person to defend in his behalf, or else interplead that person and the plaintiff, as in *Bathgate v. Exchange Bank of Chula*,⁵⁸ which held that the drawee bank of a check certified by the drawer and delivered in pursuance of an executory contract could interplead drawer and payee, after a dispute had arisen between them as to faithful performance of the contract.

Real defenses are nowhere mentioned or provided for in the Negotiable Instruments Law. Section 57, in making the holder in due course "free from any defect of title in prior parties," might be held to abolish real defenses. Since "illegality" is specifically stated in section 55 to be a defect of title, there is a strong argument that statutes making instruments void for usury and gaming are impliedly repealed by the Uniform Act.⁵⁹ The weight of authority, however, holds that those statutes are still in effect, and New York has been added to the jurisdictions so holding.⁶⁰ Collin, J., contends that the legislature did not intend by a commercial act to repeal criminal penalties, and that the usurious instrument is not a negotiable instrument at all, so that it is not affected by the Negotiable Instruments Law. This last point is not wholly sound, for an indorser of such an instrument is clearly within the Act. The first point has more force. It may also be urged that there is here not merely a defect of title, but no title at all. If the majority view is correct, an express repeal of these real defenses is desirable, for usury and gaming are not sufficiently dangerous to society to

⁵⁶ *Sutherland State Bank v. Dial*, 170 N. W. (Neb.) 666 (1919); see 28 YALE L. J. 695 in support of the case.

⁵⁷ Page 256, *supra*.

⁵⁸ 205 S. W. (Mo. App.) 875 (1918).

⁵⁹ See BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 184.

⁶⁰ *Sabine v. Paine*, 223 N. Y. 401, 119 N. E. 849 (1918), annotated in 28 YALE L. J. 85, 4 CORNELL L. Q. 44. *Quaere* on same point, *Stevens v. Freund*, 171 N. W. (Wis.) 300 (1919).

make it necessary to allow defendants who actually participated in the crime to avoid paying innocent purchasers for value.

Consideration is presumed from the execution of a bill or note, but want of consideration is an equitable defense. The requirements of consideration are, however, less rigid than in a simple contract. Thus an ordinary promise in writing to pay the antecedent debt of another would be unenforceable, but a time note has been held binding, though the only consideration besides such a debt is the vague agreement of the payee to extend credit.⁶¹ A stricter view is taken in a Minnesota case,⁶² in which an advance of money to the maker was held insufficient consideration for time notes covering both the advance and an antecedent debt of the maker's son. In any case, the actual discharge of the antecedent debt by the new obligation is good consideration.⁶³

Absence of consideration was not allowed as a defense to a receiver's suit on a note delivered gratuitously to a bank as payee for the purpose of deceiving the bank examiner.⁶⁴ Because of public policy the maker must perform his obligation, just as in other cases public policy is a reason for non-performance.

The serious risk run by an agent in signing a note on behalf of his principal is shown by *Schuling v. Erwin*.⁶⁵ A note was signed "Trustees of the Second Christian Church, A, B Chairman, C." The church, which was incorporated, authorized the note and used the money for a building. The plaintiff sued the church at maturity, got judgment, but collected very little. It was held, with dissent, that the trustees were personally liable, under section 20 of the Negotiable Instruments Law, on the ground that they signed "without disclosing their principal." Yet the principal is plainly the church, and the instrument certainly fulfills the requirement of section 20, "Where a person adds . . . words indicating that he signs . . . in a representative capacity, he is not liable on the instrument if he was duly authorized." The decision is one more example of what Mr. Brannan calls "the unnecessary and unpardonable confusion caused by the failure of some of the courts

⁶¹ *American Brass & Copper Co. v. Pine*, 173 N. Y. Supp. 147 (1918).

⁶² *Luing v. Peterson*, 172 N. W. (Minn.) 692 (1919), noted in 29 YALE L. J. 116.

⁶³ *Howard v. Rhodes*, 81 So. (Ala. App.) 362 (1918).

⁶⁴ *Niblack v. Farley*, 122 N. E. (Ill.) 160 (1919).

⁶⁵ 169 N. W. (Iowa) 686 (1918); criticized adversely in 28 YALE L. J. 613.

to exercise a little common sense and to recognize mercantile usage."⁶⁶

After the existence of a defense is discovered by the maker, what steps must he take to preserve it? If he gives a renewal note after learning that the payee's representations in obtaining the original note were fraudulent, he is held to be precluded from setting up the fraud.⁶⁷ On the other hand, he may safely continue to pay interest, according to an Iowa case,⁶⁸ which contains an extensive discussion of waiver. In this case there is said to be neither waiver nor estoppel, for the maker does not intend to abandon his right and does not lull the payee into security. However, the payment of coupons on a twenty-year bond with knowledge of a defense might well bar the maker from setting it up at maturity even against a holder with notice, who was thus misled into purchasing.

FICTITIOUS PAYEES, ALTERATION, FORGERY

Frauds of this type may be set up as defenses or as a basis for affirmative relief, so that it is convenient to group them separately.

Under section 9 (3) of the Negotiable Instruments Law an instrument is payable to bearer if "payable to a fictitious or non-existing person and such fact was known to the person making it so payable." The final clause raises at least two difficulties. Must the knowledge be actual or may it be imputed? Certainly if the drawer or maker is a corporation, it cannot be actual, and the intention of the agent who signs the instrument to pick out a fictitious payee is decisive.⁶⁹ Doubtless, the same principle would govern if the agent signed on behalf of a natural employer. Is the intention of any agent other than the actual signer significant? In *Robertson v. Brasfield*⁷⁰ a loan broker applied to the plaintiff for a loan to D. W. Johnson, a non-existent person, as the broker alone knew. The plaintiff agreed to make the loan through the broker, who had

⁶⁶ BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 70 ff., citing cases *contra* to *Schuling v. Ervin*, such as *Jump v. Sparling*, 218 Mass. 324, 105 N. E. 878 (1914).

⁶⁷ *Enslen v. Mechanics & Metals Nat. Bank of New York*, 255 Fed. 527 (C. C. A., 5th, 1919).

⁶⁸ *Ford v. Ott*, 173 N. W. (Iowa) 121 (1919). Whether waiver exists is doubtful. See WAIVER DISTRIBUTED, JOHN S. EWART, Cambridge, Harvard Univ. Press, 1917.

⁶⁹ *Snyder v. Corn. Exchange National Bank*, 221 Pa. 599, 70 Atl. 876 (1908).

⁷⁰ 79 So. (Ala.) 651 (1918).

represented him in several previous loans, and sent him a check to Johnson's order on receipt of a mortgage and notes purporting to be signed by Johnson. The broker indorsed the check and the drawee paid it. The plaintiff now sues the drawee to recover his deposit. The defendant contended that the broker was the plaintiff's agent so as to make the principal chargeable with his knowledge; but the majority held otherwise, on the ground that the broker was acting fraudulently and knew the fact before the agency began, even if he was the plaintiff's agent. The plaintiff accordingly recovered, one judge dissenting. A second difficulty is, who is the person who makes the instrument payable to a payee, — the clerk who after investigating the creditors of a corporation and the amount due them prepares the checks, or the treasurer who goes through the mechanical task of signing his name, trusting in the honesty of the clerk for all essential details? The better view would seem to be that the signer does after all create the instrument and should determine who owns it,⁷¹ and that any attempt to decide how far the treasurer uses his mind in examining the payee's name on a check and how far he uses his hand only would lead to endless fine distinctions. There is, however, some authority the other way, in a New York case where the check was mailed to the fictitious payee and reached the clerk who had hired a letter-box in the false name.⁷² The conflict is reflected in three recent decisions in lower New York courts,⁷³ each with a dissenting opinion. If the fictitious name is filled in by the clerk in a blank check delivered to him by the depositor, the check is of course payable to bearer, since the clerk has been empowered to complete it.⁷⁴

A material alteration avoids an instrument.⁷⁵ An erasure of a statement of the transaction giving rise to the instrument is not

⁷¹ *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740 (1909).

⁷² *Hartford v. Greenwich Bank*, 157 App. Div. 448, 142 N. Y. Supp. 387, 2 JJ. diss. (1913); aff'd by memo, 215 N. Y. 726, 109 N. E. 1077 (1915); called "a border line case" in *United Cigar Stores Co. v. Am. Raw Silk Co.*, *infra*.

⁷³ Not payable to bearer — *United Cigar Stores Co. v. Am. Raw Silk Co.*, 184 App. Div. 217, 171 N. Y. Supp. 480 (1918); *National Surety Co. v. National City Bank of Brooklyn*, 184 App. Div. 771, 172 N. Y. Supp. 413 (1918). Payable to bearer — *P. & G. Card & Paper Co. v. Fifth Nat. Bank*, 172 N. Y. Supp. 688 (1918).

⁷⁴ *Edelen v. Oakland Bank of Savings*, 178 Pac. (Cal. App.) 737 (1918).

⁷⁵ N. I. L. § 124.

material,⁷⁶ since it does not affect the obligation as a condition or otherwise. Adding a party to the instrument is clearly material under section 125 of the Act,⁷⁷ although there was a conflict at common law.⁷⁸ Although the Act allows "a holder in due course, not a party to the alteration,"⁷⁹ to recover according to the original tenor of the instrument, a person who altered the instrument innocently would seem to fall outside this protection, in spite of the fact that he could recover at American common law.⁸⁰ An Oregon case,⁸¹ however, takes the position that the payee making such an alteration can surrender the note and sue upon the original debt. Another problem under this clause is the liability of an accommodation indorser if the instrument was altered by the maker before delivery to the payee. It has been held that he is not liable at all since there was no "original tenor" when there was no enforceable obligation.⁸² Opposing decisions have more justly construed "original tenor" as meaning original form, and compelled him to pay accordingly.⁸³ In a recent South Carolina case⁸⁴ the maker's agent could not get the original payee to discount the note, and substituted the name of the plaintiff, who discounted it. The court assumed for the purposes of the case that the plaintiff was a holder in due course, although inclined to believe that the apparent nature of the alteration prevented this, and held that he could not enforce the note according to the original tenor, since the plaintiff would have no title to the note as it first read, and the alteration "deprived the contract of all legal validity in its inception." It is not necessary to agree with this last reason in order to regard the decision as right on the facts, for the plaintiff

⁷⁶ *Mason v. Shaffer*, 96 S. E. (W. Va.) 1023 (1918).

⁷⁷ *Bank of Commerce of Sulphur, Oklahoma v. Webster*, 172 Pac. 942 (1918).

⁷⁸ See note in L. R. A. 1918 F, 698.

⁷⁹ N. I. L. § 124.

⁸⁰ BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 338, citing some cases *contra*: *Donneybrook State Bank v. Corbett*, 37 N. D. 87, 163 N. W. 275 (1917); *Jeffrey v. Rosenfeld*, 179 Mass. 506, 61 N. E. 49 (1901); *Edington v. McLeod*, 87 Kan. 426, 124 Pac. 163 (1912).

⁸¹ *Catching v. Ruby*, 178 Pac. (Ore.) 796 (1919).

⁸² *First Nat. Bank v. Gridley*, 112 App. Div. 398, 98 N. Y. Supp. 445 (1906).

⁸³ *Thorpe v. White*, 188 Mass. 333, 74 N. E. 592 (1905); *Packard v. Windholz*, 88 App. Div. 365, 84 N. Y. Supp. 666 (1903), *semble*, *aff'd* without opinion, 180 N. Y. 549, 73 N. E. 1129 (1905).

⁸⁴ *Muse v. Clark*, 98 S. E. (S. C.) 850 (1919).

was not within the description of the original instrument and so could not enforce it.

A bank which pays an altered check cannot ordinarily charge the depositor's account, except according to the original tenor of the instrument, because it has not performed his order.⁸⁵ The doctrine of the early English case of *Young v. Grote*,⁸⁶ that the depositor must stand the loss when the alteration was caused by his negligence, has been adopted by the House of Lords in a recent decision already discussed in this REVIEW.⁸⁷ Although the Judicial Committee of the Privy Council had previously denied that such was the law of the British Empire,⁸⁸ that body is not bound to follow its own decisions⁸⁹ and will probably reverse itself at the first opportunity. The doctrine of *Young v. Grote* is also law in many American jurisdictions,⁹⁰ and is extended to the depositor's negligent failure to examine his bank balances and thus discover the fraudulent alteration.⁹¹ Some states recognize a general duty of care of one signing negotiable paper toward all persons having business dealings with the instrument, and not merely a special duty between depositor and bank. Thus one who signs a note supposing it is a different kind of document is ordinarily not liable,⁹² but if he fails to read it he may be held.⁹³ This question of fraud preventing the inception of contract is discussed in a recent issue of the *Columbia Law Review*.⁹⁴

If an indorsement of a check to a collecting bank is forged or made by an agent of the true owner without authority, the bank is wrongfully dealing with the check and should be liable to the

⁸⁵ For a recent case, see *East St. Louis Cotton Co. v. Bank of Steele*, 205 S. W. (Mo. App.) 96 (1918).

⁸⁶ 4 Bing. 253 (1827).

⁸⁷ *London Joint Stock Bank, Ltd., v. Macmillan*, [1918] A. C. 777, noted in 31 HARV. L. REV. 779, 145 L. T. 208, 35 L. QUART. REV. 5. See also 28 YALE L. J. 414, 17 MICH. L. REV. 427; 4 CORNELL L. Q. 46.

⁸⁸ *Marshall v. Colonial Bank of Australia, Ltd.*, [1906] A. C. 559 (J. C.).

⁸⁹ *Tooth v. Power*, [1891] A. C. 284, 292 (J. C.); *Ridsdale v. Clifton*, 2 P. D. 276, 306 (J. C. 1877).

⁹⁰ 31 HARV. L. REV. 779.

⁹¹ *California Vegetable Union v. Crocker National Bank*, 174 Pac. (Cal.) 920 (1918), noted in 32 HARV. L. REV. 287.

⁹² *Foster v. MacKinnon*, L. R. 4 C. P. 704 (1869).

⁹³ *Twyman v. Avera Loan & Investment Co.*, 98 S. E. (Ga. App.) 239 (1918), is a recent instance.

⁹⁴ 19 COL. L. REV. 145 (April, 1919).

true owner as a converter. The true owner may also, as in a recent Arkansas case,⁹⁵ ratify the collection, and sue the bank for money had and received to his use. The drawee bank which pays the check should also be liable to the true owner⁹⁶ as a converter, though some decisions go on the ground that the improper payment is equivalent to acceptance. A strong minority denies recovery on the ground that there is no acceptance written on the instrument and no privity otherwise between the parties. Another Arkansas case⁹⁷ has taken this view and distinguished the drawee from the collecting bank.

The right to recover money paid on forged instruments on the ground of mistake is a battle-ground of the law. The famous doctrine of *Price v. Neal*,⁹⁸ that the drawer cannot recover money paid on a forged drawer's signature, has been adopted in most states, though usually on grounds different from those put forward by Dean Ames,⁹⁹ and is often stated to be codified by section 62 of the Negotiable Instruments Law, which says that "the acceptor by accepting . . . admits the existence of the drawer, the genuineness of his signature." South Dakota, however, which rejected *Price v. Neal* at common law, has refused to follow it under the Uniform Act, pointing out with much force that payment is not "accepting."¹⁰⁰ A more specific statute seems necessary to impose the doctrine upon an unwilling jurisdiction.

If the drawee pays a bill of exchange in itself genuine but secured by a forged bill of lading, he cannot recover, and the English Court of Appeal has decided in *Guaranty Trust Co. v. Hannay*¹⁰¹ that a reference in the bill of exchange to the goods does not alter this result in either English or American law. The case was discussed in a recent number of this REVIEW.¹⁰² Although the

⁹⁵ *Schaap v. State Nat. Bank of Texarkana*, 208 S. W. (Ark.) 309 (1918). Other cases are collected in the opinion and in BRADY ON CHECKS, §§ 138-140. *Contra*, *Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank*, 220 Pa. 1, 69 Atl. 280 (1908).

⁹⁶ BRADY ON CHECKS, § 136, collects the authorities for and against liability.

⁹⁷ *State, for use of Arkansas Penitentiary v. Bank of Commerce*, 202 S. W. (Ark.) 834 (1918).

⁹⁸ 3 Burr. 1354 (1762).

⁹⁹ In 4 HARV. L. REV. 297.

¹⁰⁰ *First Nat. Bank of Pukwana v. Brule Nat. Bank of Chamberlain*, 168 N. W. (S. D.) 1054 (1918).

¹⁰¹ (1918) 2 K. B. 623 (C. A.).

¹⁰² 32 HARV. L. REV. 560. See also 35 L. QUART. REV. 124; 18 COL. L. REV. 480; 27 YALE L. J. 1046, 1077; *Hannay v. Guaranty Trust Co.*, 187 Fed. 686 (1911).

United States District Court of Southern New York had decided differently in the same litigation, the Circuit Court of Appeals in the Fifth Circuit follows the English case in a suit involving a bill which reads "charge the same to account of against 214 B/C." *i. e.* bales of cotton.¹⁰³

HOLDER IN DUE COURSE

By section 52 of the Act a holder in due course must satisfy four requirements. First, he must have bought the instrument when it was complete and regular upon its face. He is not, however, prevented from recovering by the previous existence of blank spaces unknown to him, which have since been filled in.¹⁰⁴ The payee seems a holder in due course in such a situation and should be protected as much as an indorsee. Pennsylvania has recently so held¹⁰⁵ in accordance with the weight of authority.¹⁰⁶ In *National Bank of San Mateo v. Whitney*,¹⁰⁷ A, who was about to enter a hospital, left in the hands of the cashier of a bank, through whom previous loans had been negotiated, a blank note to be filled in by the cashier upon the order of A or his brother, then to be charged to A's account and the proceeds applied to the credit of a corporation, of which A and his brother were officers. A few days later, without any instructions, the cashier filled in the blanks for \$3,000, placed the note in the bank's files, and caused it to be charged to A's personal account, taking in return \$3,000 in cash from the bank's funds, which he misappropriated. It was held that the bank could not recover from A, on the grounds that there was no delivery by A so as to authorize the blanks to be filled, and that the bank had notice of the fraud through the cashier, its agent. The second ground alone seems correct.¹⁰⁸ If the bank had indorsed the note for value to an innocent purchaser, he should have been able to recover.

¹⁰³ Hubbard Bros. & Co. v. Southern Pac. Co., 256 Fed. 761 (1919).

¹⁰⁴ See notes in L. R. A. 1918 D, 1064, 1918 E, 1042.

¹⁰⁵ Johnston v. Knipe, 260 Pa. 504, 103 Atl. 957 (1918); noted in 32 HARV. L. REV. 855, and 28 YALE L. J. 197.

¹⁰⁶ See BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., references indexed *sub* "Payee, whether holder in due course."

¹⁰⁷ 180 Pac. (Cal. App.) 845 (1919).

¹⁰⁸ Other cases on imputed notice are State Bank of Morton v. Adams, 170 N. W. (Minn.) 925 (1919), and Coleman v. Shortsville Wheel Co., 257 Fed. 591 (W. D. N. Y. 1919).

On the requirement of value an important case is *Kelso v. Ellis*.¹⁰⁹ B, who dealt in advertising specialties, furnished A, a merchant, with the scheme for a piano contest among A's customers and agreed to deliver a piano which would serve as prize. A gave negotiable promissory notes to B. B sent an order for the piano to C, a manufacturer, who had shipped several pianos to merchants on his account for similar contests and had received from him notes of merchants in payment. As B owed C \$2,000 for former pianos, C did not ship any to A. A few days later B transferred A's notes to C, which credited them on B's general account as cash. C had no actual knowledge of the terms of the contract between A and B, but knew in general that B was engaged in the piano-contest business. C now sues A, who sets up want of value and good faith. The lower court directed a verdict for C. Pound, J., stated that A had a defense against B of partial failure of consideration. "The contest without a piano was like the play of Hamlet with the part of Hamlet left out." He held that C paid value but had notice, and ordered a new trial.

The point as to value was governed by section 25 of the Negotiable Instruments Law, "An antecedent or pre-existing debt constitutes value." New York had held at common law with several other jurisdictions that an instrument taken as collateral security for an antecedent debt or in conditional payment thereof was not taken for value, although absolute discharge of an antecedent debt constituted value. It was generally supposed that the Act abolished this minority rule, and several states formerly adopting it have now held that all transfers for an antecedent debt are for value.¹¹⁰ However, many cases in the lower New York courts continued to apply the New York common-law rule.¹¹¹ It is possible to reconcile the holding of *Kelso v. Ellis* with these cases if the payment was absolute, although it was probably conditional, and it is certainly true that the question of security for an antecedent debt was not involved. But the opinion of Pound, J., shows that the Court of Appeals regards the old New York law as entirely abrogated by the Act.¹¹²

¹⁰⁹ 224 N. Y. 528, 121 N. E. 364 (1918), noted in 19 COL. L. REV. 218, 28 YALE L. J. 692.

¹¹⁰ See 19 COL. L. REV. 219.

¹¹¹ BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 104, 105.

¹¹² 224 N. Y. 528, 121 N. E. 364, 366.

"The New York rule was so well established that the inertia of *Coddington v. Bay*¹¹³ carried it along for some distance before the external force of the Negotiable Instruments Law acted upon it. . . . Even in this court a *dictum*¹¹⁴ . . . reveals the habit of bench and bar to look to cases rather than statutes for principles of commercial law until attention is sharply directed to the extent that the movement for uniformity of laws through legislation has been successful in New York and many other states. But it is perfectly clear that for the sake of uniformity New York has abrogated the rule which had been in force since the year 1822.¹¹⁵ . . . *Coddington v. Bay* and section 51¹¹⁶ of the Negotiable Instruments Law are irreconcilable in the mind of any candid student of the decisions in this and other jurisdictions."

The question of notice is also raised by *Kelso v. Ellis*.¹¹⁷ The court held that there was evidence to go to the jury on this point. It is true that knowledge of an executory contract between the maker and the payee does not *per se* put an indorsee on inquiry of a possible breach,¹¹⁸ and that ordinarily with negotiable paper actual bad faith is necessary and not merely knowledge of facts which would cause suspicion in a reasonable man.¹¹⁹ But "knowledge of such facts that his action in taking the instrument amounted to bad faith" constitutes notice;¹²⁰ for instance, knowledge of trouble in collecting previous paper of the same parties.¹²¹ It would even seem that notice may be conclusively presumed from knowledge of certain facts within standardized limits which the courts have held to constitute constructive notice despite the absence of bad faith; for instance, when a partnership is the indorser of a note pledged for a personal debt of a partner, accommodation is shown, and similar problems arise with corporation paper.¹²²

¹¹³ 20 Johns. (N. Y.) 637 (1822).

¹¹⁴ *Bank of America v. Waydell*, 187 N. Y. 115, 120, 79 N. E. 857 (1907).

¹¹⁵ Citing *Melton v. Pensacola Bank & Trust Co.*, 190 Fed. 126, 132, 111 C. C. A. 166 (1911).

¹¹⁶ This is the New York numbering for section 25 in the uniform draft.

¹¹⁷ See 19 COL. L. REV. 222 on this feature of the case.

¹¹⁸ *Producers' National Bank v. Elrod*, 173 Pac. (Okla.) 659 (1918), annotated in L. R. A. 1918 F, 1018: "Failure of executory consideration for bill or note as affecting purchaser with knowledge of the character of the consideration."

¹¹⁹ N. I. L. § 56, codifies the common law.

¹²⁰ *Ibid.*

¹²¹ *Stevens v. Venema*, 168 N. W. (Mich.) 531 (1918); annotated in L. R. A. 1918 F, 1148, "What circumstances are sufficient to put a purchaser of negotiable paper on inquiry;" also in 4 Iowa L. B. 283.

¹²² See L. R. A. 1918 F, 1163, "Right of one who takes commercial paper of corporation in payment for security for an individual debt of an officer."

In *Kelso v. Ellis* the purchaser knew much more than the existence of the contract. It had itself prevented performance by refusing to deliver the piano. The question for the jury was one of bad faith rather than of constructive notice to an honest purchaser.

"The relation between [B's] order for the piano to be shipped by the plaintiff to the defendants, and the notes of defendants payable to his order, would, we think, under the circumstances, sustain a finding that 'by the simple test of honesty and good faith' it became the duty of plaintiff to inquire as to the real situation between [B] and the defendants."

The remaining requirement that a holder in due course must purchase the paper before it is overdue or dishonored, will be treated separately below.

A defendant who sets up fraud or some other equity against an indorsee must also allege facts to show that the defendant is not a holder in due course. After the defendant has given evidence of his equity, the burden of coming forward with evidence of holding in due course rests on the plaintiff. However, the burden of establishing this issue by preponderance of evidence properly rests on the defendant, since he raises the issue by his affirmative defense. There was much confusion about this at common law, because of the ambiguity of the phrase "burden of proof," and the same conflict persists in the interpretation of these words as used in section 59 of the Negotiable Instruments Law. The Act is usually construed to throw both burdens on the indorsee,¹²³ and the same principle is applied if the victim of fraud sues him in replevin to recover the instrument,¹²⁴ or in equity to obtain its cancellation.¹²⁵ A few decisions within the past year adopt the correct view.¹²⁶

¹²³ See BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 217. Recent cases are *Metropolitan Discount Co. v. Baker*, 97 S. E. (N. C.) 495 (1918); *Atkins v. Brown*, 208 S. W. (Mo. App.) 502 (1919); *Gebby v. Carrillo*, 177 Pac. (N. M.) 894 (1918); *Schmidt v. Benedict*, 178 Pac. (Kan.) 444 (1919); *Security State Bank of Wichita v. Seaunier*, 178 Pac. (Kan.) 239 (1919); *Navajo-Apache Bank & Trust Co. v. Wakefield*, 180 Pac. (Ariz.) 529 (1919).

¹²⁴ *Thompson v. Clark*, 178 Pac. (Okla.) 655 (1919).

¹²⁵ *Lundean v. Hamilton*, 169 N. W. (Iowa) 208; noted in 32 HARV. L. REV. 729.

¹²⁶ *Downs v. Horton*, 209 S. W. (Mo. App.) 595 (1919); noted in 88 CENT. L. J. 372, which fails to perceive the correct theory; *Kenner v. Almon*, 80 So. (Ala.) 449 (1918); *Citizens' State Bank of Roundup v. Snelling*, 178 Pac. (Mont.) 744 (1919).

OVERDUE AND DISHONORED PAPER

In *Gould v. Svendsgaard*¹²⁷ the transferee of a note after maturity was held subject to a set-off by the maker against the payee, which was reduced to judgment after the transfer. The lower court had held, not without authority,¹²⁸ that the set-off had been merged in the judgment and could no longer be used, and that the judgment was not a defense because it was subsequent to the transfer. This unduly technical argument was wisely rejected, since merger should not work an injustice, and the judgment is but a new form of the old obligation. It is, of course, held in many jurisdictions that set-offs are not a defense to overdue paper in the hands of a transferee, but Minnesota permits them by statute.¹²⁹

Paper is dishonored by failure to pay installments of principal, but not if interest is defaulted.¹³⁰ This may not be due to the existence of a defense but only to temporary embarrassment, and should therefore not put a purchaser on inquiry. Minnesota formerly held a contrary view, but this has been questioned in a recent decision.¹³¹

Cases on overdue checks are discussed later.

EXTINGUISHMENT

The payment of a note by an indorser does not ordinarily extinguish it. There are two theories of the indorser's position. One regards him as a purchaser of the instrument, having the rights of an ordinary indorsee, except that he is subject to any equities which existed against him during a prior ownership. In other words, a defrauding payee cannot better himself by passing the instrument through a holder in due course. This theory finds strong support in cases which allow even a drawee¹³² or an acceptor¹³³

¹²⁷ 170 N. W. (Minn.) 595 (1919); noted in 19 COL. L. REV. 157; 47 WASH. L. REP. 396.

¹²⁸ The cases cited in the opinion are divided.

¹²⁹ GEN. STAT. MINN. 1913, §§ 5870, 7675.

¹³⁰ A recent case is *Merchants' Nat. Bank v. Smith*, 96 S. E. (S. C.) 690 (1918). Fraser, J., dissenting.

¹³¹ *Lutgens v. Lutgens*, 172 N. W. (Minn.) 893 (1919), *semble*.

¹³² *Swope v. Ross*, 40 Pa. St. 186 (1861).

¹³³ *Attenborough v. Mackenzie*, 25 L. J. Ex. 244 (1856).

or a maker¹³⁴ to hold as purchaser, and was undoubtedly accepted by the common law even as to an anomalous or irregular indorser.¹³⁵ The other theory, in what is apparently a clumsy attempt to cover the exception above stated, holds that an indorser who pays is remitted to his former rights. This formulation takes care of the fraudulent payee, but it works great injustice to the anomalous indorser, because he had no "former rights" on the instrument. Yet this second view is apparently codified by section 121 of the Negotiable Instruments Law, though some cases have maintained the first view and allowed him to recover on the note from the accommodated maker.¹³⁶ It may be argued that it is immaterial whether he can recover on the instrument, since he can sue on an independent contract of reimbursement. Such a contract is, however, more difficult to prove, and often subject to a shorter Statute of Limitations.

Two recent analogous cases add some authority to the second view. In *Hurlburt v. Quigley*,¹³⁷ one of three joint and several accommodation indorsers was compelled to pay the note, and sued a co-indorser. The period of limitation was two years in any case, but if the suit was on the indorsement it had already run since maturity. The court held that this was an action for contribution, which accrued when the plaintiff paid, so that it was not yet barred. The court does not say that an action could not have been brought on the defendant's indorsement. In *Gregg v. Carroll*,¹³⁸ however, it was held that one of two joint payees could sue for contribution only on an implied promise and not on the note, so that he could not claim the benefit of the longer Statute of Limitations applicable to negotiable paper. On the other hand, one who guarantees the payment of an instrument by a separate contract has been held to take it as a purchaser when compelled to pay, and the statute runs from maturity.¹³⁹

¹³⁴ See L. R. A. 1918 E, 170, "Effect of the reissue of a bill or note that has been paid by or transferred to a party primarily liable thereon."

¹³⁵ See 28 HARV. L. R. 102.

¹³⁶ See BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., 332, 333.

¹³⁷ 180 Pac. (Cal.) 613 (1919).

¹³⁸ 211 S. W. (Mo. App.) 914 (1919).

¹³⁹ *Leslie v. Compton*, 103 Kan. 92, 172 Pac. 1015 (1918); annotated in L. R. A. 1918 F, 709, "Rights, as against principal debtor, of one who becomes surety or guarantor without his knowledge or consent."

By section 120 a person secondarily liable is discharged by any agreement to extend the time of payment unless the secondary party consents or a right against him is expressly reserved. Such a reservation was held to exist in a Tennessee case.¹⁴⁰ A bank held notes of a corporation payable to its own order and indorsed by individuals. At maturity one note was protested and protest on another was waived. The president of the bank became interested and gave the officers of the corporation cash to cover the notes with instructions not to have them cancelled or stamped paid, but to attach them as collateral for a new note of the corporation payable four months hence and given to the bank as payee. This was done, and subsequent renewals were made, the original notes always serving as collateral. Finally, the indorsers were sued on the original notes and held liable. Even though the bank might not have been able to sue the maker on these notes during the life of an outstanding renewal note, it could have sued the indorsers at any time, or they could have paid up at any time and sued the maker immediately.

Section 120 states other acts discharging a secondary party but fails to mention several defenses ordinarily available to sureties. Does this mean that a secondary party cannot set up such a defense? The cases are in serious conflict, but the correct view is that this section is not exclusive and that under section 196 cases not expressly governed by the Act fall under the law merchant, which includes the principles of suretyship.¹⁴¹ The same principle applies to a primary party who is known to be a surety, though the section on the discharge of primary parties¹⁴² does not state any suretyship defenses. Thus the failure of the holder to use ordinary care to preserve securities belonging to the principal bars recovery against the surety, in a recent case.¹⁴³ Such defenses are not available, however, against a holder ignorant of the suretyship, even on a non-negotiable instrument.¹⁴⁴

¹⁴⁰ *Hunter v. Matt Stewart Co.*, 213 S. W. (Tenn.) 918 (1919). *Accord*, *National Park Bank of New York v. Koehler*, 137 App. Div. 785, 122 N. Y. Supp. 490 (1910).

¹⁴¹ "Suretyship at 'Law Merchant,'" Anan Raymond, 30 HARV. L. REV. 141.

¹⁴² N. I. L., § 119.

¹⁴³ *Scandinavian American Bank of Fargo v. Westby*, 172 N. W. (N. D.) 665 (1918).

¹⁴⁴ *Fletcher v. American National Bank*, 123 N. E. (Ind.) 107 (1919), extension of time.

CHECKS AND BANKING

If a check is not presented within a reasonable time after its issue, the drawer is discharged from liability thereon to the extent of the loss caused by the delay.¹⁴⁵ He is also discharged to the same extent from the original debt.¹⁴⁶ The time allowed for presentation of a certified check is said to be longer since it is more suitable for circulation as a substitute for money because of its superior credit.¹⁴⁷ But even if the drawer of a check suffers no damage from delay, he can always set up the Statute of Limitations, which begins to run at the close of the next business day after issue, if under the circumstances that is the reasonable time for presentment.¹⁴⁸ A somewhat different question as to the effect of delay arises if a bill or note is payable at a bank, for here the ultimate payor is a primary party. The point has been recently annotated.¹⁴⁹

What act of a drawee bank completes the payment of a check received by mail or through the clearing-house? There is much conflict in the cases whether stamping the check "paid" has that effect.¹⁵⁰ In *Hunt v. Security State Bank*¹⁵¹ it appears that the drawee was accustomed to stamp all checks "paid" whether cashed over the counter or received by mail, and then place them on a spindle, where they were used thenceforth as "charge slips" and entered on the books against the depositor's account the same afternoon or next morning. While a check sent in for payment by draft was on the spindle stamped "paid" and before it was charged to his account, the depositor countermanded it. The drawee thereafter remitted the amount by draft to the collecting bank and charged the depositor. It was held that the depositor could recover the amount of the check, since payment was not completed. The bank was merely preparing to pay and had satisfied itself that the check was genuine and covered by sufficient funds. The case seems right, and even an entry to the depositor's account

¹⁴⁵ N. I. L., § 186.

¹⁴⁶ *McEwen v. Cobb*, 104 Misc. 477, 172 N. Y. Supp. 44 (1918).

¹⁴⁷ *Smith v. Hubbard*, 171 N. W. (Mich.) 546 (1919).

¹⁴⁸ *Colwell v. Colwell*, 179 Pac. (Ore.) 916 (1919); noted in 33 HARV. L. REV. 107.

¹⁴⁹ 2 A. L. R. 1381, "Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it."

¹⁵⁰ See BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 3 ed., references indexed *sub* "Paid." BRADY ON CHECKS, § 155.

¹⁵¹ 179 Pac. (Ore.) 248 (1919).

might be revoked. Mailing a draft to the collecting bank, or crediting the holder's account on the books, or settling the clearing-house balance for the day should, however, be final. The stamping may be regarded as only a step. The transfer of funds seems the decisive matter in payment.

It should be noted that a bank's bookkeeping entries are not always irrevocable. A recent United States Supreme Court case¹⁵² allowed a bank to set aside a transfer from one account to another induced by fraud.

The transfer of a check by indorsement was held in *National Market Co. v. Maryland Casualty Co.*¹⁵³ not to assign the original debt, and the indorsee was not allowed to enforce the contractor's bond of the drawer.

Many states make it criminal to issue a check without having sufficient money on deposit at time of issue. It has been held in Florida¹⁵⁴ that the drawer is not guilty if his deposit covers the check at the moment of issue, though he then has other checks outstanding which are subsequently charged against the deposit and exhaust it before the close of the day. The decision leaves a safe margin open for defrauders, and makes an amendment desirable. The cases construing such statutes are collected in a recent note.¹⁵⁵

Foreign exchange is not strictly a part of the law of bills or notes, but it bears such a close relation to it in connection with banking, that mention should be made of a recent case in the New York Appellate Division,¹⁵⁶ which is discussed by the *Columbia Law Review*¹⁵⁷ in a note on the sale of foreign exchange. It is held, if a broker sells a "cable transfer," that is, agrees to order a foreign banker by cable to place money to the credit of the buyer of the exchange in a foreign city, and the broker becomes insolvent without cabling the transfer, that he holds the money paid in trust for the buyer. One judge dissented on the ground that the buyer had merely a contract right against the broker. "Foreign exchange . . . is commonly contracted for in the same

¹⁵² *Harriman Nat. Bank v. Seldomridge*, 39 Sup. Ct. Rep. 244 (1919).

¹⁵³ 100 Wash. 370, 174 Pac. 479 (1918), annotated in 1 A. L. R. 454.

¹⁵⁴ *Wolfe v. State*, 79 So. (Fla.) 449 (1918).

¹⁵⁵ L. R. A. 1918 F, 982.

¹⁵⁶ *Legniti v. Mechanics and Metals National Bank*, 173 N. Y. Supp. 814 (1919).

¹⁵⁷ 19 COL. L. REV. 322 (June, 1919).

manner and governed by the same laws as in the case of purchase of wheat, cotton, or any other subject of commerce." Certainly if the buyer had chosen a slower kind of exchange and bought a draft drawn by the seller upon the foreign banker, no trust would arise although the drawer failed and the drawee refused to accept or pay the draft. Moreover, the nature of the exchange business makes it highly inconvenient to retain deposits and credits as segregated trust items.

This abbreviated record of the litigation of a year makes it plain that the codification of a subject does not end its life. Some questions in bills and notes, like collateral acceptances, have been put out of the way by the statute; but others, like the anomalous indorser, rise from their graves to vex us, and new difficulties must ever come into existence with the rapid and multitudinous changes of methods for carrying on the business of the world.

Zechariah Chafee, Jr.

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THE TREATY-MAKING POWER UNDER THE UNITED STATES CONSTITUTION—THE FEDERAL MIGRATORY BIRDS ACT.—In view of the many current discussions as to the extent of the federal treaty-making power, especially with relation to the League of Nations and the proposed labor clauses of the Versailles treaty, particular interest attaches to the three latest federal decisions concerning the scope of the treaty-making power, all alike upholding the constitutionality of the United States Migratory Birds Act of July 3, 1918.¹

On March 4, 1913, Congress passed the first Migratory Birds Act² to afford national protection to certain wild game birds which, because of their semiannual migrations from state to state, could not be protected by the laws of any state. The act provided that "migratory game and insectivorous birds, which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any state or territory, shall hereafter be deemed to be within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations" to be made by the United States Department of Agriculture.

The constitutionality of this act was attacked in the case of *United States v. Shauver*,³ decided on May 25, 1914,⁴ upon the ground that the

¹ *United States v. Thompson*, 258 Fed. 257 (1919); *United States v. Samples*, 258 Fed. 479 (1919); *United States v. Selkirk*, 258 Fed. 775 (1919).

² 37 STAT. AT L. 847, c. 145 (COMP. STAT., § 8837).

³ 214 Fed. 154 (1914).

⁴ Motion for rehearing decided on July 9, 1914.

power to make regulations for the protection of wild birds rested with the states and had never been delegated to the federal government. Although it is well settled that primarily the state, both as trustee for the rights of all its people and in the exercise of its police power, has control over the right to reduce animals *ferae naturae* to possession,⁵ it was argued that the federal government had the power to pass this statute either (1) under the power of the national government, analogous to the state police power, to carry out its constitutional implied powers,⁶ or (2) under the theory that wild migratory birds were the "property of the United States," and that the federal government had therefore the constitutional power to protect them under Art. IV, § 3, cl. 2, or (3) under the power of Congress to regulate interstate commerce upon the theory that migratory birds constitute interstate commerce. The court decided that the act was unconstitutional, as the exercise of a power not delegated to the federal government, and therefore, under the Tenth Amendment, reserved to the states, (1) since there is no implied power given by the Constitution to the federal government to protect migratory birds, (2) since wild animals cannot constitute "property" until reduced to possession, and (3) since migratory birds cannot be said to constitute interstate commerce. The decision of *United States v. Shauver* has been followed by similar decisions in the cases of *United States v. McCullagh*,⁷ *State of Maine v. Sawyer*,⁸ and *State of Kansas v. McCullagh*.⁹

On December 8, 1916, the President proclaimed a treaty, entered into on August 16, 1916, between the United States and Great Britain on behalf of Canada, in order to afford international protection to wild birds migrating back and forth between Canada and the United States.¹⁰ Thereafter Congress passed the Migratory Birds Act of July 3, 1918,¹¹ of substantially the same character as the unconstitutional act of March 4, 1913, except that by its terms it was expressly framed to give effect to the convention. It provided that the Secretary of Agriculture might establish regulations to protect such migratory birds as were mentioned in the treaty, and made it unlawful for any one to take or kill migratory birds in any part of the United States in violation of these regulations. The President promptly promulgated regulations under this statute; and a number of violations having occurred, criminal prosecutions were commenced in several states,¹² and the question thus directly raised as to the constitutionality of the legislation of July 3, 1918. The determina-

⁵ *Patsone v. Pennsylvania*, 232 U. S. 138 (1914); *Geer v. Connecticut*, 161 U. S. 519 (1896).

⁶ "It is now equally well settled that the United States does possess what is analogous to the police power, which every sovereign nation possesses, . . . to carry into effect those powers which the Constitution has conferred upon it. (*In re Debs*, 158 U. S. 564, 581; *Light v. United States*, 220 U. S. 523, 536; *Hoke v. United States*, 227 U. S. 308, 323.)" *United States v. Shauver*, 214 Fed. 154, 156 (1914).

⁷ 221 Fed. 288 (1915).

⁸ 113 Me. 458, 94 Atl. 886; L. R. A., 1915 F, 1031 (1915).

⁹ 96 Kan. 786, 153 Pac. 557 (1915).

For a doubt as to the correctness of these decisions, see Note in L. R. A., 1915 F, 1031.

¹⁰ 39 STAT. AT L. 1702.

¹¹ 40 STAT. AT L. 755, c. 128 (COMP. STAT., §§ 8837 a-8837 m.)

¹² See cases cited *supra*, note 1.

tion of this question evidently depends upon the validity of the treaty which the law was passed to enforce; and this in turn involves a consideration of the constitutional treaty-making power of the United States.

The constitutional provisions in respect to the making of treaties are stated in the broadest terms.¹³ Under these provisions no argument is needed to show that treaties duly entered into by the United States are supreme over all state legislation, or even state constitutional provisions. This has never been doubted since it was first laid down in unequivocal terms in the early and much-quoted case of *Ware v. Hylton*.¹⁴

The relation of treaties to federal legislation has also been well settled. The courts have uniformly held that since the Constitution has declared that the laws which shall be made in accordance with its provisions and all treaties shall be "the supreme law of the land," it has placed them upon an equal footing; and that therefore a treaty may abrogate any prior statute,¹⁵ and similarly Congress may repeal or supersede any treaty by a subsequently passed statute.¹⁶ Before the courts will impute to Congress an intention to violate an article of a treaty with a foreign power, however, that intention must be clearly and unequivocally manifested, and the language of the statute must admit of no other reasonable construction.¹⁷

Granted that a treaty, as the "supreme law of the land," overrides all contrary state statutes or state constitutional provisions and all prior federal statutes, what will be the effect of a treaty whose terms are at variance with the provisions of the United States Constitution? Is the treaty-making power subject to constitutional limitations, or is it, as has sometimes been declared, entirely unlimited?

Although the courts have never directly decided this question, since no treaty in conflict with the Constitution has ever been made,¹⁸ interesting dicta have occurred in a number of cases. In a passage from *Geofroy*

¹³ Article II, Section 2, cl. 2: The President "shall have power, by and with the . . . consent of the Senate, to make treaties: Provided, two-thirds of the Senators present concur."

Article I, Section 10, cl. 1: "No State shall enter into any Treaty, Alliance, or Confederation."

Article VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

¹⁴ 3 Dallas (U. S.), 199 (1796). In that case Mr. Justice Chase said: "A treaty cannot be the supreme law of the land — that is, of all the United States — if any act of a state legislature can stand in its way. If the Constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty, and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrated? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a state legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole."

¹⁵ *Hijo v. United States*, 194 U. S. 315, 324 (1904); *United States v. Lee Yen Tai*, 185 U. S. 213, 220, 221 (1902); *Whitney v. Robertson*, 124 U. S. 190, 194 (1888).

¹⁶ *The Cherokee Tobacco*, 11 Wall. (U. S.) 616 (1870); *Ward v. Race Horse*, 163 U. S. 504 (1896); 2 BUTLER, TREATY-MAKING POWER, §§ 384-386.

¹⁷ *In re Chin A. On*, 18 Fed. 506 (1883); 2 BUTLER, TREATY-MAKING POWER, § 387.

¹⁸ 2 BUTLER, TREATY-MAKING POWER, § 459.

v. *Riggs*,¹⁹ which has been quoted with unreserved approval so often that it has come to be regarded almost as settled law, Mr. Justice Field said:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 541 [5 Sup. Ct. 995, 29 L. Ed. 264]. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."²⁰

What constitutes the precise extent and meaning of the limitations thus suggested is not entirely clear. It seems fairly obvious that it would not be possible through the exercise of the treaty-making power to unseat a state governor or to alter substantially the machinery of state government. Similarly, it would probably be impossible to violate, even through the plenary treaty-making power, those fundamental and express prohibitions of the Constitution such as the Thirteenth and Eighteenth Amendments; there is little doubt but that a treaty provision introducing slavery into the United States would be void, — municipally if not internationally.²¹ As to some of the other constitutional prohibitions which have not been treated as quite so fundamental, the question is open to more doubt. Clearly a treaty could deprive one of his right to jury trial, in a consular court²² or in an "unincorporated territory," such as Porto Rico or the Philippines;²³ it is extremely questionable, however, whether a treaty could deprive a person of this right within one of the states of the United States. The Fifth Amendment prohibits the federal government from depriving any one of his life, liberty, or property without due process of law; whether the United States could by treaty abrogate an individual's vested rights of life, liberty, or property without payment of compensation²⁴ has never been directly settled. It is quite

¹⁹ 133 U. S. 258 (1890).

²⁰ *Geofroy v. Riggs*, 133 U. S. 258, 266 (1890).

²¹ The inquiry has never been pressed home as to whether a treaty which is void under a state's municipal law may be valid and binding from the viewpoint of international law, *i. e.* whether a state whose constitution forbids the effectuating of a treaty duly entered into is liable internationally for its breach. The question would seem to depend upon whether the other parties to the treaty could be charged with notice internationally of the constitutional limitations which limit the state's treaty-making powers. It would seem that foreign states should be charged with notice of such clear and express limitations as the Thirteenth Amendment forbidding slavery; but the matter is open to far more question as to those limitations dependent upon the settled course of judicial interpretation.

²² *In re Ross*, 140 U. S. 453 (1891).

²³ *Cf. Hawaii v. Mankichi*, 190 U. S. 197 (1903).

²⁴ There seems no doubt but that if compensation were paid, individual vested rights may be given away by treaty. Per Chase, J., in *Ware v. Hylton*, 3 Dallas (U. S.)

arguable that the deprivation of such vested rights by a treaty otherwise valid would be a deprivation by due process of law.

It is also open to serious question whether or not the federal government has the power to alienate by treaty territory belonging to one of the states without its consent. Although such an extreme power was denied by Daniel Webster, as secretary of state, yet Chief Justice Marshall and Mr. Justice Story maintained its existence in certain contingencies, and Chancellor Kent squarely affirmed it, declaring in no uncertain terms that "there can be no doubt that the power competent to bind the nation by treaty may alienate the public domain and property by treaty, . . . whether that territory be already in the occupation of the enemy, or remains in the possession of the nation, and whether the property be public or private."²⁵

The argument has been pressed that if the treaty-making power is subject to constitutional restrictions, if it is restricted as declared in *Geofroy v. Riggs*, *supra*, "by those restraints which are found in that instrument [*i. e.* the Constitution] against the action of the government or of its departments," then among these fundamental limitations is the restriction that the President and the Senate cannot by treaty effect what if done by an act of Congress would be clearly an invasion of the powers reserved to the states and a violation of the Tenth Amendment. If federal legislation and treaties are by the Constitution placed upon an equal footing, then, it is said, the President and the Senate cannot accomplish by treaty what would be unconstitutional if enacted by Congress as federal legislation.²⁶ This argument is so plausible that it has won many adherents; yet that it is indefensible is shown by a varied line of cases whose authority has become so well established that they are not now open to question.

No right could be more exclusively the subject of state control than the ownership of land within the state.²⁷ Congressional legislation undertaking to regulate such a matter would be clearly unconstitutional. A Maryland statute, passed under this unquestioned power of the state, provided that land inherited by French subjects should, after the expiration of ten years from the date of acquisition, pass to the state of Maryland unless the French owner should settle within the state of Maryland or become a citizen thereof. Yet when the United States made a treaty with France in 1800 enabling the people of each country to hold inherited lands in the other country without naturalization or other requirement, even though this conflicted with the existing Maryland statute, the treaty was held valid and binding in the case of *Chirac v. Chirac*,²⁸ and the state legislation therefore void.²⁹ Similarly, the regulation of inheri-

199, 245 (1795). Cf. French Spoliation Claims. Cf. also, *The Schooner Peggy*, 1 Cranch (U. S.), 103 (1801).

²⁵ KENT, COMMENTARIES, *166. For the views of Chief Justice Marshall and Justice Story, see 9 MOORE'S DIGEST OF INTERNATIONAL LAW, 173. See also 2 BUTLER, TREATY-MAKING POWER, 387-394.

²⁶ Thomas Jefferson is said to have once maintained this view. See 2 BUTLER, TREATY-MAKING POWER, § 467.

²⁷ *United States v. Fox*, 94 U. S. 315 (1876).

²⁸ 2 Wheat. (U. S.) 259 (1817).

²⁹ See, to the same effect, *Fairfax v. Hunter*, 7 Cranch (U. S.), 603 (1812); *Craig v.*

tance of realty within a state clearly falls among the powers reserved to the several states in the Tenth Amendment,³⁰ yet the Supreme Court has not hesitated to declare in the case of *Hauenstein v. Lynnharn*³¹ that the federal government may by treaty regulate the right to inherit state lands, even though the effect is to abrogate an otherwise valid state statute. Likewise in *Hopkirk v. Bell*,³² which involved a state statute of limitations, a subject clearly within the exclusive jurisdiction of the states, it was held that the state statute must give way to the conflicting provisions of a national treaty. The right of a state to determine who shall be allowed within its borders to act as executor or administrator is again a power retained exclusively by the states; yet the courts have uniformly held that the federal government may in the exercise of the treaty-making power abrogate or alter such state regulations.³³

The foregoing decisions to the effect that powers ordinarily understood as being reserved to the states may be invaded by the federal government under the treaty-making power are clearly correct. Such "reserved powers" or "states' rights" have been again and again invaded by the federal government acting under other plenary powers. Under the interstate commerce power, the taxing power, the power to declare war and to raise and support armies, the large general powers unquestionably reserved to the states have been invaded by Congress through the enactment of such far-reaching and important legislation as the White Slavery Act,³⁴ the Pure Food and Drugs Act,³⁵ the Webb Kenyon Act,³⁶ the Narcotic Drugs Act,³⁷ the Oleomargarine Act,³⁸ the Espionage Law,³⁹ and countless others. If our courts have established the well-settled principle that the federal government in the exercise of its expressly delegated plenary powers may invade the general reserved powers of the states, it would be strange indeed if the treaty-making power, granted by the Constitution to the federal government in such large and unrestricted terms, formed the single exception.

The truth is that the states clearly do *not* reserve to themselves all pow-

Radford, 3 Wheat. (U. S.) 594 (1818); *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 496 (1824); *Droit d'Aubaine*, 8 Opin. Att'y-Gen'l, 411.

³⁰ *Clarke v. Clarke*, 178 U. S. 186, 190 (1900).

³¹ 100 U. S. 483 (1879).

³² 3 Cranch (U. S.), 453; 4 Cranch (U. S.), 164.

³³ *In re Fattosinis' Estate*, 33 Misc. 18, 67 N. Y. Supp. 1119 (1900); *In re Lobrasciano's Estate*, 38 Misc. 415, 77 N. Y. Supp. 1040 (1902); *In re Wyman*, 191 Mass. 276, 77 N. E. 379 (1906); *Carpigiani v. Hall*, 172 Ala. 287, 55 So. 248 (1911); *In re Scutella's Estate*, 145 App. Div. 156, 129 N. Y. Supp. 20 (1911).

³⁴ Act of June 25, 1910, c. 395, 36 STAT. AT L. 825 (COMP. STAT., §§ 8812-8819). Upheld in *Hoke v. United States*, 227 U. S. 308, 43 L. R. A. (N. S.) 906 (1913).

³⁵ Act of June 30, 1906, c. 3915, 34 STAT. AT L. 768 (COMP. STAT., §§ 8717-8728). Upheld in *Seven Cases v. United States*, 239 U. S. 510, L. R. A. 1916D, 164 (1916). *Weeks v. United States*, 245 U. S. 618 (1918).

³⁶ Act of March 1, 1913, c. 90, 37 STAT. AT L. 699 (COMP. STAT., § 8739). Upheld in *Clarke Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, L. R. A. 1917 B 1218 (1917).

³⁷ Act of December 17, 1914, c. 1, 38 STAT. AT L. 785 (COMP. STAT., § 6287 g). Upheld in *United States v. Doremus*, 249 U. S. 86 (1919).

³⁸ Act of August 2, 1886, c. 840, 24 STAT. AT L. 209, amended by Act of May 9, 1902, c. 784, 32 STAT. AT L. 193. Upheld in *McCray v. United States*, 195 U. S. 27 (1904).

³⁹ Act of June 15, 1917, c. 30, 40 STAT. AT L. 217, amended by Act of May 16, 1918, c. 75, 40 STAT. AT L. 553. Upheld in *Schenck v. United States*, 249 U. S. 47 (1919).

ers except those expressly delegated to the federal government. Those powers which may be *implied* from the express delegations of federal power are likewise surrendered by the states;⁴⁰ and a large amount of power must be implied from the express treaty-making power. Thus it is that even in the case of purely domestic affairs which ordinarily fall within the unquestioned regulatory power of the states, if these once become matters of international concern, they are no longer reserved to the states. The mere fact that they have become of sufficient international concern to other nations to cause the making of a treaty is enough to show that under the Constitution they no longer remain within the sphere of state reserved powers, but fall within the power of the federal government, to regulate by treaty, or by legislation passed in order to carry out such treaty.

Were it true that the United States could not enter into treaties affecting matters understood to be generally reserved to the states, since the states have by the Constitution surrendered to the United States the *entire* treaty-making power, the result would be an intolerable restriction upon the power of a sovereign nation. There would be an entire absence of power to make treaties often vitally necessary; such a crippling of the sovereignty of the national government could never be presumed to have been intended by the framers of the Constitution. "To subject the treaty power to all the limitations of Congress in enacting the laws for the regulations of internal affairs would in effect prevent the exercise of many of the most important governmental functions of the nation, in its intercourse and relations with foreign nations, and for the protection of our citizens in foreign countries."⁴¹

Whether considered in the light of past decisions, or in the light of building up a practical and serviceable framework of government, therefore, there would seem to be no room to doubt the correctness of the three latest decisions⁴² upon the scope of the treaty-making power in the United States.

STATE REFERENDUM AND FEDERAL AMENDMENTS. — The Eighteenth Amendment¹ — prohibition's signal victory — has come before the highest courts of several states,² and is likely to reach those of others.³

⁴⁰ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316 (1819).

⁴¹ *United States v. Thompson*, 258 Fed. 257, 263 (1919).

⁴² Cases cited in note 1, *supra*. All alike uphold the power of the United States to provide by treaty for the protection of migratory birds.

¹ "Article —, Sec. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." 40 STAT. AT L. 1941.

² *Herbring v. Brown*, Att'y-Gen'l, 180 Pac. (Ore.) 328 (1919); *State v. Howell*, 181 Pac. (Wash.) 920 (1919); *Hawke v. Smith*, 900 N. E. (Ohio) 900 (1919); *In re Opinion of Justices*, 107 Atl. (Me.) 673 (1919).

³ See Theodore A. Bell, "The Referendum Against National Prohibition," at page 5.

The contention is that in a state which has the initiative and referendum, so called, any amendment to the Federal Constitution must be referred to the people as part of the legislative body.⁴ The answers of the courts are not harmonious.⁵ But their divergence cannot be rested, as has been attempted,⁶ upon the wording of the referendum provisions. In this matter any judicial declaration must involve primarily the interpretation of the amending article of the Federal Constitution.⁷

Congress is therein given, in the last stage of the evolution of an amendment, the choice of two alternative methods of ratification: (1) "by the Legislatures of three fourths of the several States, or" (2) "by Conventions in three fourths thereof." In this instance Congress adopted the former method.⁸ So, in order to determine just who, in a particular state, shall take part in the ratification or rejection of an amendment, the courts proceed to exercise their judicial function of construction by seeking to determine what the framers meant when they used the word "Legislatures" in Article V of the Constitution.

Conceivably, either of two things may have been intended by "Legislatures": (1) the periodical representative assembly in each state, or (2) the law-making power in each state.

To adopt the first interpretation will mean that the people in a state having a referendum cannot here make use of that new mode of expressing their will. But such an apparently startling result is not in conflict with the history of the adoption of the Constitution.⁹ In that instrument the people of each of the thirteen sovereign states shifted their legal sovereignty to the people of the United States, or more exactly to "the States' governments as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union."¹⁰ Article V itself accomplishes this shift of sovereign power, for by its provisions the Constitution may be amended in spite of the unanimous vote of the people of any one state, and an amendment proposed by

⁴ This question has received very little attention from text writers. But *cf.* "The people have no direct power either to propose an amendment to the Constitution, or to ratify it after it is proposed and submitted." 2 WATSON, CONST., 1310.

⁵ The Ohio court (6 to 1) refused to enjoin the Secretary of State from putting the proposed amendment on the November ballot. *Hawke v. Smith*, *supra*. The Washington court (5 to 4) affirmed the issuance of a writ of mandamus to compel the Secretary of State to submit the amendment to a vote of the people. *State v. Howell*, *supra*. The Oregon court, on the other hand, refused such a mandamus. *Herbring v. Brown*, *supra*. The Maine justices advised Governor Milliken that the amendment need not be referred to the people under Maine's referendum provisions. *In re Opinion of Justices*, *supra*.

⁶ *Herbring v. Brown*, *supra*. See *State v. Howell*, *supra*, at p. 927.

⁷ U. S. CONST., Art. V.

⁸ 40 STAT. AT L. 1050.

⁹ "By referring this business to the Legislatures, expense would be saved, and in general it may be presumed that they would speak the general sense of the people. It may, however, on some occasions be better to consult an immediate delegation for that purpose. This is therefore left discretionary." Iredell in North Carolina Convention which ratified the Federal Constitution, 4 ELLIOT, DEBATES, 2 ed., 182, 183. The Constitution went into operation on the day fixed by Congress, March 4, 1789, although it had then been ratified by only eleven states and the Articles of Confederation had required unanimity of approval for all alterations. ARTS. OF CONF., Art. XIII. See 1 STORY, CONST., 5 ed., §§ 278, 279.

¹⁰ DICEY, LAW OF THE CONSTITUTION, 8 ed., 144, 145.

unanimous vote of the people in one state cannot become "the supreme Law"¹¹ of that state unless it be approved by sufficient sister states to total three fourths of the then existing states.

But the second conceivable meaning of the word "Legislatures" in Article V does find support in the interpretation given the same word elsewhere in the Constitution. "Legislature," or its plural, appears thirteen times in ten connections in the Constitution, each time referring to state legislatures.¹² And on analysis it is clear that neither one of the two conceivable senses was adopted exclusively.¹³ For the people as part of the law-making body do not take a "Recess,"¹⁴ and yet they may very properly be construed to have a voice in prescribing "The Times, Places and Manners of holding Elections for Senators and Representatives."¹⁵ Therefore, cannot the word as used in Article V be fairly said to mean law-making bodies? For to adopt this second interpretation will mean that the people of a state having a referendum can here make use of that new mode of expressing their will. But however desirable this result may seem to some, the treatment which Article V has received in the past would indicate that this has not been the interpretation. The ratification or rejection of amendments has not been regarded as an exercise of the law-making function. Thus, joint resolutions of ratification by state legislative assemblies are often not signed by the state executives,¹⁶ though state constitutions ordinarily provide that they shall sign all laws either by way of approval or veto.¹⁷ Attempts by a state to revoke a ratification once made have been ignored by the federal government,¹⁸ which surely would recognize a change in a state's laws made by the proper state body. If ratification is not a law-making function, then it is not for the law-making body as such.¹⁹

¹¹ U. S. CONST., Art. VI, § 2.

¹² U. S. CONST. Art. I, Sec. 2, § 1, Sec. 3, § 1, Sec. 4, § 1, Sec. 8, § 17; Art. II, Sec. 1, § 2; Art. IV, Sec. 3, § 1, Sec. 4 (twice); Art. V (twice); Art. VI, § 3. In addition the word "legislature," or its plural, appears in the following amendments: XIV, § 2; XVII, § 1; § 2 (twice).

¹³ See 24 HARV. L. REV. 220.

¹⁴ U. S. CONST., Art. I, Sec. 3, § 2.

¹⁵ U. S. CONST., Art. I, Sec. 4, § 1; State *ex rel.* Schrader v. Polley, 26 S. D. 5, 127 N. W. 848 (1910); State *ex rel.* Davis v. Hildebrand, 94 Ohio St. 154, 114 N. E. 55 (1916). No one will quarrel with the decision of the United States Supreme Court that by giving effect to such an interpretation of Art. I, Sec. 4, Ohio does not cease to have a republican form of government. Davis v. Hildebrand, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172 (1916). See 30 HARV. L. REV. 184.

¹⁶ "This resolution, ratifying the proposed constitutional amendment . . . was not signed by the Governor, nor would it have been vetoed by him." *In re* Opinion of Justices, *supra*, at p. 676. Nor need the Governor sign the resolution submitting a proposed amendment to a state constitution to the people. State *ex rel.* Morris v. Mason, 43 La. Ann. 590, 9 So. 776 (1891); Com'lth *ex rel.* Att'y-Gen'l v. Griest, 196 Pa. St. 396, 46 Atl. 505 (1900).

Similarly, the President need not sign the resolution of Congress sending a proposed federal amendment to the states. Hollingsworth v. Virginia, 3 Dall. (U. S.) 378, 1 L. Ed. 644 (1798). See 1 WILLOUGHBY, CONST., 520 521; 2 WATSON, CONST., 1318 ff.

¹⁷ See People v. Bowen, 21 N. Y. 517, 519 (1860).

¹⁸ See JAMESON, CONST. CONV., 4 ed., §§ 582, 583.

¹⁹ Nor would it seem that express provision in the Referendum law, such as that in Ohio (November, 1918, CONST. AM., Art. II, §§ 1, 1 a), that the people shall vote on proposed federal amendments could make it such in matters involving the Federal Constitution by Article V.

And to grant for the moment that ratification is a law-making function throws one back upon the original problem of which interpretation shall here be given the word "Legislatures."

To outbalance the weight of precedent, an argument of great force is offered, — that here of all places should the people be accurately heard when a change in their Constitution is involved;²⁰ that to interpret narrowly the word "Legislatures" in Article V will create a danger of unseemly conflicts between outside, direct expressions of popular will and the official expression conveyed through the people's representatives; and that in interpreting a constitution presumptions should always favor whatever construction will best effect the end of all governments — the orderly welfare of their people. And so in deference to this argument let it be recognized that here is a very close question of interpretation.

Article V provides that proposed amendments "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures," etc., and does not designate a body to determine when such amendments have been ratified, or the validity of the acts of ratification. But Congress by Article V may choose the mode of ratification. Moreover, it is Congress which is empowered "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."²¹ Certainly it is inconceivable that the power of determining the validity of ratification was meant to be vested in any one state, or anywhere but "in the Government of the United States." And Congress has passed a law in this matter providing "That, whenever official notice shall have been received, at the Department of State, that any amendment . . . proposed to the Constitution of the United States, has been adopted, according to the provisions of the Constitution, it shall be the duty of the said Secretary of State forthwith to cause the said amendment to be published . . . with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."²²

Before that Act of 1818 the first ten amendments had been communicated to Congress by the President,²³ and the eleventh had been declared adopted by the President in a message to Congress, while the twelfth, the Secretary of State by Proclamation declared adopted.²⁴ After that

²⁰ On all sides are cries of alarm (see W. L. Marbury, "The Limitations upon the Amending Power," p. 223 *ff.*, *supra*) at the ease with which the twentieth century is effecting changes in a Constitution "whose cumbrous machinery of formal amendments erected in Article V," it was said but a few years ago, one could expect nowadays to be moved by "no impulse short of the impulse of self-preservation, no force less than the force of revolution." WILSON, CONGRESSIONAL GOV'T, 242.

²¹ U. S. CONST., Art. I, Sec. 8, § 18. See the valuable discussion of the powers of interpretation really resting in the legislative department, which interpretations are not to be upset by a proper functioning of the judiciary, in THAYER, LEGAL ESSAYS, 7-13.

²² 3 STAT. AT L. 439; R. S., § 205; U. S. COMP. STAT., § 303.

²³ See 1 WAMBAUGH, CASES ON CONST. LAW, xxvi, note 1.

²⁴ *Ibid.*, xxvii, notes 1, 2.

Act one Secretary of State referred to Congress ratifications made of doubtful validity by subsequent rejections, and Congress by resolution declared the Amendment adopted.²⁵ In the immediate case, Acting Secretary of State Polk has declared the Eighteenth Amendment to be "valid to all Intents and Purposes, as part of the Constitution," enumerating, among the necessary three fourths, states having a referendum, whose ratifications had been submitted by joint resolution of the representative assemblies.²⁶ And Congress has not put the Executive's decision in question, but has proceeded to act on the basis of the amendment's valid adoption.²⁷

It would seem, then, that the matter has become something closely akin to a political question. For it is the correctness of the Acting Secretary of state's decision, in which Congress has acquiesced, that is involved. And the courts have refused to consider the correctness or wisdom of congressional action under the constitutional power given Congress to coin money,²⁸ or of the President's decision that a state of war exists,²⁹ a decision made by him in his capacity as constitutionally appointed Commander-in-Chief of the Army and Navy. Likewise, the courts have refused to question the State Department's recognition of foreign governments,³⁰ of which is the sovereign government over certain territory,³¹ and its declaration of international boundaries,³² however absurdly inaccurate³³ the latter may in fact have been.³⁴ A very close analogy to the present case is suggested in the rule of the majority of courts that proper authentication and enrolment is conclusive evidence of the validity of a statute, and that therefore the court is unable to look into records concerning the passage of an act in order to determine its validity.³⁵ The result of such cases is that the courts do not on such occasions decide the merits of private rights of individuals before them, and therefore do not exercise their ordinary judicial function.

Constitutional interpretation is unquestionably a judicial function.

²⁵ See JAMESON, CONST. CONV., 4 ed., §§ 582, 583; 2 WATSON, CONST., 1314, 1315.

²⁶ 40 STAT. AT L. 1941. (Proclamation of January 29, 1919. Maine, Ohio, Oregon, and Washington are among the thirty-six states listed therein.)

²⁷ As indicative of the probable fact that the 65th Congress used the word "legislatures" in its narrow sense, it is worthy of note that Congress provided in the proposed Amendment (note 1, *supra*) that "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation" (Sec. 2), and yet that the article was to be inoperative unless ratified "*by the legislatures of the several States*, as provided in the Constitution" (Sec. 3). [The italics are the Editor's.]

²⁸ Legal Tender Cases, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204 (1883).

²⁹ Prize Cases, 2 Black (U. S.), 635, 17 L. Ed. 459 (1862).

³⁰ Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726 (1917); Ricaud v. American Metal Co., 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. 733 (1917).

³¹ Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691 (1890).

³² Foster v. Neilson, 2 Pet. (U. S.) 253, 7 L. Ed. 415 (1829).

³³ See *In re Cooper*, 143 U. S. 472, 499 ff., 12 Sup. Ct. 453, 459 ff., 36 L. Ed. 232, 240, 241 (1891); *The James G. Swan*, 50 Fed. 108 (1892).

³⁴ Again, the Maryland court referred in mandamus proceedings against the state executive to declare "the rule of law which ought to guide the discretion of the Governor in this ascertainment of the result of the late election had for the adoption or rejection of the 'New Constitution.'" *Miles v. Bradford*, 22 Md. 170 (1864).

³⁵ *Lyons v. Woods*, 153 U. S. 649, 14 Sup. Ct. 969, 38 L. Ed. 854 (1894); *State v. Septon*, 3 R. I. 119 (1855); *People v. Harlan*, 133 Cal. 16, 65 Pac. 9 (1901); *Cox v. Pitt County*, 146 N. C. 584, 60 S. E. 516 (1908).

Could the word "Legislatures" in Article V have reached the courts, in a proper case demanding interpretation, before the proclamation of January 29, 1919, then the courts might with propriety have declared themselves. But by that proclamation the political departments of the government have expressed themselves. To avoid conflict with those departments has always been the aim of state and federal courts, under the leadership of the United States Supreme Court.³⁶ And it is submitted that here, without shirking responsibility or without departing from precedent,³⁷ the Judiciary may refrain from all action except the adoption and application of that interpretation of Article V already declared by the other two branches of the federal government.

STATE CONTROL OVER INTERSTATE BRIDGES. — That constitutions should be regarded as living instruments, the fundamental principles of which are applicable to varying conditions, is illustrated in the history of our "commerce clause."¹ It is a significant fact that until 1860 only twenty cases involving its construction had been submitted to the Supreme Court; while today, because of the breadth of its application and the diversity of interests involved, probably no other clause of the Constitution must be considered so often by our federal tribunals. The construction of the clause as applied to interstate commerce has been varied, and it is impossible to reconcile the language of the various decisions. But throughout there has been the steady development of a fundamental principle. Until the case of *Gibbons v. Ogden*² it was doubted whether the clause gave Congress control of navigation when carried on among the several states. In that case the view was taken that the national power is "exclusive," even when dormant.³ This was questioned in *Willson v. Blackbird Creek Co.*,⁴ and in the *License Cases*⁵ it was limited in favor of state regulation where Congress had not acted. The basis of the modern rule was first adopted as the rule of decision in *Cooley v. Port Wardens*.⁶ The general principle there applied was that the power of Congress is exclusive as to those subjects which require uniformity; while in peculiarly local matters the states may act within

³⁶ Cases cited in notes 28 to 34, *supra*.

³⁷ "In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." Taney, C. J., in *Luther v. Borden*, 7 How. (U. S.) 1, 39, 12 L. Ed. 581, 597 (1849).

¹ U. S. CONST., Art. I, Sec. 8, clause 3: Congress shall have power "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

² 9 Wheat. (U. S.) 1 (1824).

³ See also *Brown v. Maryland*, 12 Wheat. (U. S.) 419 (1827).

⁴ 2 Pet. 245 (1829).

⁵ 5 How. (U. S.) 504 (1846).

⁶ 12 How. (U. S.) 299, 319 (1851).

their respective jurisdictions until Congress sees fit to act.⁷ But the application of this rule has led to more confusion.⁸

A recent case⁹ illustrates the difficulty of finding any definite *criteria* for the distinction taken in *Cooley v. Port Wardens*.¹⁰ The power of a state to regulate the establishment of ferries¹¹ and the construction of bridges¹² has been recognized as valid. Where they run across boundary waters between two states, the traffic over them is interstate commerce.¹³ Accordingly, in *Covington Bridge Co. v. Kentucky*,¹⁴ it was held (at least in the absence of mutual action)¹⁵ that neither state could regulate tolls on an interstate bridge built pursuant to the concurrent action of the two states.¹⁶ In *Port Richmond Ferry v. Hudson County*,¹⁷ however, it was held that New Jersey could regulate boundary ferries between that state and New York and prescribe rates on ferriage from its own shore. The West Virginia case¹⁸ goes further in holding that the state may declare invalid the use of a pass from another state.

It is suggested that this confusion is due in part to the different methods of approach. Thus, one attitude seems to start with the proposition that the power of Congress to regulate interstate commerce is *prima facie* exclusive, throwing the burden upon the state to show justification for its action. It is submitted that it would be more logical to work from the other end. Thus, *prima facie*, the power to regulate

⁷ The rule is stated to the same effect in *Ex parte McNeil*, 13 Wall. (U. S.) 236, 240 (1871); *Welton v. Missouri*, 91 U. S. 275, 280 (1875); *Mobile v. Kimball*, 102 U. S. 691, 697 (1880); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204 (1885); *Bowman v. Chicago, etc. Ry. Co.*, 125 U. S. 465, 481, 485 (1888); *Covington Bridge Co. v. Kentucky*, 154 U. S. 204, 212 (1894); *Minnesota Rate Cases*, 230 U. S. 352, 399, 400 (1913); *Port Richmond Ferry Co. v. Hudson County*, 234 U. S. 317, 330 (1914).

⁸ See, for example, the cases relating to the power of the states to regulate charges on interstate carriers within the state, reviewed in *Wabash, etc. Ry. v. Illinois*, 118 U. S. 557 (1886), and compare the latter case with *The Minnesota Rate Cases*, 230 U. S. 352 (1913).

⁹ *Schrader v. Steubenville, etc. Co.*, 99 S. E. 207 (W. Va.) (1919). For a statement of the facts, see RECENT CASES, *infra*, p. 312.

¹⁰ *Supra*, note 6.

¹¹ *Conway v. Taylor*, 1 Black (U. S.) 603 (1861).

¹² *Cardwell v. Bridge Co.*, 113 U. S. 205 (1885).

¹³ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (1885); *New York Central R. R. Co. v. Freeholders*, 227 U. S. 248 (1913).

¹⁴ 154 U. S. 204 (1894).

¹⁵ See *Broadway & Newport Bridge Co. v. Commonwealth*, 173 Ky. 165, 190 S. W. 715 (1917). U. S. CONST., Art. I, Sec. 10, clause 3, provides that "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State." However, if the two states should establish uniform regulations over the bridge, it would seem that the possibility of friction between them would be academic and the need for regulation by Congress slight.

¹⁶ The Kentucky statute undertook to regulate the fares on the bridge as to commerce from both sides. However, the opinion of the majority of the court seemed to take the view that the state had no power to regulate the rates of toll on commerce on such a bridge to any extent. The separate opinion of the four justices, who concurred in the result, stated that "the several states have power to establish and regulate ferries and bridges, and the rates of toll thereon . . . subject to the paramount authority of Congress over interstate commerce" (p. 223).

¹⁷ 234 U. S. 317 (1914).

¹⁸ See note 9, *supra*. The court held that there was no legislation by Congress with respect to the pass, as the bridge was unconnected with any railroad. 8 U. S. COMP. STAT. 1916, § 8563, p. 9054.

interstate commerce continues,¹⁹ as does other legislation not expressly prohibited, to reside in the state, with, however, the vast limitation²⁰ that the state's regulations as to such commerce are wholly subordinate to the power of the nation as to this same matter;²¹ and that, even though the nation has not acted at all, a state may not deal with such commerce so as to clog its operation as such by way of hostile discrimination. Under this theory we would start with the proposition that the state retains its sovereign powers unless limited expressly or by reasonable implication. Thus, where Congress has not acted, the test is whether the regulation is unreasonable or discriminatory. In applying the test, the underlying purpose of the clause must be kept in mind — to avoid serious clashes between the states in the exercise of the power over a common agency.

Accordingly, it would seem that a state has the power, in the absence of action by Congress, to prevent extortion by regulating the rates on a bridge or ferry²² across a boundary stream as to commerce emanating from its shore. In such a local situation, the interests of the states are such that the prospect of any serious clash between them is slight; a mere difference in tariff rates from different shores is not important. But where either state attempts to prevent such extortion by regulating the rates as to commerce from the other shore it is thereby derogating from similar authority of that state; there would be almost inevitably different regulations as to the same commerce and serious friction between the states. Accordingly the power would be disallowed.²³ Likewise it would seem that a state could not regulate the rates for round-trip tickets;²⁴ the argument that it is commerce emanating from its shore is

¹⁹ Under the Articles of Confederation there were practically no restrictions upon the power of the several states to regulate interstate commerce. See Art. VI. It was the separate commercial legislation of the states and the want of a general power over the subject by the federal government which threatened the harmony of the United States under the Confederation. During the Constitutional Convention, many proposals to make the extent of the federal power over commerce definite were rejected. Likewise a motion to make the commerce clause by express terms "sole and exclusive" was lost by a vote of six states to five. For a discussion of the history of the commerce clause, see PRENTICE AND EGAN, *THE COMMERCE CLAUSE OF THE CONSTITUTION*.

²⁰ These limitations are so vast that frequently the state's power is said to have been wholly suspended or destroyed.

²¹ For a collection of the cases showing the ways in which the state power has been used legitimately, see *The Minnesota Rate Cases*, *supra*.

²² It seems possible to draw a distinction between the case of a bridge and a ferry on the ground that the latter is considered historically of a more peculiarly local nature. See *Conway v. Taylor*, 1 Black (U. S.) 603 (1861); *Freeholders v. The State*, 24 N. J. 718 (1853); *Port Richmond Ferry v. Hudson County*, *supra*, pp. 331-332. A further distinction might be drawn on the basis of the fundamental difference of the two, the ferry being movable, in reality, as to either state at times within its jurisdiction and going in only one direction at a time; while the bridge is immovable, part fixed in either state and the traffic in both directions at all times. But it is submitted that these differences are insufficient to merit different conclusions, and apparently this is the view taken by the courts. See *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420 (1837); *Covington Bridge Co. v. Kentucky*, *supra*, p. 218; *Port Richmond Ferry v. Hudson County*, *supra*, p. 328; *Schrader v. Steubenville, etc. Co.*, *supra*, p. 212.

²³ *Covington Bridge Co. v. Kentucky*, *supra*. See also *Port Richmond Ferry v. Hudson County*, *supra*, p. 333.

²⁴ This question was expressly left undecided in *Port Richmond Ferry v. Hudson County*, *supra*, p. 333. In the principal case (*supra*, note 9, p. 212), the pass was

specious, in that the journey is broken and in fact there is a separate trip each way. Here again there is real danger of controversy between the states. The case of a pass is more troublesome. There is undoubtedly a difference in degree between regulating the rate of charges on commerce from the other shore and in saying that a person shall not come into the state on a public service corporation *gratis* when others are required to pay.²⁵ But in both cases the power invoked by the state will affect only indirectly its morals, peace, and welfare, while there is the same danger of conflict with the other state. The test of the necessity for uniformity is the danger of irreconcilable regulation according to the diverse and discriminatory interests of the states involved.

It is submitted that this is the attitude of the Supreme Court.²⁶ The apparent diversity in the decisions is due to some extent to the practical manner in which it has been applied. Where there is actual danger of serious conflict, the exercise of the power by the state would be inexpedient and an unreasonable burden upon commerce. But where controversy is merely a possibility, the exercise of the power by the state within its jurisdiction is legitimate. It is to be hoped that the West Virginia case will be taken to the Supreme Court, as its decision would do much to point out the correct *criteria* of the extent of a state's power over interstate commerce.

ELIGIBILITY OF WOMEN FOR PUBLIC OFFICE. — While many courts in the last half-century have expressed opinions that women are ineligible for office at common law, the great majority of the cases directly involve only the construction of a statute or constitution. In Great Britain, the question has been whether an act fixing the qualifications for a certain office is to be construed as giving women the right to hold it; in America, most of the cases turn upon whether there is a broad constitutional inhibition. While the question of common-law eligibility can enter in each type of case, courts in both countries have confused considerations of interpretation and construction with a problem of substantive law.

The constitutions of a not inconsiderable number of states do not expressly confine the right to hold office to electors, and have not been amended to give women the vote. In such states, when a woman claims her election or appointment to office is valid, the first question must be whether, apart from common-law eligibility, there is an implied restric-

treated as a succession of round-trip tickets. The power of a state to limit the charge for a round-trip ticket was recognized as valid in *Missouri v. Sickmann*, 65 Mo. App. 499 (1896).

²⁵ "Its only effect is equalization by apposite proscription against discrimination in the various forms of commercial exchange of commodities and intercourse between the states." *Schrader v. Steubenville, etc. Co.*, *supra*, p. 212. But suppose one state stipulates in the franchise of the corporation that its public employees shall be permitted to use the bridge free of charge and the other state commands the corporation to allow no one to pass free.

²⁶ See *Covington Bridge Co. v. Kentucky*, *supra*, pp. 220-221; *Port Richmond Ferry v. Hudson County*, *supra*, pp. 330-333. See also *Broadway & Newport Bridge Co. v. Commonwealth*, 173 Ky. 165, 172, 190 S. W. 715, 718 (1917).

tion in the constitution making the right to hold office co-extensive with the right to vote. It is asserted that the one right necessarily depends upon the other;¹ there is, however, this distinction: the vote is a power of sovereignty; the office, the means whereby the power operates. It is a *non sequitur* that, in limiting the classes of voters, the constitution is necessarily limiting the classes of officeholders through whom the voters may make their wishes effective. Several cases have pointed out that the restriction upon those who can hold office would be a restriction upon the freedom of choice of the voters, and have repudiated any such implied limitation upon the exercise of the voters' will.² The rule is also repudiated, although not in words, where the same court holds that the restriction does not extend to offices created by the legislature, as distinguished from those created by the constitution,³ but that the legislature, in creating offices, cannot make the franchise for the new positions any broader than it was for the old ones;⁴ for the result is that voters are allowed to elect non-voters. Even this attitude, so far as it imposes the qualification upon any officeholders, seems incorrect.⁵

Whether, if there is a common-law ineligibility, it is incorporated in the constitution, is a quite different question. A clause giving the right to elect to office must be read in the light of what such a privilege meant at common law, just as a clause that no one shall answer to a criminal charge unless indicted must be read in the light of the common-law rule that a grand jury cannot indict unless twelve jurors so vote.⁶ This would seem clear, but it is not so clear that such ineligibility could only be removed by a constitutional amendment. It could be argued, on the one hand, that, although implied, a restriction upon those who can take part in governmental functions is as much a part of the constitution as any express enactment;⁷ on the other, that, while the constitution must be interpreted under the common law, it does not enact the common law of its time, and that the common-law rule of ineligibility can be changed.⁸ Taking this second view, it might be maintained that the law on this point can and should adapt itself to altered circumstances without waiting for legislative enactment; that courts which can declare

¹ See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 894, note 1; MECHEM, PUBLIC OFFICES AND OFFICERS, § 67.

² Wright v. Noell, 16 Kan. 601 (1876); Steusoff v. State, 80 Tex. 428, 15 S. W. 1100 (1891); Opinion of the Justices, 62 Fla. 1, 57 So. 351 (1912); and see Barker v. The People, 3 Cow. (N. Y.) 686, 703 (1824); People v. McCormick, 261 Ill. 413, 419, 103 N. E. 1053, 1056 (1914). *Contra*, State v. Smith, 14 Wis. 497 (1861); State v. McMillen, 23 Neb. 385, 36 N. W. 587 (1888); Attorney General v. Abbott, 121 Mich. 540, 80 N. W. 372 (1899); State v. Hodges, 107 Ark. 272, 154 S. W. 506 (1913); State v. Knight, 169 N. C. 333, 85 S. E. 418 (1915).

³ Huff v. Cook, 44 Iowa, 639 (1876).

⁴ See Coggeshall v. City of Des Moines, 138 Iowa, 730, 736, 117 N. W. 309, 311 (1908); *In re Carragher*, 149 Iowa, 225, 227, 128 N. W. 352, 353 (1910).

⁵ "It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites." 1 STORY, COMMENTARIES ON THE CONSTITUTION, 5 ed., § 625.

⁶ State v. Barker, 107 N. C. 913, 12 S. E. 115 (1890).

⁷ See Arthur W. Machen, Jr., "The Elasticity of the Constitution," 14 HARV. L. REV. 200, 273; 24 HARV. L. REV. 139.

⁸ Schuchardt v. The People, 99 Ill. 501 (1881).

a newspaper syndicate a public utility⁹ and can hold a trust to promote atheism not against public policy¹⁰ should be able to hold that the modern woman has intelligence and discretion enough to hold public office. The analogies are not strictly in point, for this question would involve, not the determination of whether a new fact fits an old conception, but a change of status. It could, however, be said that statutes have gone so far in removing women's legal incapacity that the courts do not have to effect a change of status but merely to accept it.¹¹ It is significant, in this aspect of the problem, that Lord Ronan has declared in a dictum in the recent case of *Frost v. The King*¹² that, whatever may have been the previous law, women can no longer be held ineligible for office.

That there was a general common-law ineligibility is by no means certain. Cases which hold that there was usually assume that such an ineligibility must have existed, and then treat the numerous early cases where women's rights to hold offices have been upheld as exceptions to the rule assumed. An English case usually cited by the courts as holding that there is an ineligibility at common law in reality holds no more than that the framers of an act giving the right to hold a certain office did not mean to open it to women;¹³ dicta to the effect that women are ineligible at common law are based upon a preceding case, which only decided they could not vote at common law,¹⁴ a question which may involve quite different considerations.¹⁵ There are many early cases holding that women can fill offices whose functions can be performed by deputy,¹⁶ which would seem to show that the law did not regard women as incapable of the necessary discretion, for of course the deputy is subject to the officeholder's control. The consideration of feminine sensitiveness does not seem to have kept women out of the positions of prison-keeper¹⁷ and commissioner of sewers.¹⁸ Most of the cases concern women's eligibility to administrative offices, and it is generally said, even by courts which hold that there is no ineligibility here, that the eligibility does not extend to judicial and legislative offices. Certainly the capacities required by the three classes of office differ; in each, common-law eligibility depends upon custom, and, as there is considerably less evidence of women holding offices of the last two classes,¹⁹ the distinction will probably be maintained. As for administrative offices, the tendency of recent years has been to hold women eligible. Some of the cases have been concerned with offices purely ministerial,²⁰ but some

⁹ *The Interocean Publishing Co. v. The Associated Press*, 184 Ill. 438, 56 N. E. 822 (1900).

¹⁰ *Bowman v. Secular Society, Limited*, [1917] A. C. 406.

¹¹ *Ward v. Berkshire Life Insurance Co.*, 108 Ind. 301, 9 N. E. 361 (1886).

¹² [1919] 1 I. R. 81, 106.

¹³ *Beresford-Hope v. Lady Sandhurst*, L. R. 23 Q. B. D. 79 (1889).

¹⁴ *Chorlton v. Lings*, L. R. 4 C. P. 374 (1868).

¹⁵ See *supra*.

¹⁶ See 38 L. R. A. 208, note.

¹⁷ *Rex v. Lady Braughton*, 3 Keb. 32 (1672).

¹⁸ See *CALLIS ON SEWERS*, 4 ed., 296, 299.

¹⁹ But see 24 HARV. L. REV. 139, notes 7 and 8; 38 L. R. A. 208, note.

²⁰ *Gilliland v. Whittle*, 33 Okla. 708, 127 Pac. 698 (1912). Here it was held that, under the wording of the state constitution, a woman could be clerk of court. *State v. De Armijo*, 18 N. M. 646, 140 Pac. 1123 (1914) (state librarian).

have gone much further.²¹ England²² and Quebec²³ have recently held that, at common law, women cannot be attorneys, but these cases involve only the custom in a particular profession. In both England and America, should the question of common-law eligibility arise again before the matter is finally settled by statute, the dicta and discussion in *Frost v. The King*²⁴ may lead the court to decide in favor of eligibility.

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LEGAL STATUS OF VOLUNTARY ASSOCIATIONS.¹—In the absence of a statute, it is clear that a voluntary or unincorporated association cannot sue or be sued in the name of the association.² But statutes in many jurisdictions allow actions by, or against, such organizations in their ordinary name, or in the name of some officer.³ The famous case of the *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*⁴ held that an Act of Parliament⁵ which gave unincorporated trade unions a right to hold property for their own use and provided for a registry of their names, by implication made the unions liable to suits against them in such registered name. For the purposes of that case, it is submitted, it would have made no great difference whether the association were regarded as a legal entity distinct from its members, or whether the trade union's name were considered merely as an authorized compendious designation, by way of procedure, for all or for certain representative members of the union. The House of Lords did adopt the view that the union was a legal entity, and this seems a proper and desirable result. But since the suit was for an injunction only, the suggestion of Lord Macnaghten⁶ and of Lord Lindley,⁷ that a representative action,

²¹ *State v. Quible*, 86 Neb. 417, 125 N. W. 619 (1910) (county treasurer); Opinion of the Justices, *supra* (county treasurer).

²² *Bebb v. Law Society*, L. R. [1914] 1 Ch. D. 286.

²³ *Langstaff v. Bar of Province of Quebec*, 25 Que. K. B. 11 (1915). The American authorities are divided.

²⁴ *Supra*.

¹ For a discussion of the general problem of the jurisdiction of courts over a controversy between a voluntary association and a member, see *Universal Lodge No. 14, F. & A. M. v. Valentine*, 107 Atl. 531 (Md. 1919).

² *Francis v. Perry*, 82 Misc. 271, 144 N. Y. Supp. 167 (1913). See *Allis-Chalmers Co. v. Iron Moulders' Union*, 150 Fed. 155, 183 (1906); *New England States Sangerbund v. Fidelia Musical & Educational Society*, 218 Mass. 174, 105 N. E. 629 (1914).

³ *Francis v. Perry*, *supra*; *Court Harmony, A. O. F. v. Court Abraham Lincoln, A. O. F.*, 70 Conn. 634, 40 Atl. 606 (1898). Colorado, Michigan, Minnesota, New Jersey, Pennsylvania, and a number of other states have similar statutes. In some cases they are limited to fraternal benefit societies paying more than a minimum death benefit, as in West Virginia. See CODE 1913, c. 55 A, §§ 3226-3263. In Minnesota, the statute has been held to apply only to business partnerships and only to parties defendant. *St. Paul Typothetae v. St. Paul Bookbinders' Union*, 94 Minn. 351, 102 N. W. 725 (1905). Other modifications are found in the interpretations of the Ohio and the Nebraska statutes.

⁴ [1901] A. C. 426. See 15 HARV. L. REV. 311.

⁵ TRADE UNION ACT 1871, 34 & 35 VICT. c. 31, as amended by ACT OF 1876, 39 & 40 VICT. c. 22.

⁶ See page 438 of report. See also *Pickett v. Walsh*, 192 Mass. 572, 589, 78 N. E. 753, 760 (1906); *American Steel & Wire Co. v. Wire Drawers' & Die Cutters' Unions*, 90 Fed. 598, 605 (1898). See POMEROY, CODE REMEDIES, 4 ed., 267.

⁷ See page 443 of report.

even in the absence of statute, would have bound all members of the society, seems tenable.

In many cases, however, the decision of the question, whether statutes allowing suits against voluntary associations in the association name affect the adjective or the substantive law, is of importance practically as well as theoretically. Thus, since the common law dealt with associations solely in accordance with the principles governing partnerships, such an organization could not sue a member or be sued by a member at law,⁸ and the only remedy lay in equity.⁹ Hence a court which regarded the change as procedural merely, might be expected to hold that this right was not enlarged, and the Connecticut court has taken this view.¹⁰ The New York court, on the other hand, has held that such an action at law was permitted¹¹ under the New York Code.¹² Again, in the case of *Saunders v. Adams Express Co.*,¹³ the New Jersey court decided that the question of the party to be sued was one of procedure, to be regulated by the *lex fori*, and that the action need not be brought against the president or treasurer of this New York joint-stock association, as the New York statute provided, but that it might be brought against the association in its usual name, in accordance with the provisions of the New Jersey Code.¹⁴ A Michigan case,¹⁵ however, finds a statute of this type sufficient reason for treating a voluntary association as a legal entity, distinct from its members.

In the satisfaction of a personal judgment rendered against a voluntary association, the question of the status of the association is again raised. At common law, such a judgment was, of course, void and could not be enforced.¹⁶ But under the statutes it has been held that such a judgment could be enforced against the property of the association.¹⁷ And many cases have limited the right of the plaintiff to levy execution, under such a judgment, to this association property.¹⁸ But this does not mean that the liability of a member is a limited liability. If an action against the association fails to secure the satisfaction of the debt, then an action will still lie against the individual associate.¹⁹ Nor is limited liability the *sine qua non* of corporateness. It is submitted that if the legislature should pass a law providing for the unlimited liability of

⁸ *McMahon v. Rauh*, 47 N. Y. 67 (1871); *Ceeny v. Clark*, 3 Vt. 431 (1830).

⁹ *McDowell v. Joice*, 149 Ill. 124, 36 N. E. 1012 (1893); *Labouchere v. Earl of Wharnccliffe*, L. R. 13 Ch. D. 346 (1879).

¹⁰ *Huth v. Humbolt Stamm* No. 153, 61 Conn. 227, 23 Atl. 1084 (1891).

¹¹ *Westcott v. Fargo*, 61 N. Y. 542 (1875); *McCabe v. Goodfellow*, 39 N. Y. St. 941, 15 N. Y. Supp. 377 (1891).

¹² CODE OF CIVIL PROCEDURE, § 1919.

¹³ 71 N. J. L. 270, 57 Atl. 899 (1904).

¹⁴ P. L. 1903, p. 545, § 40.

¹⁵ *Detroit Light Guard Band v. First Michigan Independent Infantry*, 134 Mich. 598, 96 N. W. 934 (1903).

¹⁶ *McConnell v. Apollo Savings Bank*, 146 Pa. 79, 23 Atl. 347 (1892); *Methodist Episcopal Church v. Clifton*, 34 Tex. Civ. App. 248, 78 S. W. 732 (1904).

¹⁷ *Gale v. Townsend*, 45 Minn. 357, 47 N. W. 1064 (1891); *Welsh v. Kirkpatrick*, 30 Cal. 202 (1866); *Allen v. Clark & Thompson*, 65 Barb. 563 (1873).

¹⁸ *Davison v. Holden*, 55 Conn. 103, 10 Atl. 515 (1887); *Schuylerville Nat'l Bank v. Van Derwerker*, 74 N. Y. 234 (1878); *Mertz v. Fenouillet*, 13 App. Div. 222, 43 N. Y. Supp. 217 (1897).

¹⁹ See *Allen v. Clark*, *supra*, p. 571.

stockholders for the debts of a certain class of corporations this would not make the corporations any less entities. And there seems no good reason why an unincorporated association should not be regarded as just this sort of an entity. If the association is regarded as an entity, certain difficulties are avoided, which are presented if the obligation is treated as an ordinary joint obligation. Under the latter view, for instance, if one of the members of the association were a nonresident of the state in which judgment was given, and if he had not been served with process within the state, the entry of judgment against the association would be void, in accordance with the interpretation of the Fourteenth Amendment, laid down in *Pennoyer v. Neff*.²⁰ Execution could not even be levied upon joint property under such a void judgment. Of course, the plaintiff might reach the property by an action *quasi in rem*, but there are advantages connected with a personal judgment for which a judgment *in rem* would hardly be an adequate substitute. As a practical matter, a voluntary association does act as a unit, and it would appear that the liability ought to be primarily that of the unit. To the man in the street who deals with a labor union or a club, there is no difference apparent between the conduct of that organization, unincorporated, and the conduct of a similar incorporated association. Nor is any difference apparent to a member. Affairs are managed in quite the same fashion: business is transacted in the association name: the entity in the world of things is quite as definite. It seems, too, that the view of these associations which confirms the popular notion of them is at least as much in harmony with the language of these statutes as the procedural view. Perhaps it would be possible to recognize such voluntary societies as entities, even where there is no statute. In *Simpson v. Grand International Brotherhood of Locomotive Engineers*, an interesting recent case, the West Virginia court has refused to go this far.²¹ At any rate, the statutes afford a desirable opportunity to make the law accord with ordinary thought, and, at the same time, to lessen the divergence between the treatment of organizations substantially similar.

ADOPTION OF ADMIRALTY RULES BY COMMON-LAW COURTS. — The United States Supreme Court has recently held that in personal actions for damages due to the negligence of shipowners, the state common-law courts must adopt the admiralty rule,¹ which denies compensation for consequential damages.² The question is whether this is in accordance with the intent of the Constitution and the former apparent attitude of the court, which has said that the "legislation of a State, not directed against commerce or any of its regulations, but relating to rights, duties, and liabilities of citizens, and only indirectly and remotely affecting

²⁰ 95 U. S. 714, 733 (1878). See also *Blessing v. McLinden*, 81 N. J. L. 379, 79 Atl. 347 (1911).

²¹ 98 S. E. 580 (W. Va. 1919). See RECENT CASES, *infra*, p. 325.

¹ *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372 (1918).

² Laws of Oleron, Arts. VI-VII; Laws of Hanseatic Towns, Arts. XXXIX-XL; Laws of Wisby, Arts. XVIII-XVIV; Marine Ordinances of Louis XIV, Bk. III, Title IV, Art. XI. See also *The City of Alexandria*, 17 Fed. 390 (1883).

operations of commerce, is of obligatory force on citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-state, or in any other pursuit."³

The constitutional provision extending the federal judicial power to all cases of admiralty and maritime jurisdiction,⁴ and subsequent statutes saving to suitors a common-law remedy, where that law is able to give it,⁵ do not create a maritime code, but vest in federal courts the exclusive right to adjudicate those suits and controversies which in 1789 were within state admiralty jurisdiction.⁶ These suits are distinguished from common-law actions in that "the vessel is itself seized and impleaded as the defendant and is judged and sentenced accordingly," whereas by the common-law process "property is reached only through a personal defendant and then only to the extent of his title."⁷ While common-law judgments could not bind parties outside the jurisdiction of the state courts, suits peculiar to admiralty might necessarily affect adversely the interests of such persons. This fact justifies the interpretation that the Constitution, to secure an impartial administration of justice, vests the federal courts with exclusive jurisdiction over only those suits which are peculiar to admiralty.⁸

On this assumption the Supreme Court held that a state court may entertain a bill in equity to enforce a lien on a raft, dependent on possession, for towage charges.⁹ In such a case the lien is granted by the common law, and a sale in enforcement thereof would pass the property subject to prior equities and titles, thereby not affecting the interests of persons not before the court. So also a right of recovery, granted by state statute, for a wrongful death within its territorial waters is enforceable in a personal action in the local common-law courts.¹⁰ Nor is a statute allowing attachment of a ship as an incident to a personal action in the state courts invalid.¹¹ But when a state attempts to authorize its courts to adjudicate suits against the ship itself, which shall bind all parties, whether before the court or not, the statute is unconstitutional.¹²

³ *Sherlock v. Alling*, 93 U. S. 99, 104. "State statutes, if applicable to the case, constitute the rules of decision in common-law actions in Circuit Courts as well as State courts, but the rules of pleading, practice, and of evidence in the admiralty courts are regulated by the admiralty law as ultimately expounded by the decisions of this court." *American Steamboat Co. v. Chase*, 16 Wall. (U. S.) 522, 534 (1872).

⁴ Art. III, Sec. 2.

⁵ 1 STAT. AT L. 77; UNITED STATES JUDICIAL CODE, § 256; COMP. STAT., 1918, § 1233.

⁶ "The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'" *The Lottawanna*, 21 Wall. (U. S.) 558, 574 (1874). See also *Leon v. Galceran*, 11 Wall. (U. S.) 185, 188 (1870).

⁷ *The Moses Taylor*, 4 Wall. (U. S.) 411, 427 (1866). The doctrine is restated in *Rounds v. Cloverport Foundry and Machine Company*, 237 U. S. 303, 306 (1914).

⁸ STORY, "COMMENTARIES," § 1664.

⁹ *Knapp, Stout, & Co. v. McCaffrey*, 177 U. S. 638 (1899).

¹⁰ *American Steamboat Co. v. Chase*, 16 Wall. (U. S.) 522 (1872).

¹¹ *Leon v. Galceran*, *supra*; *Rounds v. Cloverport Foundry & Machine Co.*, *supra*.

¹² *The Moses Taylor*, *supra*; *The Belfast*, 7 Wall. (U. S.) 624 (1868).

The federal courts have recognized that the admiralty law is incomplete, and that it must sometimes draw on the municipal law for guiding principles.¹³ Not only is a state statute allowing recovery for wrongful death on navigable waters enforceable by a libel in the federal admiralty courts,¹⁴ but also a state statute giving a materialman's lien on a domestic ship is enforceable by a libel *in rem*.¹⁵ In the former case state courts have concurrent jurisdiction,¹⁶ but in the latter they have none at all.¹⁷ The fellow-servant rule, which admiralty adopted,¹⁸ is of common-law origin.¹⁹ While the admiralty rule differs from that of common law as to the effect of contributory negligence on the right of recovery,²⁰ in libels under Lord Campbell's Acts, admiralty follows the common-law rule embodied by these acts in that the personal representative of the deceased may maintain an action only if the deceased could have brought an action had he lived.²¹

The Supreme Court followed these principles until the passage of Workmen's Compensation Acts. Some of the state and United States district courts held that these acts gave a common-law remedy within the meaning of the saving clause,²² but others held the contrary, either on the ground that the maritime law as to injuries governed the seaman's contract,²³ or else that the acts were unconstitutional in that the employers were subjected to double liability, once under the act and once in admiralty.²⁴ The Supreme Court upheld the latter decisions, holding also that even in the absence of congressional legislation, states may not legislate on maritime matters as to which uniformity is essential.²⁵ In thus extending a rule which had previously been applied only to in-

¹³ "The general body of the (maritime) law as regards the ordinary fundamental rights of persons and property, whether on sea or land, is . . . derived from the constitutional order of the State, that is, from the municipal law which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects." The City of Norwalk, 55 Fed. 98, 107 (1893). See also Sherlock v. Alling, *supra*, 104.

¹⁴ The Hamilton, 207 U. S. 398 (1907). Thompson Towing & Wrecking Association v. McGregor, 207 Fed. 209 (1913).

¹⁵ The Glide, 167 U. S. 606 (1896).

¹⁶ American Steamboat Co. v. Chase, *supra*.

¹⁷ The Glide, *supra*.

¹⁸ Olson v. Oregon Co., 96 Fed. 109 (1899).

¹⁹ Priestly v. Fowler, 3 M. & W. 1, 6 (1837); Farwell v. Boston & Worcester Railroad Corporation, 4 Metc. (Mass.) 49 (1842).

²⁰ The Max Morris, 137 U. S. 1 (1890).

²¹ Robinson v. Detroit & C. Steam Navigation Co., 73 Fed. 883 (1896); Gretschnann v. Fix, 189 Fed. 716 (1911); Monongahela River Consolidated Coal & Coke Co. v. Schinnerer, 196 Fed. 375 (1912).

²² Lindstrom v. Mutual S. S. Co. 32 Minn. 328, 156 N. W. 669 (1916); North Pacific S. S. Co. v. Industrial Acc. Commission of California, 174 Cal. 346, 163 Pac. 199 (1917); Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372 (1915); Berton v. Tietjen & Lang Dry Dock Co., 219 Fed. 763 (1915); Keithley v. North Pacific S. S. Co., 232 Fed. 255 (1916).

²³ Schuede v. Zenith S. S. Co., 216 Fed. 566 (1914).

²⁴ State v. Doggett, 87 Wash. 253, 151 Pac. 648 (1915). The argument of the court is refuted by the fact that the substitution of a statutory for a common-law liability no more subjects the employer to a double liability than he was formerly subjected, when the seaman could sue either at common law or in admiralty.

²⁵ So. Pacific S. S. Co. v. Jensen, 244 U. S. 205 (1917).

terstate commerce,²⁶ the fact seems to have been overlooked that while the Constitution expressly gives Congress the right to regulate interstate commerce,²⁷ it merely vests federal courts with jurisdiction over admiralty and maritime causes.²⁸ When the state courts in suits by seamen are compelled to adopt the admiralty rules, there can be no recovery for consequential damages. As a matter of substantive law, the justice of this result seems questionable.

CONSIDERATION IN CONVEYANCES BETWEEN HUSBAND AND WIFE IN FRAUD OF CREDITORS. — The marriage relationship lends itself conveniently as a cloak for the fraudulent concealment of property, which a hard-pressed debtor seeks to place beyond the reach of his creditors. Hence, transfers from husband to wife, whenever creditors are involved, are always subjected to the closest scrutiny by the courts, to assure against fraudulent motive.¹ The mere relationship, however, between grantor and grantee creates no just basis for a presumption of fraud.² If consideration proceeds from the wife which would, in the ordinary case, suffice to sustain a conveyance as against creditors, the fact of relationship can have little consequence.³ But it is to be noted that, in these transactions, what constitutes valuable consideration is often determined by principles peculiar to the marital relation, and in such instances the fact does assume significance.

Thus, marriage, it has been declared, constitutes the highest consideration known to the law.⁴ Therefore, an antenuptial settlement executed in consideration of marriage, though its moving purpose be to hinder and delay creditors, is upheld universally, as long as the beneficiary was not cognizant of the fraudulent motive.⁵ So, also, is the validity of a postnuptial settlement sustained if made in accordance with a written agreement entered into by the parties before marriage.⁶ But if such agreement was oral, and failed therefore to comply with the provisions of the Statute of Frauds, the conveyance may be set aside at the instance of creditors.⁷ In England, however, a recital of the pre-

²⁶ *Cooley v. The Board of Wardens of the Port of Philadelphia*, 12 How. (U. S.) 299 (1851).

²⁷ Art. 1, Sec. 8.

²⁸ Art. 3, Sec. 2.

¹ See *White v. Benjamin*, 150 N. Y. 258, 44 N. E. 956 (1896); *Baumann v. Horn*, 199 Mo. App. 555, 204 S. W. 53 (1918); *Regal, etc. Co. v. Gallagher*, 188 S. W. (Mo.) 151 (1916); *McKey v. Emanuel*, 263 Ill. 276, 104 N. E. 1051 (1914).

² See WILLISTON, CASES ON BANKRUPTCY, 141, note; *Ford v. Ott*, 182 Iowa, 671, 164 N. W. 629 (1917); *Lyon v. Wallace*, 221 Mass. 351, 108 N. E. 351 (1915).

³ *Crenshaw v. Halvorsen*, 165 N. W. (Iowa) 360 (1917); *Nat'l Exch. Bank v. Simpson*, 78 W. Va. 309, 88 S. E. 1088 (1916); *In re Jutte's Estate*, 230 Pa. 333, 79 Atl. 569 (1911).

⁴ *Magniac v. Thompson*, 32 U. S. 348 (1833); *Smith v. Allen*, 5 Allen (Mass.), 454 (1861); *Tolman v. Ward*, 86 Me. 303, 29 Atl. 1081 (1894); *American Surety Co. v. Conway*, 88 N. J. Eq. 370, 102 Atl. 839 (1917).

⁵ *Barrow v. Barrow*, 2 Dick. 504 (1774); *Clark v. McMahon*, 170 Mass. 91, 48 N. E. 939 (1898); *Robertson v. Schlotzhauer*, 243 Fed. 324 (1917).

⁶ *Goring v. Nash*, 3 Atk. 186 (1744); *Metz v. Blackburn*, 9 Wyo. 481, 65 Pac. 857 (1901).

⁷ *Warden v. Jones*, 23 Beav. 487 (1857); *Reade v. Livingston*, 3 Johns. Ch. (N. Y.)

marital contract in the deed proper has been held to satisfy the statute, and in consequence to render the conveyance unimpeachable.⁸ From a strictly legal point of view it is difficult to see how the Statute of Frauds can affect the validity of the settlements in any of these cases. In its nature it is purely evidential, and influences in no wise the binding force of the contract.⁹ Furthermore, the provision of the statute involved simply forbids an action to be brought "to charge any person upon any agreement made upon consideration of marriage;"¹⁰ clearly, this provision has no relevance to the particular situation, since no suit on any contract is involved. As a practical consideration, however, the line drawn by the American courts is a desirable one, for otherwise the opportunity for resurrecting fictitious oral agreements, and for imposition generally, would be unlimited. Postnuptial settlements, when not executed in conformance with prior agreements of marriage, are governed by principles applicable to all other forms of conveyances.¹¹ It is interesting to note, however, that the English courts in their tenderness toward family settlements have often disregarded the rules of consideration and have in effect upheld substantially voluntary transfers in this class of cases.¹²

With conveyances between husband and wife other than settlements, the marriage status also affects the question of consideration, though in the main general rules apply. At the common law, the surrender of a wife's separate earnings to her husband did not constitute value sufficient to support a conveyance to her,¹³ since the husband received nothing to which he was not already legally entitled. But to-day wherever the wife may separately own her property, a surrender of her earnings would, if not intended as a gift, base a later transfer by her husband on good consideration.¹⁴ Services of a wife to her husband, however, do not render valid a conveyance, since they are duties incident to the marriage relation.¹⁵ A release of an inchoate right of dower,¹⁶ or a release of a wife's homestead rights,¹⁷ is obviously valuable consideration, both rights properly forming part of the wife's separate estate. A recent case raises the question whether a conveyance made in pursuance of a separation agreement and in consideration of the right

481 (1877); *Barnes v. Black*, 193 Pa. St. 447, 44 Atl. 550 (1899); *Gagnon v. Baden*, etc. Spring Co., 56 Ind. App. 407, 105 N. E. 512 (1914). Before the Statute of Frauds, it seems clear that a postnuptial settlement founded on an antenuptial oral agreement was valid as against creditors. See 1 Vent. 194.

⁸ *In re Holland*, [1902] 2 Ch. 360.

⁹ See *Maddison v. Alderson*, 8 A. C. 467 (1883).

¹⁰ 29 Car. 2, c. 3, § 4.

¹¹ See MOORE, *FRAUD. CONVEYANCES*, 327, note 53.

¹² See *In re Tetley*, 66 L. J. 111 (1898); *Ex parte Mercer*, 17 Q. B. D. 290 (1886).

¹³ *Cramer v. Reford*, 17 N. J. Eq. 367 (1898); *Union Trust Co. v. Fischer*, 25 Fed. 178 (1884).

¹⁴ *Draper v. Buggee*, 133 Mass. 258 (1882); *Hedge v. Glenney*, 75 Iowa, 513, 39 N. W. 818 (1888). See also WAIT, *FRAUD. CONVEYANCES*, 3 ed., § 304.

¹⁵ *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 64 N. W. 334 (1895); *Farmer's Nat'l Bank v. Thomson*, 74 Vt. 442, 52 Atl. 961 (1902); *Henze v. Rogatzky*, 199 Mich. 558, 165 N. W. 629 (1917).

¹⁶ *Burwell v. Lumsden*, 24 Grat. (Va.) 443 (1874); *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. 946 (1887); *Deal v. Ford*, 204 S. W. (Mo.) 181 (1918).

¹⁷ *Sullivan v. Parkinson*, 128 Mich. 527, 87 N. W. 639 (1901).

to future support is voluntary.¹⁸ It was formerly held in England,¹⁹ and the doctrine still persists in some of our American states,²⁰ that an agreement of separation is void as against public policy. In conformity with that rule a transfer of property to the wife could be attacked by creditors.²¹ The prevalent view to-day, however, holds such a contract valid, and consequently a conveyance in satisfaction of the wife's right to support must be upheld.²² But if cohabitation is resumed after a short period of separation, it has been held that the conveyance in turn becomes voluntary. The limitation imposed seems justified, since a failure of consideration has occurred which entitles the husband to a return of the property transferred. The agreement to relinquish a divorce suit where such agreement has also been held illegal would of course fail to support a conveyance.²³ But generally, as with separation agreements, they have been held legally binding;²⁴ a discontinuance of divorce proceedings should therefore constitute valuable consideration.

A more troublesome question relative to conveyances from husband to wife, and one with reference to which there is much diversity of decision, concerns payments on premiums by an insolvent on a policy running to his wife. Clearly, the payments as against creditors cannot be upheld on any principles of consideration, since the wife relinquishes nothing of value in return for the benefit conferred. Hence, it would seem that the cases permitting the beneficiary to retain the full face value of the policy²⁵ cannot be sustained, regardless of the portion of the estate diverted to the payment of the premiums. No more correct is the doctrine which permits a retention of the full proceeds diminished by the amount of the premiums,²⁶ for the wife thereby receives the benefit of an investment made with money properly belonging to creditors. The strict rule which requires the full proceeds to be turned over to the creditors seems the correct one.²⁷ Statutes, however, in the majority of jurisdictions permit the husband to set aside a definite sum each year in payment upon his life insurance.²⁸ These enactments do not affect the question of consideration, but are to be regarded solely as exemption statutes.

The Commissioners on Uniform State Laws have recently drafted an act designed to make uniform in the United States the law of fraudulent conveyances.²⁹ By its terms, generally, a conveyance made by an

¹⁸ *Baldwin v. Kingston*, 44 Am. B. R. 12 (1919). See RECENT CASES, *infra*, p. 316.

¹⁹ *Wilkes v. Wilkes*, 2 Dick. 791 (1774); *St. John v. St. John*, 11 Ves. 526 (1805).

²⁰ *Allen v. Allen*, 73 Conn. 54, 46 Atl. 242 (1900); *Foote v. Nickerson*, 70 N. H. 496, 48 Atl. 1088 (1901).

²¹ *Morgan v. Potter*, 17 Hun (N. Y.), 403 (1874); *Friedman v. Bierman*, 43 Hun (N. Y.), 387 (1887).

²² *Pippin v. Tapia*, 148 Ala. 353, 42 So. 545 (1906); *Farmer's State Bank v. Keen*, 167 Pac. (Okla.) 207 (1917).

²³ *Morgan v. Potter*, *supra*; *Friedman v. Bierman*, *supra*; *Oppenheimer v. Collins*, 115 Wis. 305, 91 N. W. 680 (1902).

²⁴ *Adams v. Adams*, 91 N. Y. 381 (1883). See also *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271, dissenting opinion.

²⁵ *Central Bank v. Hume*, 128 U. S. 195 (1888).

²⁶ *Etna Nat. Bank v. U. S. Life Ins. Co.*, 24 Fed. 770 (1885).

²⁷ *Merchants' & Miners' Trans. Co. v. Borland*, 53 N. J. Eq. 282, 31 Atl. 272 (1895).

²⁸ See 26 HARV. L. REV. 362, note 2.

²⁹ Commissioners on Uniform State Laws: Proceedings 28 Ann. Conf. 1918, p. 348.

insolvent is fraudulent when fair consideration has not been given in exchange.³⁰ Fair consideration is defined in accordance with the common-law conception of the term.³¹ An enactment, therefore, of the proposed statute will leave unaffected the law of the various states particularly concerned with the transactions between husband and wife. The question, however, seems more closely allied to the law of persons than it does to the law of fraudulent conveyances.

PRESUMPTION OF LEGITIMACY OF A CHILD BORN IN WEDLOCK. — Familiar to all lawyers, and to most laymen, is the age-old presumption that a child born of a married woman is the child of her husband.¹ As it first appeared in the common law, it was conclusive and no evidence was admissible in rebuttal.² This was in accord with the strict notions of the common lawyers, and was probably based upon regard for property rights, a bastard being incapable of inheriting or of having any heirs except those of his own body.³ But with the advance of civilization and the recognition of rights of personalty, the presumption was relaxed and could be rebutted by evidence that the husband was impotent or was beyond the four seas of England at the time of conception.⁴ The further development of ideas of individualism brought about the evolution of the modern rule permitting the presumption to be rebutted by any evidence appropriate to the issue.⁵ To such rule there exists only one exception, that neither the husband nor the wife may testify directly as to the question of access.⁶

But the law has not gone to the full extent of regarding the presumption as based merely on logical inference. Almost universally it requires of the rebutting evidence a strength or clearness greater in degree than

³⁰ Section 4, *supra*.

³¹ Section 3, *supra*.

¹ For historical discussions, see preface, LE MARCHANT, *The Gardiner Peerage Case* (1825); NICOLAS, *ADULTERINE BASTARDY* (1836), containing all the known cases on adulterine bastardy up to that date; Joseph Cullen Ayer, Jr., "Legitimacy and Marriage," 16 HARV. L. REV. 22-42. Mr. Ayer advances the view that in its origin the notion of legitimacy was based upon domestic religion, and rejects the traditional explanation that marriage was a convenient and certain evidential fact indicating the heir.

² Y. B. 32-33 EDW. I. 60 (1304); see THAYER, *CASES, EVIDENCE*, 2 ed., 45.

³ See 1 BL. COMM. 458, 459; 2 TIFFANY, *REAL PROPERTY*, 990, 991.

⁴ *ROLLE'S ABR.* 358, tit. Bastards, letter B (1668); CO. LITT. 244 a. The last case seems to be *Regina v. Murray*, 1 Salk. 122 (1704). The Canon law looked only at actual paternity. See NICOLAS, *ADULTERINE BASTARDY*, 2.

⁵ *St. Andrews v. McBrides*, 1 Str. 51 (1717); *Pendrell v. Pendrell*, 2 Str. 925 (1733); *Shelley v. —*, 13 Ves. 56, 58 (1806). "The physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved." *Banbury Peerage Case*, 1 Sim. & Stu. 153, 155 (1811). See also cases cited *infra*, notes 13-17 inclusive.

⁶ This exception is "founded on justice, decency, and morality." *Lord Mansfield in Goodright v. Moss*, Cowp. 591, 594 (1777). See also *Scanlon v. Walshe*, 81 Md. 118, 31 Atl. 498 (1895); *People v. Case*, 171 Mich. 282, 137 N. W. 55 (1912). For a criticism of Lord Mansfield's view, see *Legge v. Edmonds*, 34 L. J. Ch. 125, 135 (1856). The exception is not made in cases of antenuptial conception. *Poulette Peerage Case*, [1903] A. C. 395. *Contra*, *Gates v. Marcia*, 20 N. M. 158, 148 Pac. 493 (1915).

that capable of rebutting the ordinary presumption of fact.⁷ That the courts are correct in demanding such extra *quantum* of proof seems clear upon a consideration of the conflicting interests involved. It is undeniable that society as a whole benefits by the prevention of bastardy, which is an anomaly in a system of law based upon the family as a unit. Moreover, in some jurisdictions, bastards are a charge upon society,⁸ and almost everywhere statutory proceedings are necessary to fasten upon the father the burden of support.⁹ From the point of view of the child, bastardy involves not only a social stigma, but also a loss of legal rights. At common law, he was *filius nullius*, and was denied a name unless he acquired one by reputation; having no family recognized by the law, he was incapable of inheriting property.¹⁰ And while his degraded position has been ameliorated by statute, such legislation, being in derogation of the common law, is strictly construed.¹¹ But, on the other hand, while protecting the interests of the child and of society, the law should not ignore those of the alleged father. To place upon him the burden of supporting and recognizing a child not his own would be harsh indeed. Requiring unusual clearness in the proof of illegitimacy effects a compromise which does substantial justice to all concerned.¹²

Unfortunately, however, the expressions used to designate the degree of proof necessary to rebut the presumption are at wide variance. Some courts require a showing of natural impossibility.¹³ Others, more moderate, say that satisfactory evidence is enough.¹⁴ The prevailing statement is that the evidence must be strong, distinct, satisfactory, and conclusive.¹⁵ A few have adopted the usual standard of criminal law, that is to say, proof beyond a reasonable doubt,¹⁶ while two have in-

⁷ See *infra*, notes 13-17 inclusive.

⁸ See, for example, *People v. Chamberlain*, 106 N. Y. Supp. 149 (1907).

⁹ At common law, neither the father nor the mother had the duty to support bastard children. See RODGERS, DOMESTIC RELATIONS, § 605. But see, as to the mother, *Humphreys v. Polak*, [1901] 2 K. B. 385, 389.

¹⁰ See 1 BL. COMM. 458, 459.

¹¹ *Sanford v. Marsh*, 180 Mass. 210, 62 N. E. 268 (1902).

¹² For a discussion of the individual interests in domestic relations, see Roscoe Pound, "Individual Interests in the Domestic Relations," 14 MICH. L. REV. 177-196.

¹³ *King v. Luffe*, 8 East, 193, 206 (1807); *Patterson v. Gaines*, 6 How. 550, 589 (1848); *Adger v. Ackerman*, 115 Fed. (C. C. A.) 124, 133 (1902); *Bunel v. O'Day*, 125 Fed. 303, 317 (1903).

¹⁴ *Banbury Peerage Case*, *supra*, p. 155.

¹⁵ *Morris v. Davies*, 3 C. & P. 215, 217 (1827); on appeal, 5 Cl. & F. 163, 265 (H. L. 1837); *Hargrave v. Hargrave*, 9 Beav. 552, 555 (1846); *Bosville v. Att'y-Gen'l*, 12 Prob. Div. 177, 183 (1887); *Scanlon v. Walshe*, *supra*; *Bullock v. Knox*, 96 Ala. 195, 198, 11 So. 339 (1892) (husband and wife white, the child black, and the court indicated that these facts, of themselves, would be enough to rebut the presumption); *Bell v. Territory*, 8 Okla. 75, 83, 56 Pac. 853, 855 (1899); *Bethany Hospital Co. v. Hale*, 64 Kan. 367, 371, 67 Pac. 848, 849 (1902); *People v. Case*, 171 Mich. 282, 284, 137 N. W. 55, 56 (1912); *Jackson v. Thornton*, 133 Tenn. 36, 39, 179 S. W. 384 (1915).

¹⁶ *Plowes v. Bossey*, 31 L. J. Ch. (N. S.) 681, 682 (1862); *Stegall v. Stegall*, 2 Brock. 256, 22 Fed. Cas. 1226 (1825), per Marshall, C. J.; *Phillips v. Allen*, 2 Allen (Mass.), 453, 454 (1861); *Timmann v. Timmann*, 142 N. Y. Supp. 298, 299 (1913); *State v. Shaw*, 89 Vt. 121, 129, 94 Atl. 434, 437 (1915) (the charge to the jury was that the rebutting evidence must be "proof to your satisfaction." The court said this was the same as proof beyond a reasonable doubt. *Sed quare?*).

licated that a mere preponderance is enough.¹⁷ In many cases any one of these expressions may suffice, but hard cases are likely to arise where the terminology, if adhered to, is of vital importance. The facts of a recent case in California, *In re McNamara's Estate*,¹⁸ are pertinent in this connection. The child was born three hundred and four days after the wife separated from the husband and went to live with a former lover. This was a possible, but exceptional, period of gestation. If the evidence must be conclusive, or show natural impossibility, the presumption had not been overcome. Yet it was fairly clear that the husband was not the father. The court, faced with the necessity of a definite choice, decided that, as the proof was beyond a reasonable doubt, illegitimacy had been made out. It is believed that this test is the most desirable one, for it not only carries out the policy of the law, but also provides a standard with the use of which the courts are familiar. Its universal adoption would make for simplification and certainty in an important social matter.

A peculiarity in the operation of the presumption of legitimacy deserves notice. A leading authority on evidence, Professor J. B. Thayer, laid it down as an invariable rule that the burden of proof is fixed by the pleadings and never shifts during the trial, and that the only function of a presumption is to shift the burden of going forward.¹⁹ But the law undoubtedly is that once the fact of birth in wedlock is shown, the presumption of legitimacy continues until overcome by evidence at least greater than a mere preponderance.²⁰ It would seem to follow that the presumption necessarily involves a shifting of the burden of proof. If this is true, Professor Thayer's proposition may be maintained only by concluding that the presumption of legitimacy is not a presumption at all, but a special rule going to the weight of proof required. It seems more desirable, however, to retain the universal nomenclature for this law respecting birth in wedlock and to recognize it as an exception — probably the only one — to Thayer's general proposition that a presumption shifts only the burden of going forward with evidence.

¹⁷ *Wright v. Hicks*, 12 Ga. 155, 160 (1854) (antenuptial conception, however); *Godfrey v. Rowland*, 16 Hawaii, 377, 386 (1905). In the *Poulette Peerage Case*, *supra*, Lord Halsbury said, "The question is to be treated as one of fact, and like every other question of fact, when you are answering a presumption, it may be answered by any evidence appropriate to the issue." It should be noted that the case was one of antenuptial conception, and the question decided was that the husband could testify as to non-access before marriage. Probably the relevancy of the evidence, rather than its weight, was in the mind of the Lord Chancellor. In this country, there is some indication that in cases of antenuptial conception less evidence will be required. *Wilson v. Babb*, 18 S. C. 59, 70 (1882); *Wright v. Hicks*, *supra*. But see *Wallace v. Wallace*, 137 Iowa, 37, 44, 114 N. W. 527, 530 (1908). For the peculiar Louisiana rule, see *McNeeley v. McNeeley*, 47 La. Ann. 1321, 17 So. 928 (1895).

¹⁸ 183 Pac. 552. See RECENT CASES, page 315, *infra*. Melvin, J., dissenting, thought that natural impossibility had not been made out and therefore the presumption had not been overcome.

¹⁹ See THAYER, PRELIM. TREAT. EVID. 383, 384. He criticised the use of the phrase *onus probandi* in the *Banbury Peerage Case* as erroneous. *Ibid.* 358.

²⁰ See *supra*, notes 13 to 17 incl.; THAYER, CASES, EVIDENCE, 2 ed., 46, note.

RECENT CASES

ADMIRALTY — ADOPTION OF ADMIRALTY RULES BY COMMON-LAW COURTS. — A sailor sued in a state common-law court to recover damages for an injury caused at sea by the negligence of the shipowners. *Held*, that damages must be granted in accord with the admiralty rule, not the common law. *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372.

For a discussion of this case, see NOTES, p. 300, *supra*.

AGENCY — NATURE AND INCIDENTS OF THE RELATION — LIABILITY OF AGENT FOR INTERFERENCE WITH A PROSPECTIVE SALE. — The plaintiff alleged that the defendant was his agent to effect a sale, that the defendant prevented a sale prearranged for a certain price by representing to the purchaser that the defendant had title instead of the plaintiff, that this statement was false and known to the defendant to be false, and that the plaintiff was thereby forced to sell for less. *Held*, that a good cause of action was stated. *Zeck v. Bowers*, 171 N. W. 673 (Iowa).

An agent owes a duty of loyalty to his principal. He must take no position conflicting with the interests of the latter. *Quinn v. Burton*, 195 Mass. 277, 81 N. E. 257; *Hofflin v. Moss*, 67 Fed. 440. See MECHEM ON AGENCY, § 455. And he is liable for any loss to his principal resulting from his disloyalty. *Watson v. Bayliss*, 62 Wash. 329, 113 Pac. 770. There seems also to be present here sufficient basis for recovery on the theory of slander of title by a rival claimant. The necessary elements of such an action are a false disparagement of the plaintiff's title, published maliciously, and causing actual damage. *Fearon v. Fodera*, 169 Cal. 370, 148 Pac. 200. See SALMOND ON TORTS, 3 ed., § 149, 4, 7. The defendant's knowledge that his representation was false probably constitutes malice. *Long v. Rucker*, 166 Mo. App. 572, 149 S. W. 1051. See J. Smith, "Disparagement of Property," 13 COL. L. REV. 30. Still another ground for the decision could be found in the wrongful interference with the plaintiff's advantageous relation. Where the plaintiff would have entered into a contract but for the wrongful interference of a third party, the interference has been held to be a tort. *Lewis v. Bloede*, 202 Fed. 7; *Tarleton v. M'Gawley*, 1 Peake, 270. This goes a step further than the principle, now well established, that it is a tort for a third person to induce a breach of contract. *Lumley v. Gye*, 2 E. & B. 216. See Notes, 31 HARV. L. REV. 1017. This doctrine is increasing in favor, but still faces serious opposition. *Davidson v. Oakes*, 128 S. W. 944.

BANKRUPTCY — BANKRUPTCY ACT OF 1898 — CONSTRUCTION OF § 4 A — MEANING OF THE WORD "RAILROAD." — An electric street railway operating a short line over the streets of a single town filed a voluntary petition in bankruptcy. The Bankruptcy Act of 1898 (§ 4 a) provides that a "railroad" may not be granted voluntary bankruptcy. *Held*, that the petitioner be adjudicated a bankrupt. *Matter of Grafton Gas & Electric Light Co.*, 42 Am. B. R. 567 (Dist. Ct., N. D., W. Va.).

Railroads are not subject to bankruptcy proceedings, under § 4 of the Bankruptcy Act, for the reason that they are the most important of all public-service corporations. Transportation must not be interrupted while their financial affairs are being straightened out. See *In re Hudson River Power Transmission Co.*, 183 Fed. 701, 704. The proper method of dealing with insolvent railroads, therefore, is by way of a receivership rather than by proceedings in bankruptcy. Street railways are the most important local public utilities. Like considerations exist for including them in the exception of § 4 as exist in the

case of steam roads. Moreover, the word "railroad" in its generic sense includes street railways. *Bloxham v. The Consumers' Electric Light & Street R. Co.*, 36 Fla. 519; *Mass. Loan & Trust Co. et al. v. Hamilton*, 88 Fed. 588. Where there is nothing to indicate that the legislature intended to employ the term in a restricted sense it should be construed in its broadest signification. See *Gyger v. Phila., etc. Ry. Co. et al.*, 136 Pa. St. 96, 104; *Shreveport Traction Co. v. Kansas City, S. & G. Ry. Co.*, 119 La. 759, 773. The decision in the principal case seems of doubtful propriety. The court relies chiefly on the construction given to the word "railroad" in the Interstate Commerce Act of 1887. The Supreme Court has held that the term does not include street railways. *Omaha & Council Bluffs St. Ry. Co. v. Interstate Commerce Commission*, 230 U. S. 324. But in that case the court expressly rests its decision on the intention of Congress, as gathered from the context, not to subject street railways to the provisions of the act. No general or arbitrary rule is laid down that the word "railroad" in federal statutes shall always be construed in its narrow sense.

BANKRUPTCY — PREFERENCES — ACTION BY TRANSFEREE TO RECOVER PROCEEDS OF PROPERTY SOLD BY TRUSTEE.—One month before bankruptcy a creditor, knowing the debtor to be insolvent, took a conveyance of a crop of rice in discharge of all claims. These claims were partially secured by a mortgage on livestock worth \$3,000. The creditor had advanced \$2,000 for rent and seed upon the debtor's promise to pay the old debt and advances out of the proceeds of the crop. The creditor spent \$3,600 harvesting the crop. The trustee avoided the transfer and sold the crop, realizing \$11,000. Bill to require the trustee to pay over all or part of the proceeds of the crop. *Held*, that the bill be dismissed. *Crawford et al. v. Broussard et al.*, 43 Am. B. R. 603 Circ. Ct. App.).

A transfer founded upon present consideration is not a preference. *Ernst et al. v. Mechanics, etc. Bank*, 201 Fed. 664. By the better view a transfer partly to pay an antecedent debt and partly for present consideration is separable into its voidable and valid parts. *In re Cobb*, 96 Fed. 821; *In re Dismal Swamp Contracting Co.*, 135 Fed. 415. If such a transfer is avoided, the trustee should restore what was given: in the principal case, the amount of the mortgage surrendered. *Barber v. Coit*, 144 Fed. 381. It seems clear that the trustee should restore the money spent in harvesting the crop before the avoidance of the transfer. Otherwise the estate would be unjustly enriched at the expense of one who is not an intermeddler. *Crandall v. Coats*, 133 Fed. 965. See *Seig v. Greene*, 225 Fed. 955, 961. But the creditor should not recover the old debt or the advances. Although the original agreement to pay these claims out of the proceeds of the crop was made six months before bankruptcy, there was no crop until within four months. Consequently there could be no lien until it was too late for the debtor to dispose of his property according to his contracts. *In re Dismal Swamp Contracting Co.*, *supra*. See Samuel Williston, "Transfers of Personal Property," 19 HARV. L. REV. 573.

BANKRUPTCY — PROPERTY PASSING TO THE TRUSTEE — UNENFORCEABLE CLAIM AGAINST THE GOVERNMENT.—The bankrupt was one of a class of railroad employees that, prior to January 1, 1918, had made a demand for increased wages. Upon the railroads being taken over by the government, the director-general of railroads promised to investigate the claim, and to make any increase in pay, in case such should be granted, retroactive to January 1, 1918. § 70 a (5) of the Bankruptcy Act of 1898 provides that "property which . . . [the bankrupt] could by any means have transferred" shall pass to the trustee. The trustee claimed the money paid on the basis of services performed by the bankrupt prior to the adjudication, in pursuance of an order made by the

director-general after the adjudication. *Held*, that the trustee was entitled to this money. *Matter of Evans*, 42 Am. B. Rep. 448 (Dist. Ct., W. D., Tenn.).

If the debtor had no previous legal right to the property in question, his trustee in bankruptcy has no right to the property. So where by the local law a contingent remainderman has no present interest during the life of the life tenant, the trustee does not take property vesting after the adjudication. *In re Hoadley*, 101 Fed. 233. Or where there is a mere expectancy of acquiring property through the exercise of a power of appointment, property acquired through the exercise of the power after adjudication does not pass to the trustee. *In re Wetmore*, 99 Fed. 703 (affirmed in 108 Fed. 991). Similarly, if the debtor has made a claim for a reward, which has not been allowed by the government prior to the adjudication, the trustee does not take. See *In re Ghazal*, 169 Fed. 147, 148. See WILLISTON, CASES ON BANKRUPTCY, 2 ed., 435, note. If the debtor had a claim against the government which was not only valid but enforceable, it should pass to the trustee. *Bank of Commerce v. Downie*, 218 U. S. 345. If the property of the bankrupt had been destroyed or wrongfully seized by this or a foreign government, so that the debtor had a valid though unenforceable claim, the trustee should take any proceeds therefrom realized after the adjudication. *Comegys v. Vasse*, 1 Pet. (U. S.) 193; *Phelps v. McDonald*, 99 U. S. 298; *Williams v. Heard*, 140 U. S. 529. Similarly, if such a claim exists because of money paid or services rendered to the government, the trustee should take its proceeds. *Milnor v. Metz*, 16 Pet. (U. S.) 221. Cf. *Price v. Forrest*, 173 U. S. 410; *Calder v. Henderson*, 54 Fed. 802. But see *Emerson v. Hall*, 13 Pet. (U. S.) 409; *In re Ghazal*, *supra*. It seems correct to treat the money in question in the principal case as the proceeds of a valid claim for additional pay for services rendered within the above authorities.

CARRIERS — LIMITATION OF LIABILITY — TERMINATION OF LIABILITY — EFFECT OF PROVISIONS OF SPECIAL CONTRACT. — The plaintiff shipped goods on the defendant's road consigned to himself. The provisions of the bill of lading were: (1) shipper to unload at his own risk; (2) carrier to be under no liability with respect to the goods except in the actual transportation; (3) no claim which may accrue to the shipper under the contract to be sued on unless such claim be made within five days after removal of the stock from the car. The car had been on a delivery siding one half hour, and the shipper was unloading, when the defendant railway negligently backed a train into it. The shipper made no claim as required, and the carrier defended on that ground. *Held*, that the shipper could not recover. *Clark, McKenna, Brandeis, and Day, JJ.*, dissenting. *Erie Railroad Co. v. Stuart et al.*, U. S. Sup. Ct. No. 342, October Term, 1918.

A railroad cannot by contract exempt itself from liability for negligent injury to goods in interstate shipment. *Adams Express Co. v. Croninger*, 226 U. S. 491. See 34 STAT. AT L. 595, known as the Carmack Amendment. So neither the first nor the second provision above will protect the carrier from liability for its own negligent injury to the goods. But the five-day notice clause is effective under Supreme Court decisions. *Chesapeake & Ohio R. Co. v. McLaughlin*, 242 U. S. 142; *B. & O. Ry. Co. v. Leach*, U. S. Sup. Ct. No. 132, October Term, 1918. It then furnishes a good defense if the claim accrued under the contract. That term cannot refer only to contractual liability, since it includes a claim for a tort in the actual carriage. *Chesapeake & Ohio R. Co. v. McLaughlin*, *supra*; *B. & O. v. Leach*, *supra*. It includes likewise a claim while the carrier is liable as warehouseman. *C. C. C. & St. Louis R. Co. v. Dettlebach*, 239 U. S. 588. See *So. Ry. v. Prescott*, 240 U. S. 632, 637. So long as the carrier remained in possession of the goods, therefore, whether as carrier or warehouseman, the relationships created by the contract had not terminated, and a claim for the carrier's negligent injury to the goods would

seem to accrue under the contract. See *So. Ry. v. Prescott*, *supra*, 639. In the instant case the shipper had started but not completed the act of assuming control; the stock remained in the car and was not out of the carrier's possession. See *Young v. Hichens*, 6 Q. B. 606. The claim did then accrue under the contract, and the shipper's failure to give notice afforded the carrier a good defense. It would seem that the question of termination of transportation as discussed in authorities relative to the change from carrier's to warehouseman's liability, a question to which the court directed much attention, was immaterial.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — CONTROL BY STATES — INTERSTATE BRIDGES. — The plaintiff built a bridge across the Ohio River between West Virginia and Ohio under a contract with the defendant, part of the consideration for his work being a "free pass over and across said bridge perpetually." A West Virginia statute, enacted later, made it unlawful for a public service corporation to receive from any person a greater or less compensation for any service than it received from any other person. The plaintiff seeks an injunction to restrain the defendant from requiring him to pay toll when crossing the bridge: (1) from the West Virginia shore; (2) from the Ohio shore. *Held*, that the bill be dismissed. *Schrader v. Steubenville, East Liverpool & B. V. T. Co.*, 99 S. E. 207 (W. Va.).

For a discussion of this case, see NOTES, p. 292, *supra*.

CONSTITUTIONAL LAW — MAKING AND CHANGING CONSTITUTIONS — FEDERAL AMENDMENTS — STATE REFERENDUM. — A mandamus was sought to compel the Secretary of State of the state of Washington to submit to the people the proposed Eighteenth (Prohibition) Amendment to the Federal Constitution which had already been ratified by joint resolution of the Washington legislature. An amendment to the state Constitution provided that "all acts, bills or laws" passed by the legislature should be subject to review by the electors on proper petition. The lower court ordered the writ to issue. *Held*, that this was proper. *State v. Howell*, 181 Pac. 920 (Wash.).

A similar mandamus was sought under the provisions of the Oregon Constitution which reserve to the people "power at their own option to approve or reject at the polls any act of the legislative assembly." *Held*, that the writ of mandamus should not issue. *Herbring v. Brown*, 180 Pac. 328 (Ore.).

For a discussion of these cases, see NOTES, p. 287, *supra*.

CONSTITUTIONAL LAW — TREATY-MAKING POWER — FEDERAL MIGRATORY BIRD ACTS. — After the federal Migratory Birds Act of March 4, 1913, had been declared unconstitutional as an exercise by the federal government of power reserved to the states, the federal government made a treaty with Great Britain on behalf of Canada to protect birds migrating between the United States and Canada. On July 3, 1918, Congress passed a second Migratory Birds Act, of substantially the same character as the unconstitutional Act of 1913, except that it was framed expressly to carry out the British treaty. *Held*, that the act of 1918 is constitutional. *United States v. Thompson*, 258 Fed. 257; *United States v. Samples*, 258 Fed. 479; *United States v. Selkirk*, 258 Fed. 775.

For a discussion of these cases, see NOTES, p. 281, *supra*.

CONTRACTS — CONSTRUCTION OF CONTRACTS — CONTRACT TO PERFORM TO SATISFACTION OF OTHER PARTY. — The plaintiff contracted to do the tile work on the defendant's new house. The contract provided that the "work must be satisfactory to the owner." The trial court found that the job was done in a workmanlike manner and was "reasonably satisfactory," though not "satis-

factory to the defendant." *Held*, that the condition was fulfilled. *Bruner v. Hegyi*, 183 Pac. 369 (Cal.).

If one party contracts to perform to the personal satisfaction of the other, there is a valid contract for sufficient consideration. See *Brown v. Foster*, 113 Mass. 136; *Andrews v. Belfield*, 2 C. B. (N. S.) 779. In cases where the satisfactory character of the services or finished article is determined by feelings, taste, or sensibility, it is more natural to conclude that personal satisfaction of the party — nothing less — is meant. *Zaleski v. Clark*, 44 Conn. 218; *Gibson v. Cranage*, 39 Mich. 49. And the courts do not seek to avoid this meaning in the case of a sale where, upon the buyer's dissatisfaction, the article can be returned and the *status quo* restored. *McClure v. Briggs*, 58 Vt. 82; *Printing Press Co. v. Thorp*, 36 Fed. 414. But such an interpretation, when it would work hardship, as where the work is performed on another's land or chattel, will not be adopted, unless clear language requires it. The courts prefer to hold that a reasonable satisfaction was intended, and often look to other descriptions of the work in the contract to reach this conclusion. *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312; *Erickson v. Ward*, 266 Ill. 259, 107 N. E. 593. However, the New York courts have gone further, and have held that reasonable satisfaction was sufficient to fulfill the promise, even in cases where the language of the parties pointed clearly the other way. *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749; *Russel v. Allerton*, 108 N. Y. 288, 15 N. E. 391. This seems an unjustifiable making over of the contract of the parties, brought about by a distaste for enforcing, even at law, a hard bargain. The principal case seems to fall into this category.

CONTRACTS — DEFENSE OF IMPOSSIBILITY — DAMAGES FOR BREACH OF AN IMPOSSIBLE CONTRACT. — The plaintiff desired to send money to her bank in time to pay off a mortgage. With knowledge of the evident difficulty, the defendants promised to wire the money in time. Delivery of the telegram in time was admitted to be impossible and was not made. The plaintiff sued for the loss caused by the defendants' failure to pay off the mortgage. *Held*, that the plaintiff could not recover. *McMahon v. Western Union Telegraph Co.*, 171 N. W. 700 (Iowa).

Impossibility, apart from certain exceptional classes of cases, is not a defense to a breach of contract. See 19 HARV. L. REV. 462. The court did not aver that impossibility was a defense, but held that the defendants were not liable for the plaintiff's loss on the ground that it was not caused by the defendants' breach, because, payment in time being impossible, the loss had already occurred before the contract was made. This argument would set up a defense in substance, if not in form, in practically every case of impossibility. But the court seems to have overlooked two fundamental principles of the law of contracts. Parties may bind themselves to liability for non-performance of any legal contract, even though impossible of fulfillment, if such intention is clearly expressed as here. *Berg v. Erickson*, 234 Fed. 817; *Reid v. Alaska Packing Co.*, 43 Ore. 429, 73 Pac. 337. And the usual measure of damages for breach of contract is what would place the plaintiff in the same position he would have been in if the contract had been performed. *Wall v. City of London Real Property Co.*, L. R. 9 Q. B. 249. See 1 SEDGWICK ON DAMAGES, 9 ed., § 30; 2 SEDGWICK, § 609.

CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE — HUSBAND'S NEGLIGENCE NOT IMPUTED TO WIFE. — The plaintiff was injured in a collision between a street car and an automobile in which she was a passenger. The collision was the result of the negligence of both the motorman and her husband who drove the automobile. The plaintiff herself exercised due care. She brought suit under a statute giving a married woman the right to sue in her own name

and for her own benefit. *Held*, that she could recover. *Brooks v. British Columbia Electric Ry. Co.*, 48 D. L. R. 90.

Where the relation of principal and agent exists between a passenger and his driver, the negligence of the latter will on principles of agency be attributed to the former. *Wood v. Coney Island R. Co.*, 133 N. Y. App. Div. 270, 117 N. Y. Supp. 703. In the absence of such a relation, the passenger is not affected by the negligence of his driver. *The Bernina*, L. R. 12 P. D. 58; *Cincinnati St. Ry. Co. v. Wright*, 54 Ohio St. 181, 43 N. E. 688. Logically, the same principles are equally applicable to the case of husband and wife who are driver and passenger respectively. And the weight of authority is to that effect. *Southern Ry. Co. v. King*, 128 Ga. 383, 57 S. E. 687; *Louisville Co. v. Creek*, 130 Ind. 139, 29 N. E. 481. But some courts impute the husband's negligence to his wife, presumably because they are identified in interest, but without stating that ground. *Yahn v. City of Ottumwa*, 60 Iowa, 429, 15 N. W. 257; *City of Joliet v. Seward*, 86 Ill. 402. Other courts expressly make this the ground of their decisions. *Penna. R. Co. v. Goodenough*, 55 N. J. L. 577, 28 Atl. 3; *McFadden v. Santa Ana R. Co.*, 87 Cal. 464, 25 Pac. 681. Consistently, therefore, a married woman was allowed to recover where her husband was killed in the same accident. *Horandi v. Central R. Co.*, 78 N. J. L. 190, 73 Atl. 93. However, where, as in the principal case, a married woman may sue in her own name and the damages recovered are her own property, the argument from identity of interest fails, and it seems to be agreed that the ordinary principles apply. *Louisville R. Co. v. McCarthy*, 129 Ky. 814, 112 S. W. 925.

ELIGIBILITY OF WOMEN FOR PUBLIC OFFICE—CONSTRUCTION OF STATUTE.—An act concerning the office of clerk of court used only masculine pronouns. A prior act regarding the office had had no gender interpretation clause, but a general interpretation act provides that words importing the masculine gender shall include females unless the contrary appear. The question is whether a woman is eligible for the office. *Held*, that she is not. *Frost v. The King*, [1919] 1 I. R. 81.

For a discussion of this case, see NOTES, p. 295, *supra*.

EQUITY—JURISDICTION—PROTECTION OF RIGHTS OF PERSONALITY.—The defendant seduced the plaintiff's minor daughter. The plaintiff seeks to enjoin the defendant from associating or communicating with the girl in any manner. *Held*, that an injunction will issue. *Stark v. Hamilton*, 99 S. E. 861 (Ga.).

The orthodox definition of equity jurisdiction gives the Chancellor no power to protect purely personal rights. *Chappell v. Stewart*, 82 Md. 323, 33 Atl. 542; *Hodecker v. Stricker*, 39 N. Y. Supp. 515. But courts of equity have shown an increasing tendency to take jurisdiction of injuries to personality. *Ex parte Warfield*, 40 Tex. Crim. 413, 50 S. W. 933; *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97. See Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 640, 668. However, even when substantially protecting an interest of personality the courts have protested that they were concerned with property alone and that they secured interests of personality merely incidentally. The New Jersey court has gone further and has said, *obiter*, that if necessary it would not hesitate to protect personality as such. See *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 919, 67 Atl. 97, 100. But in that case the court found a property interest remotely involved, and made that the "technical basis" of its equity jurisdiction. *Vanderbilt v. Mitchell*, *supra*. The principal case might also have been decided as involving a property right. The plaintiff could have maintained an action at law for the loss of his daughter's services. *Mulvehall v. Millward*, 11 N. Y. 343; *Kennedy v. Shea*, 110 Mass. 147. But the court does not rest its jurisdiction on this property interest, but upon the interests of personality which are really at stake.

EVIDENCE — HEARSAY — DECLARATION OF MENTAL STATE DISTINGUISHED FROM *RES GESTAE*. — In an action for alienation of affections by a wife against her husband's parents, the plaintiff was allowed to testify that two weeks after she received a letter in which the husband declared his separation, he said to her that the defendants had told him he was not the father of her child. *Held*, that this was error. *Gilmore v. Gilmore*, 173 N. W. 865 (S. Dak.).

The court based its decision on the ground that the statement was not part of the *res gestae*. It was undoubtedly right in holding that such declaration of the husband was not admissible as a verbal act, since it was not contemporaneous with the act of separation. See 3 WIGMORE ON EVIDENCE, § 1776. But there are two other classifications of declarations admitted in such cases to which the term *res gestae* is sometimes loosely applied: (1) A direct statement of mental condition *per se* an exception to the hearsay rule; (2) A statement proving mental condition by inference, to which, as Dean Wigmore points out, the hearsay rule is not applicable. See 3 WIGMORE, § 1715. See also Eustace Seligman, "An Exception to the Hearsay Rule," 26 HARV. L. REV. 146, 150. So in this case the alienation of the husband's affections and what caused such alienation are questions of states of mind, and the husband's declaration should have been admitted to prove them. *Bailey v. Bailey*, 94 Iowa, 598, 63 N. W. 341; *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614. For the purpose of proving the defendants' agency in causing this state of mind the declaration comes within no exception to the hearsay rule and is therefore incompetent. *Elmer v. Fessenden*, 151 Mass. 359; *Rose v. Mitchell*, 21 R. I. 270, 43 Atl. 67. Of course evidence not admissible for all purposes may yet under proper instructions be admitted for the purpose for which it is competent. See 1 WIGMORE, § 13. This, it seems, would have been the proper ruling to have made in the principal case.

EVIDENCE — PRESUMPTION OF LEGITIMACY OF A CHILD BORN IN WEDLOCK — QUANTUM OF PROOF NECESSARY TO OVERCOME THE PRESUMPTION. — A, the wife of B, went to live with a former lover, C. Three hundred and four days later, A gave birth to a child, which both she and C recognized as C's. B had had no access in the interval between the separation and the birth. A and C were subsequently married. C died intestate and the child now claims as heir. It was contended that as the child was born in wedlock, he must be presumed to be the child of A's then husband, B. The court took judicial notice that two hundred and eighty days is the normal period of gestation, but that a period of three hundred and four is possible, although exceptional. *Held*, that the evidence, being beyond a reasonable doubt, overcomes the presumption of legitimacy. *In re McNamara's Estate*, 183 Pac. 552 (Cal.).

For a discussion of this case, see NOTES, p. 306, *supra*.

EVIDENCE — PROOF OF FOREIGN LAW — PRESUMPTION THAT THE STATUTORY *LEX LOCI* IS THE SAME AS THE STATUTORY LAW OF THE FORUM. — Under a statute in Idaho an action at law was the remedy to recover an award under the Workmen's Compensation Act upon default of the employer in payment. An action at law was brought in Washington to recover a defaulted award for an injury alleged to have been sustained in Idaho. Under the Workmen's Compensation Act of Washington the action at law for default in payment by the employer was barred. *Held*, that the action was barred. *Freyman v. Day et al.*, 182 Pac. 940 (Wash.).

The result was reached by presuming the law of Idaho to be the same as the law of Washington. As to presumptions of foreign statute law, in the absence of pleading and proof to the contrary, there are two views. One is that the *lex loci* is presumed to be the same as the *lex fori*. Cases often cited in support of this rule seem to support no broader doctrine than that the presumption will

be indulged as to the common law. *Chesapeake and N. R. Co. v. Venable*, 111 Ky. 41, 63 S. W. 35; *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 54 Atl. 570; *Peter Adams Paper Co. v. Casard*, 206 Pa. St. 179, 55 Atl. 949. This first view, if we consider that a state court has no power to take judicial notice of foreign law, is illogical, but it is commended by its simplicity of application. The weight of authority, however, supported by logic, is in favor of a second view to the effect that there is no presumption of identity or similarity of foreign and domestic statute law, but that, in absence of pleading and proof to the contrary, the presumption is that the common law prevails in the state where the cause of action arose, even though the *lex fori* is statutory. *Kelley v. Kelley*, 161 Mass. 111, 36 N. E. 837; *In re Hamilton*, 76 Hun (N. Y.), 200, 27 N. Y. Suppl. 813; *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111; *Louisville and Nashville Ry. Co. v. Williams*, 113 Ala. 402, 21 So. 938. It is indeed a questionable doctrine to apply *in toto* the statute law of the forum, as was done in the principal case, to a cause of action that was admittedly governed by foreign law. It would be better to dismiss the action on the court's own motion for insufficiency of facts.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — ASSIGNMENT TO RESIDUARY LEGATEE OF RIGHT TO ENFORCE ESTATE'S CLAIM TO CONTRIBUTION. — An executor paid a judgment against his decedent and the defendant as co-sureties on a note. Having paid all debts and fully administered the estate, he assigned the judgment and execution to the plaintiff who was residuary legatee. A statute required sales of personalty by an executor to be public unless by order of court. (1914 PARK'S GA. CODE, §§ 4022-4025.) The plaintiff now sought to enforce the estate's right of contribution from the defendant. *Held*, that he could not maintain this action. *Wilson v. Brice*, 99 S. E. 385 (Ga.).

The personal representative is the proper party to enforce claims due the estate. *Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745; *Flynn v. Flynn*, 183 Mass. 365, 67 N. E. 314. However, at common law he might assign a chose in action to any one and the assignee might sue thereon. *Harper v. Butler*, 2 Pet. (U. S.) 239; *Petersen v. Chemical Bank*, 32 N. Y. 21. Many states have statutes similar to that in the principal case. See 2 WOERNER, AM. LAW OF ADM. 331. Some expressly include choses in action. *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89; *Winningham v. Holloway*, 51 Ark. 385, 11 S. W. 579. Unless so included, however, the tendency is to construe such statutes as not infringing upon the common-law right of the executor to alien choses in action. *Weider v. Osborn*, 20 Ore. 307; *Chapman v. Charleston*, 30 S. C. 549. Under such a statute, a legatee was permitted to sue on a note assigned to him as his share of the estate by the executor without an order of court. *Weider v. Osborn*, 20 Ore. 307; *Clark v. Moses*, 50 Ala. 326. The residuary legatee may take a chose in action if he wishes. *Reed's Estate*, 82 Pa. St. 428. Assent by the executor to a legacy vests title in the legatee so as to enable him to maintain an action thereon. *Peoples' National Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20. Therefore it seems clear that the plaintiff should have been allowed to maintain his action in the principal case.

FRAUDULENT CONVEYANCES — HUSBAND AND WIFE — WIFE'S SEPARATE SUPPORT AS CONSIDERATION. — An insolvent wrongfully left his wife and neglected to afford her proper support. In consideration of her agreement to live separately, and of her right to support, he conveyed to her some real estate. Within four months thereafter a petition of bankruptcy was filed against him, and the trustee in bankruptcy seeks to set aside the conveyance as being in fraud of creditors. *Held*, that the conveyance was supported on good consideration. *Baldwin v. Kingston*, 44 Am. B. R. 17 (1919).

For a discussion of principles involved, see NOTES, *supra*, p. 303.

LEGACIES AND DEVISES — CONSTRUCTION — FORFEITURE ON CONDITION — HAPPENING OF CONDITION IN TESTATRIX'S LIFETIME. — The testatrix ordered her trustee under the will to pay four thousand dollars annually to her son, but provided "that if my son shall marry A, the trustee shall thereafter pay only two thousand dollars, instead of four thousand dollars, per year." The son married A before the testatrix died. A statute provided, "Where a limitation, condition, or future interest is created by will, the death of the testatrix is to be deemed the time of the creation of the limitation, condition, or interest" (CAL. CIV. CODE, § 749). Upon the death of the testatrix, the son claimed to be entitled to four thousand dollars annually. *Held*, that he was. *In re Duffill's Estate*, 183 Pac. (Cal.) 337.

Such a condition in restraint of marriage is valid. *Gillet v. Wray*, 1 P. Wms. 284; *In re Nourse*, [1899] 1 Ch. 63. See 4 B. R. C. 64 *et seq.* But the effect of such a forfeiture provision is disputed when the marriage occurs in the testator's lifetime. The gift has been held forfeited where the condition was not in restraint of marriage. *Wynne v. Wynne*, 2 Keen, 778; *Metcalfe v. Metcalfe*, [1891] 3 Ch. 1. Where the condition is in restraint of marriage, however, there is some support for the rule in the principal case that the gift is not forfeited. *Chapman v. Perkins*, 1905 A. C. 106; *Brown v. Severson*, 12 Heisk. (Tenn.) 381. But other courts have reached the contrary conclusion. *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241; *In re King*, [1892] 1 L. Rep. 29 Eq. 401; *Greene v. Kirkwood*, [1895] 1 L. Rep. 130. On principle, the latter view seems preferable. *Prima facie*, words of futurity should be read as speaking from the date of the execution of the will. See *Perkins v. Chapman*, [1904] 1 Ch. 431, 436. The court relied, in the principal case, on the statutory provision, and the fact that the claimant was to receive his annuity from a trustee, whose control over the property dated from the death of the testatrix. But that the interest is to be deemed created at the time of the testatrix's death is not inconsistent with a provision for alternative interests, the ruling one to be determined by a course of events either prior or subsequent to her decease. Nor, since the son was to take in any event, does a provision for payments to him by the trustee under the will indicate that a marriage prior, as well as subsequent, to her death was not contemplated by the testatrix. It seems that the clear intent to reduce the legacy, should a specific union, whenever consummated take place, might properly have been regarded.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — RETROACTIVE EFFECT OF AN AMENDMENT. — A workman was injured in the course of his employment and rendered physically helpless, so as to require a constant attendant. After the injury occurred an amendment to the Workmen's Compensation Act went into effect, providing that the monthly payment to such a workman "shall be increased \$20 per month so long as such requirement shall continue" (WASH., LAWS OF 1917, c. 28). This suit was brought to recover the increased allowance from the date on which the amendment went into effect. *Held*, that the plaintiff recover. *Talbot v. Industrial Insurance Commission*, 183 Pac. 84 (Wash.).

Compensation acts, because of their remedial nature, are liberally construed. See *Virginia & Rainy Lake Co. v. Dist. Ct.*, 128 Minn. 43, 47, 150 N. W. 211, 213; *J. C. Coakley's Case*, 216 Mass. 71, 73, 102 N. E. 930, 932. But see *Andrejwski v. Wolverine Coal Co.*, 182 Mich. 298, 303, 148 N. W. 684, 686. But they are usually held not to operate retroactively. *Western Coal Co. v. Corkille*, 96 Ark. 387, 131 S. W. 963; *Wright v. So. Ry. Co.*, 123 N. C. 280, 31 S. E. 652; *Stoll v. Daly Mining Co.*, 19 Utah, 271, 57 Pac. 295. This accords with the general rule of construction that statutes operate prospectively only, unless the contrary intent of the legislature clearly appears. *Estate of Van Kleeck*, 121 N. Y. 701, 25 N. E. 50. See *Haverhill v. Marlborough*, 187 Mass. 150, 155, 72 N. E. 943, 945. The same rule applies to amendments. *Coon v. Kennedy*,

91 N. J. L. 598, 103 Atl. 207; *Boyer v. Crescent Paper Box Factory*, 143 La. 368, 78 So. 596. However, the principal case is distinguishable. The words of the amendment are sufficiently broad to include compensation from the date on which it went into effect for injuries received prior to that date. The obvious purpose of the legislature — to meet the hardship caused by the expense of an attendant — could be fully accomplished only by giving the amendment this retroactive effect. On the other hand, to allow this retroactive operation impairs no existing right. These considerations seem sufficient to take the case out of the general rule favoring a prospective operation. See *City of Montpelier v. Senter*, 72 Vt. 112, 113, 47 Atl. 392, 393. See 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., § 674.

MASTER AND SERVANT — WORKMEN'S COMPENSATION — VIOLATION OF STATUTE AS BAR TO RECOVERY. — The Quarries Act made it a crime to go near a blasting charge within one half hour after a misfire. Plaintiff's deceased, a quarryman whose duty it was to do blasting, was killed by a hangfire when recharging the blast after ten minutes. In a proceeding to recover workmen's compensation, *held*, that an award be refused. *Matthews v. Pomeroy*, 54 L. J. 223 (Court of Appeal).

Where disobedience to an order of the employer is a causal factor in the injury, in the following four cases it is generally held that the accident did not arise out of the employment: (1) Where the order was disobeyed that the employee might do something not at all a part of his employment for his own purposes. *Lowe v. Pearson*, [1899] 1 Q. B. 261. (2) Where such disobedient act was done because of personal advantage to the employee, though physically within the employment. *Weighill v. South Helton Coal Co.*, [1911] 2 K. B. 757. (3) Where such disobedience though done with the employer's interest in mind was in an undertaking to do something the employee was not employed to do in any way. *Jennikson v. Harrison Co.*, 4 B. W. C. C. 194 (1911). (4) Where such disobedient act added risk for no reason at all. *Schelf v. Kishpaugh*, 37 N. J. LAW J. 173. But where none of the above elements is present and the employee was doing what he was employed to do, it is perfectly clear that the fact that he disobeyed express orders will not prevent the accident from arising out of the employment. *Harding v. Brynddu Colliery Co.*, [1911] 2 K. B. 747; *Chicago Railways Co. v. Industrial Board*, 276 Ill. 112, 114 N. E. 534. The same rules would seem to apply in the case of the violation of a criminal statute as in the case of disobedience to the employer's orders. Therefore the court seems unwarranted in basing its decision on the ground that the accident did not arise out of the employment. It might be argued that it is against general public policy to award compensation when the workman was injured in the commission of a crime. But where death occurs, such an argument is not sound in the face of specific public policy as expressed by the Workmen's Compensation Act, which allows recovery in spite of serious or willful misconduct where death or total disability occurs. See 6 EDW. VII, c. 58.

QUASI CONTRACTS — MONEY PAID UNDER DURESS OR COMPULSION OF LAW — SUFFICIENCY OF PROTEST TO PERMIT RECOVERY OF TAX. — The plaintiff paid his taxes to the dependant and obtained receipts endorsed, "Paid under Protest." The taxes were collected under proper warrants but there was no threat of levy on the plaintiff's property. The taxes were afterwards declared invalid and plaintiff sued to recover. *Held*, that he could not do so. *Albro v. Kettelle*, 107 Atl. 198 (R. I.).

Invalid taxes, paid voluntarily, cannot be recovered whether or not a protest is made. *Railroad Co. v. Commissioners*, 98 U. S. 541; *Cincinnati, R. & Ft. W. Ry. Co. v. Wayne Township*, 55 Ind. App. 533, 102 N. E. 865. And it has often been said that a payment is voluntary unless there is a threat of immediate

arrest or seizure of goods. *Lange v. Soffell*, 33 Ill. App. 624; *Detroit v. Martin*, 34 Mich. 170; *Railroad Co. v. Commissioners*, 98 U. S. 541. The entire common-law doctrine as to voluntary payments was unjust and illogical, and now in many jurisdictions has been greatly altered by statute. For example, invalid taxes may be recovered, though paid voluntarily in the common-law sense, if a specific protest is made. See 1915 MICH. COMP. LAWS, § 4049; CAL. POL. CODE, § 3819; 1913 NEB. REV. STAT., § 6491; 1902 MASS. REV. LAWS, c. 13, § 86. Where there are such statutes, the requirements as to protest must be strictly complied with. *Bankers Association v. Douglas County*, 61 Neb. 202, 85 N. W. 54; *Traverse Beach v. Elmwood*, 142 Mich. 78, 105 N. W. 30; *Knowles v. Boston*, 129 Mass. 551. Rhode Island has no such statute. But the court in the principal case, contrary to the older authorities, came to the conclusion that the payment by the plaintiff was involuntary. This conclusion is supported by the more recent decisions. *Ottawa University v. Franklin County*, 85 Kan. 246, 116 Pac. 892; *Atchison, T. & S. P. Ry. Co. v. O'Connor*, 223 U. S. 280. But the court went on to hold that the protest was not sufficiently specific to permit a recovery even though the payment was involuntary. However, the better authorities do not, in the absence of statute, require a specific protest if the payment is deemed involuntary. *Cox v. Welcher*, 68 Mich. 263, 36 N. W. 69; *Woodmere v. Springwells*, 130 Mich. 466, 90 N. W. 277. Unsatisfactory decisions are inevitable so long as the jargon of voluntary and involuntary payments is retained. The principle on which such cases should properly be rested is simply that one is entitled to recover money paid over when he neither intended a gift nor received any consideration. See POLLOCK, CONTRACTS, WILLISTON'S EDITION, 731, 732; 3 ILL. L. REV. 235, 237.

REFORMATION OF INSTRUMENTS — REFORMATION OF INSURANCE POLICY FOR MISTAKE OF FACT. — An insurance policy lapsed because of non-payment of premiums. Thereupon the insured became entitled to extended paid-up insurance, calculated upon the terms and by the methods provided in the policy, until July 13, 1915. The complainant's clerk made an error in computing the extended term, and indorsed on the policy a continuation until May 6, 1916, returning the policy to the insured. The latter died on Jan. 15, 1916. The complainant brought a bill to reform or cancel the indorsement. *Held*, that the bill be dismissed. *New York Life Ins. Co. v. Kimball*, 106 Atl. 676 (Vt.).

A party seeking reformation of a written instrument must clearly establish a valid agreement which the writing fails to express accurately by reason of a mutual mistake. *Kruse v. Koelzer*, 124 Wis. 536, 102 N. W. 1072; *Fullton v. Colwell et al.*, 112 Fed. 831. Negligence of the party demanding reformation will not be a bar to relief unless it constitutes a neglect of a legal duty. *Los Angeles & R. R. Co. et al. v. New Liverpool Salt Co.*, 150 Cal. 21, 87 Pac. 1029; *Snyder v. Ives*, 42 Iowa, 157. And there is no basis for estoppel where the defendant has not been prejudiced nor his position changed so that he cannot be put *in statu quo*. *Southern Finishing & Warehouse Co. v. Ozment*, 132 N. C. 839, 44 S. E. 681; *Detweiler v. Swartley et al.*, 74 Kan. 855, 86 Pac. 141. If one of the parties labors under a mistake of fact in entering into the agreement, of which the other is ignorant, but the writing expresses the intention of the parties accurately, there is no ground for reformation. *Steinmeyer et al. v. Schroepfel*, 226 Ill. 9, 80 N. E. 564; *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264. The court — erroneously it seems — brings the principal case within the last category. The result, however, might conceivably be supported on two grounds: First, that the elements of an estoppel exist. But usually the facts upon which an estoppel is raised must be pleaded. *Delaware Ins. Co. v. Penna. Fire Ins. Co.*, 126 Ga. 380, 55 S. E. 330. The defendant here did not allege that, in reliance upon the representation, the insured did an act or refrained from doing any. Second, that the complainant's remedy at law was

adequate. If the insurer could set up a defense to an action at law on the policy, reformation would be properly denied. *Thompson v. Phoenix Ins. Co.*, 25 Fed. 296; *Craft v. Dickens*, 78 Ill. 131. But when the adequacy of the legal remedy is doubtful, equity will grant relief. *Green v. The Morris and Essex R. Co.*, 12 N. J. Eq. 165. There seems to be enough danger here that the erroneous indorsement might be prejudicial to the complainant if an action at law was brought on the policy to justify equity in exercising its jurisdiction.

99a
RESTRAINT OF TRADE — CONTRACT NOT TO ENGAGE IN BUSINESS — RESTRICTION IN USE OF STAGE NAME. — In a contract of employment, the plaintiff, a motion picture firm, agreed to advertise the defendant, if at all, under the name of "Stewart Rome;" and the defendant agreed never to appear under this name for any one but the plaintiff. The defendant acted under this name for a long time and became a "star." At the termination of his employment with the plaintiff, he signed a contract with a rival firm to act under the name of "Stewart Rome." The plaintiff now seeks to enjoin the defendant from using this name in violation of the contract between them. *Held*, that the injunction would not be granted. *Hepworth Manufacturing Co. v. Ryott*, 121 L. T. R. 226 (Ch. Div.).

A person may by contract conclude himself from the use of his own name, and, *a fortiori*, of a pseudonym, for specified purposes. *Vernon v. Hallam*, 34 Ch. Div. 748; *Zagier v. Zagier*, 167 N. C. 616, 83 S. E. 913; *Ludwig v. Claviola Co.*, 144 App. Div. 388, 129 N. Y. Supp. 310. Whether such a contract is void because in restraint of trade depends, by the modern and better view, on the test of reasonableness. If the restraint imposed is only such as to afford fair protection to the interests of the covenantee and is not so broad as to interfere with the interests of the public, the contract is not illegal. *Nordensfeldt v. Maxim Nordensfeldt Co.*, [1894] A. C. 535; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; *National Enameling & Stamping Co. v. Haberman*, 120 Fed. 415. Under this rule, a contract not to engage in business, standing alone, is void. *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027; *Clemons v. Meadows*, 123 Ky. 178, 94 S. W. 13. But where a restrictive agreement is ancillary, as in the sale of a business, it may be enforced. *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509; *Freudenthal v. Espey*, 45 Colo. 488, 102 Pac. 280; *Mills v. Kessler*, 87 Kan. 549, 125 Pac. 58. Similarly, such agreements in employment contracts may be valid. *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Knapp v. S. Jarvis, Adams Co.*, 135 Fed. 1008. Equity may, however, deny an injunction on the ground of gross inadequacy of consideration or because there is a complete remedy at law. *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348. See *Mandeville v. Harmon*, 42 N. J. Eq. 185, 195, 7 Atl. 37, 41; *Keeler v. Taylor*, 53 Pa. St. 467, 469, 470. The principal case is supportable on the ground that the scope of the restriction is greater than necessary to protect the interest of the employer. *Morris, Ltd. v. Saxelby*, [1916] 1 A. C. 688; *Herreshoff v. Boutineau*, 17 R. I. 3; *Althen v. Vreeland*, 36 Atl. 479 (N. J.). If the restraint were for a reasonable period, *i. e.* for the life of "Stewart Rome" films owned by the plaintiff, the injunction, it is submitted, should be granted. Cf. *Tribune Ass'n v. Simonds*, 104 Atl. 386 (N. J.). See 32 HARV. L. REV. 176. And this should be the result even where the reasonable restraint is coupled with another which is unreasonable, provided that the two are distinct and severable by the terms of the contract. *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. St. 288, 59 Atl. 1088; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723. But in the absence of such severance, equity will not undertake to make over the contract, and the whole being void, there will be no relief as to any part. *Perls v. Saalfeld*, [1892] 2 Ch. 149; *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6.

RULE AGAINST PERPETUITIES — SUSPENSION OF OWNERSHIP — NEW YORK RULE. — A father created a trust fund for the maintenance of his family, the income to go to his wife and two daughters, then living, upon his death; and one half of the income to go to each daughter upon the death of both parents, the principal to be distributed equally between the daughters when they should attain the age of thirty-five. A statute provided that such a suspension of absolute ownership of personal property, for more than two lives in being at the date of the instrument, was invalid. (1909 N. Y. CONSOL. LAWS, c. 41.) The wife claimed an enforceable interest in the trust, irrespective of the validity of the limitations to the daughters. *Held*, that this claim be allowed. *Carrier v. Carrier*, 123 N. E. 135 (N. Y.).

Since 1828, the common-law rule against perpetuities has been substantially altered by New York legislators, who have conceived its sole object to be a limitation of restraint on alienation. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 748. The artificial limit of two lives in being on the period of suspension of absolute ownership has superseded the natural common-law rule of lives in being. 1909 N. Y. CONSOL. LAWS, c. 41; LAWS 1909, c. 45; PERSONAL PROPERTY LAW, § 11. That this arbitrary rule invites litigation is shown by the fact that under it the issue of remoteness has been presented in well over four hundred cases, as compared with a single one previous to its adoption. See GRAY, *idem*, §§ 749, 750. The principal case is typical of the large majority of them. And unfortunately, in the early decisions, trusts containing any illegal limitations were held invalid *in toto*. *Lorillard v. Coster*, 5 Paige, 172; *Armory v. Lord*, 9 N. Y. 403. Now, however, valid provisions of the instrument are enforced, if the rejection of the invalid limitations will effect no unjust distribution of the estate. *Tiers v. Tiers*, 98 N. Y. 568; *In re Mount*, 185 N. Y. 162, 77 N. E. 999. In the principal case, the trust to endure for two lives only would accomplish a distinct purpose of the settlor, — the maintenance of the family unit during the lives of the parents. The saving rule, being thus applicable, was rightly invoked to sustain the wife's interest.

SALES — CONDITIONAL SALES — WHETHER INCLUDED UNDER ACT REGARDING MORTGAGES. — The plaintiff sold and delivered certain machinery under an instrument providing that title should remain in the seller until full payment of price. A recording statute thus defined mortgages: "All deeds . . . conveying . . . property . . . for the purpose . . . of securing the payment of money, whether . . . from the debtor to the creditor, or from the debtor to some third person in trust for the creditor." (1906 FLA. GENL. STAT., §§ 2494, 2496.) The above instrument was not recorded. The seller replevied from a purchaser from the buyer. If the instrument was a mortgage, the seller could not recover. *Held*, that he could recover. *Dobson Printer's Supply Co. v. Corbett*, 82 So. 804 (Fla.).

A transaction wherein possession is delivered but passing of title is conditioned upon payment of price is a typical conditional sale. *Nichols v. Ashton*, 155 Mass. 205, 29 N. E. 519; *American Harrow Co. v. Deyo*, 134 Mich. 639, 96 N. W. 1055. A mortgage differs from this in that the original property owner is or becomes the debtor. *Campbell Printing Co. v. Walker*, 22 Fla. 412, 1 So. 59. And a sale with mortgage back to seller differs from it in that title passes at once. See *Frick & Co. v. Hilliard*, 95 N. C. 117; *Chicago Cottage Organ Co. v. Crambert*, 78 Ohio, 149, 84 N. E. 788. So in most jurisdictions statutes relating to mortgages are not held applicable to conditional sales. *Nichols v. Ashton*, *supra*; *Campbell Printing Co. v. Walker*, *supra*. But the legal effect of each is substantially the same. See *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 283. It is submitted that the difference in method by which the legal result is reached is immaterial, and that the opposite view is preferable. *Hart v. Barney Co.*, 7 Fed. 543 (Ky.). See 16 HARV. L. REV. 370. But the

statute in the principal case undertakes to define specifically what shall be included in the term "mortgage." It clearly contemplates transactions in which the original property owner is or becomes the debtor. It was therefore rightly judged not to include conditional sales.

SOVEREIGN — TELEGRAPH AND TELEPHONE COMPANIES — LIABILITY TO SUIT OF TELEGRAPH AND TELEPHONE COMPANIES UNDER FEDERAL CONTROL. — An action was brought against a telegraph company under federal control for delay in delivery of a telegram. The defense was that the defendant company was being operated by the Postmaster General on behalf of the United States. *Held*, defense insufficient. *Witherspoon & Sons v. Postal Telegraph & Cable Co.*, 257 Fed. 758 (Dist. Ct., E. D. La.).

The United States cannot be sued without its consent. *Stanley v. Schwalby*, 162 U. S. 255. This immunity extends to governmental agents and agencies. *Maganab v. Hitchcock*, 202 U. S. 473. When the transportation systems were taken under federal control, Congress authorized suits against them, but prohibited issuance of process against property so taken over. See 40 STAT. AT L. 451. Some courts, in action brought against these systems, have treated the Director General of Railroads as the proper party defendant. *Rutherford v. Union Pacific R. Co.*, 254 Fed. 880; *Dahn v. McAdoo, Director General of Railroads*, 256 Fed. 549. The courts that treat the systems as being also proper parties defendant recognize them nevertheless as governmental agencies. *Jensen v. Lehigh Valley R. Co.*, 255 Fed. 795; *Gowan v. McAdoo*, 173 N. W. 440 (Minn.); *Johnson v. McAdoo, Director General of Railroads et al.*, 257 Fed. 757. The government assumed control over the telegraph and telephone systems for the same reasons and purposes as produced control over transportation. See 40 STAT. AT L. 904. By proclamation, the President took possession of all systems and assumed complete control, which might or might not be exercised through the then owners and managers. See 40 STAT. AT L. 1807. It would seem, therefore, that they likewise became governmental agencies. Congress made no provision for possible suits against them. Nevertheless, judgments have been rendered against these systems, operating under federal control, when the action was commenced prior to federal control. *Western Union Telegraph Co. v. Huffman*, 208 S. W. 183 (Tex.); *Mummau v. Southwestern Telegraph & Telephone Co.*, 208 S. W. 476 (Mo.); *Danaher v. Southwestern Telegraph & Telephone Co.*, 209 S. W. 74 (Ark.). Also, after federal control, one court allowed an injunction to issue against a telephone company. *State v. Dakota Central Telephone Co. et al.*, 171 N. W. 277 (S. D.). Moreover, the companies have secured relief in their own names. *City of Amarillo v. Southwestern Telegraph & Telephone Co.*, 253 Fed. 638; *Postal Telegraph & Cable Co. v. Call, District Judge*, 255 Fed. 850. On the other hand, they have also been held governmental agencies and so not proper parties. *Southwestern Telegraph & Telephone Co. v. City of Houston*, 256 Fed. 690; *Railroad Commissioners of Florida v. Burleson et al.*, 255 Fed. 604. And an injunction has been refused because the suit was in substance against the United States. *Public Service Commission v. New England Telephone & Telegraph Co.*, 122 N. E. 567 (Mass.). It might be argued, in support of the principal case, that suits are included in the authority, given by the President's Proclamation, to continue operation of the systems in the usual and ordinary course of business. See 40 STAT. AT L. 1807. But the President or his ministers have no power to authorize actions against the United States or its agencies. *Maganab v. Hitchcock*, *supra*.

STATUTE — CONSTRUCTION — ESTATE TAX OF FEDERAL INHERITANCE TAX. — A petition was brought by an executor to determine whether, in the absence of any express directions in the will, the federal estate tax should be charged entirely against the residue of the estate or apportioned *pro rata* among all the

devisees and legatees. The Act of Congress of 1916 provided for an "Estate Tax" to be levied on the net estate transferred upon death. (39 STAT. 756, c. 463; 39 STAT. 1000; 40 STAT. 300.) *Held*, that it is chargeable entirely against the residue. *Plunkett v. Old Colony Trust Co.*, 124 N. E. 265 (Mass.).

The executor charged the federal estate tax *pro rata* among three legatees. This account was affirmed by the Surrogate, reversed by the Appellate Division, and on appeal, *held*, that it is chargeable entirely against the residue. *In re Hamlin*, 124 N. E. 4 (N. Y.).

The Massachusetts and the New York courts both reach the same conclusions for exactly the same reasons. The difference between an estate tax and a legacy tax is well recognized. See *Minot v. Winthrop*, 162 Mass. 113, 124, 38 N. E. 512, 516. A legacy tax is a tax upon the right to receive property by will as distinguished from a tax upon the right to devise property, and so is chargeable upon the individual legacy. An estate tax is one imposed upon the net estate transferred by death and not upon each individual succession resulting from death. *In re Roebbling's Estate*, 89 N. J. Eq. 163, 104 Atl. 295. Hence it is chargeable upon the estate and therefore upon the residuary fund. At the time Congress enacted the statutes under consideration legacy taxes were common in the states. See RANDOLPH, UNITED STATES INHERITANCE AND TRANSFER TAXES, 1917, p. 54. Previous federal legislation, the Act of 1898, imposed a legacy tax. See 30 STAT. AT L. 464. This act had been held constitutional. *Knowlton v. Moore*, 178 U. S. 41. If Congress had intended a legacy tax it would have followed the language of that act. Moreover, the intention of Congress to enact an estate tax is evident from the records of legislative proceedings in connection with the passage of the law. See Report No. 922, 64th Congress, 1st session, 5. The instant decisions, of importance practically, seem certain to be followed.

TAXATION — PROPERTY SUBJECT TO TAXATION — GOOD WILL OF A BUSINESS. — To ascertain the value of the intangible property in Arizona belonging to a foreign corporation, the board of equalization capitalized the net profits realized by the corporation from Arizona sales in 1917 at 25 per cent, and deducted from the result the value of the corporation's tangible property within the state. This valuation was distributed among the counties of the state in the proportion of their several contributions to the gross sales of the corporation, with instructions to the county authorities to enter on the assessment rolls the words: "Tangible and intangible valuation of property above enumerated based on excessive earnings." Arizona statutes provide that all property of whatsoever kind or nature is subject to taxation. (1913 ARIZONA REV. STAT., Title 49, c. 4, §§ 4846, 4847.) *Held*, that the assessment was unwarranted. *Standard Oil Co. v. Howe*, 257 Fed. 481 (Circ. Ct. App.).

Although a tax on excessive earnings was not authorized by the statutes of Arizona, the court might well have confirmed the assessment, on the ground that it related to the good will of the plaintiff's business. The court failed to regard the result produced, but considered simply the method used. See *Great Northern Ry. Co. v. Okanogan County*, 223 Fed. 198, 201. Statutes authorizing a tax on foreign corporations doing business in interstate commerce in terms of gross receipts have often been held constitutional, being construed as substantially imposing a tax either on the property of the corporation within the state or on the privilege of doing business there, the value of which is measured by the gross earnings. *State v. U. S. Express Co.*, 114 Minn. 346, 131 N. W. 489; *Maine v. Grand Trunk Ry.*, 142 U. S. 217. See *McHenry v. Alford*, 168 U. S. 651, 671. That business good-will is a form of property is well recognized to-day. *People v. Roberts*, 159 N. Y. 70, 53 N. E. 685. See 16 HARV. L. REV. 135. And it may be taxed at the place of business. *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185. See Joseph H. Beale, "Jurisdiction to

Tax," 32 HARV. L. REV. 587, 601. Hence it would seem to be subject to taxation under the Arizona statutes. Though the reasoning in the principal case seems erroneous, it should be noticed that the question of fact as to the value of the good-will could have been more accurately determined by the equalization board by taking as a basis of computation the average profits over a series of years, rather than the net profits of a single year.

TORTS — DAMAGES — NERVOUS SHOCK FROM FRIGHT CAUSED BY SPOKEN WORDS. — The defendant, a private detective, in order to induce the plaintiff to show him some letters, said to her: "I am from Scotland Yard. You are the woman we are after. You have been corresponding with a German spy." Because of the fright induced by these words, the plaintiff became seriously ill. The jury found that these threats and false statements were made for the purpose of frightening the plaintiff. *Held*, that the plaintiff could recover. *Jamvier v. Sweeney and Barker*, [1919] 2 K. B. 316.

Upon the question of a recovery for nervous illness induced by fright without physical impact the authorities are still at variance. See 28 HARV. L. REV. 359-363; 15 HARV. L. REV. 304. For a variety of reasons, most jurisdictions deny a recovery where the action is based upon negligence. *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335; *Spade v. Lynn R. Co.*, 168 Mass. 285, 47 N. E. 88; *Mitchell v. Rochester Ry.*, 151 N. Y. 107, 45 N. E. 354. *Contra*, *Dulieu v. White*, [1901] 2 K. B. 669. The same is true where the negligence consists of spoken words. *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657. But even the courts that allow no recovery in negligence cases say that there would clearly be a recovery where the act was a wilful wrong. *Jeppsen v. Jensen*, 47 Utah, 536, 541, 155 Pac. 429, 431; *Davidson v. Lee*, 139 S. W. 904, 907 (Tex. Civ. App.); *Spade v. Lynn R. Co.*, *supra*, 290, 89. There is decisive authority that where the words or the act alone constitute an admitted tort, the defendant is liable for any nervous illness resulting proximately. *Lonergan v. Small*, 81 Kan. 48, 105 Pac. 27 (assault); *Engle v. Simmons*, 148 Ala. 92, 41 So. 1023 (trespass); *Garrison v. Sun Pub. Ass'n*, 207 N. Y. 1, 100 N. E. 430 (slander). Threats of bodily harm sent by letter and causing illness by reason of apprehension of violence have also been held to be ground for an action. *Houston v. Woolley*, 37 Mo. App. 15; *Grimes v. Gates*, 47 Vt. 594. But, in spite of numerous dicta, there are very few square decisions in favor of recovery for the consequences of fright induced by spoken words, where the words do not otherwise constitute an admitted tort. The principal case is therefore to be regarded as an important one in reaffirming the right of recovery established in an earlier English case. *Wilkinson v. Downton*, [1897] 2 Q. B. 57.

TRUSTS — POSTPONEMENT OF ENJOYMENT OF THE INTEREST OF A SOLE CESTUI QUE TRUST — MERGER OF LEGAL AND EQUITABLE ESTATES. — The testator devised certain realty to his wife in trust for herself for ten years and then to herself absolutely. He expressed a desire that the estate should remain intact during the trust period, but placed no restrictions on alienation and gave his wife the power in her will to designate a successor in the trusteeship. Accordingly she empowered her grandson to convey the land in fee. The latter, after the death of the testator's widow but before the expiration of the ten years, contracted to convey the land. *Held*, that he could pass good title. *Odom v. Morgan*, 99 S. E. (N. C.) 105.

Generally, if both the legal and equitable title to real estate held in trust become vested in the same person, there will be a merger resulting in absolute ownership and the consequent termination of the trust. *Swisher v. Swisher*, 157 Iowa, 55, 137 N. W. 1076. See *Woodward v. James*, 115 N. Y. 346, 357, 22 N. E. 150, 152. See 1 PERRY ON TRUSTS, 6 ed., 347. But this rule does not operate mechanically; where termination of the trust might injure the interests

of others there will be no merger. *Sherlock v. Thompson*, 167 Iowa, 1, 148 N. W. 1035. In the principal case no one had any standing to object if the trustee conveyed to herself. *Partridge v. Clary*, 228 Mass. 290, 117 N. E. 332. See A. W. Scott, "Control of Property by the Dead," 65 UNIV. OF PA. L. REV. 649-650. The sole reason for keeping the trust alive would be to give effect to the testator's ill-expressed intent that the enjoyment of the corpus of the trust be postponed. In England and in some of our jurisdictions a postponement of the enjoyment of the interest of a sole *cestui que trust* would be invalid aside from the question of merger. *Saunders v. Vautier*, 4 Beav. 66; *Magrath v. Morehead*, L. R. 12 Eq. 491; *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495. *Contra*, *Clafin v. Clafin*, 149 Mass. 18, 20 N. E. 454. And, even in the jurisdiction which enunciated the doctrine of *Clafin v. Clafin*, such limitation will be disregarded if circumstances make postponement of enjoyment inexpedient. *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786. The Massachusetts court has recently approved the language in *Sears v. Choate* and has expressed itself in accord with the principal case on similar facts. See *Langley v. Conlan*, 212 Mass. 135, 138, 98 N. E. 1064, 1066.

VOLUNTARY ASSOCIATIONS — ACTIONS AGAINST. — The plaintiff was expelled from membership in an unincorporated association, upon a vote of the members of the association, because of an alleged violation of a regulation of the society. He brought an action for damages against the society in its collective name without service on the individual members, and recovered judgment. *Held*, that judgment be reversed for want of jurisdiction. *Simpson v. Grand International Brotherhood of Locomotive Engineers*, 98 S. E. 580 (W. Va.). For a discussion of the principles involved in this case, see NOTES, *supra*, p. 298.

WATERS AND WATERCOURSES — PROFITS À PRENDRE — RIGHT TO TAKE FISH ON A NON-NAVIGABLE, NON-TIDAL STREAM. — The defendant was alleged to have converted mussels by taking them from the bed of a non-navigable, non-tidal river at a place where the plaintiff was owner of both banks of the stream. A statute declared that title to all game and fish was vested in the state (1909 MO. REV. STAT., c. 49, § 6508). *Held*, that the plaintiff could not recover. *Gratz v. McKee*, 258 Fed. 335 (Circ. Ct. App., 8th Circ.).

Title to the beds of all navigable streams is vested in the sovereign in trust for the public. *Forestier v. Johnson*, 164 Cal. 24, 127 Pac. 156. See *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, 90. *Contra*, *Willow River Club v. Wade*, 100 Wis. 86, 76 N. W. 273. By the English and early American common law the existence of a tidal ebb and flow determined navigability. *Adams v. Pease*, 2 Conn. 481; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90. Geographical conditions have altered the test in many jurisdictions to navigability in fact. *The Daniel Ball*, 10 Wall. (U. S.) 557. See *Kinkead v. Turgeon*, 74 Neb. 573, 584, 109 N. W. 744, 746. But some jurisdictions have retained the earlier rule. *Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47; *Washington Ice Co. v. Shortall*, 101 Ill. 46. When the bed of a stream is owned by the sovereign, the right of fishing is public. *In re Provincial Fisheries*, 26 Can. Sup. Ct. 444. See *Dunham v. Lamphere*, 3 Gray (Mass.), 268, 271. By the great weight of authority the owner of both banks of a non-navigable river, who is thereby owner of the subaqueous soil, acquires the exclusive right of fishing. *Beach v. Morgan*, 67 N. H. 529; *Queen v. Robertson*, 6 Can. Sup. Ct. 52. But some courts hold that the right of fishing is incident to the general easement of passage over public waters. See *Hartman v. Tresise*, 36 Colo. 146, 162, 84 Pac. 685, 690. The right to fish upon the land of another is a profit à prendre and is incapable of creation except by grant or prescription. *Fitzgerald v. Firbank*, [1897] 2 Ch. 96. See *Cobb v. Davenport*, 33 N. J. L. 223, 225. An action will lie for violation thereof.

Griffith v. Holman, 23 Wash. 347, 63 Pac. 239. The principal case appears to accept the doctrine that fishing rights are dependent upon the public character of the waters, regardless of the ownership of the subaqueous soil, although it emphasizes the more narrow procedural ground that trover will not lie, as title to the mussels is vested in the state.

BOOK REVIEWS

JURIDICAL REFORM. A Critical Comparison of Pleading and Practice under the Common Law and Equity Systems of Practice, the English Judicature Acts and Codes of the Several States of this Country, with a View to Greater Efficiency and Economy. By John D. Works. New York: The Neale Publishing Company. 1919. pp. 199.

Fifty years at the bar and on the bench may serve to confirm a lawyer in the idea that the main lines of the procedure with which he has been familiar for half a century were ordained by nature and, beyond a few cautious changes in details, must not be questioned, or they may make him conscious of the magnitude of the task confronting the lawyer of to-day on whom rests the chief responsibility for making the legal administration of justice an effective instrument of social engineering. Mr. Works, a soldier in the Civil War, practitioner in Indiana and in California, author of two well-known legal texts, sometime Justice of the Supreme Court of California and United States Senator, writes from abundant and varied experience and with first-hand knowledge of the defects in American judicial organization and procedure of which he speaks. Hence his pronouncement that we have too many courts (p. 25) and that the intermediate appellate courts now so common in this country are a "blunder" (p. 26), his approval of committing regulation of procedure to rules of court rather than to legislation (p. 43, also chap. 14), his argument for abolishing the demurrer (chap. 5), and his preference for an appointive bench (p. 128), add weight to opinions now general among thinking lawyers.

But Mr. Works does more than approve of these things which have come to be commonplaces in programs of law reform. On occasion he shows himself a bold, independent thinker, as, for example, in his comments on the practical impossibility of the statement of facts constituting a cause of action or defense such as the codes of procedure contemplated (p. 45), — something which the framers of the federal Equity Rules should have had before them when they penned rule 25, with its call for the "ultimate facts," — in his remarks as to the jury in civil cases (p. 50), his observations as to the attorney general and the federal courts (p. 123), and his views on the subject of appeals (pp. 86-87). The last two deserve notice. Sir John Hollams in 1906 — thinking, perhaps, of a situation in which the decision of a county judge was reviewable by a divisional court, which was reviewable by the Court of Appeal, which was reviewable by the House of Lords — wrote that, as he believed, "A majority of suitors would prefer a system without appeal" (Jottings of an Old Solicitor, 161). For many cases the elaborate series of appeals is now abridged in England. But three hearings are still possible and common. Mr. Works, familiar with a system where two appeals are permissible and common, is also willing to abolish appeals. Perhaps a better course would be to provide for but one appeal and greatly to simplify appellate procedure, treating an appeal as a motion for a rehearing or new trial, or for vacation or modification of the order or judgment complained of, before another tribunal. It is significant, however, that two experienced and orthodox common-law lawyers should come independently

to the conclusion that the law ought not to be settled for the benefit of the commonwealth by subjecting private litigants to a system of repeated and elaborate judicial reviews. As to the other point, Mr. Works argues convincingly the impropriety of subjecting federal courts and the conduct of business in those courts to the scrutiny and even control of one who practices as counsel for one of the chief litigants therein. In an address before the conference of the Bar-Association Delegates at Saratoga in 1917 I ventured to say: "It is doubtless enough for the Attorney General, who is the counsel of the state in its capacity of a juridical person, owning property, a creditor of some, a debtor to others, and sometimes a tortfeasor, to conduct the state's litigation and have charge of enforcement in the courts of the laws guarding public and social interests. For these purposes an advocate is required. Another type of lawyer should be minister of justice." Mr. Works reinforces this point by showing how the advocate for one of the litigants is able to influence the tribunal so that what would be legitimate in a Ministry of Justice runs counter to the traditions and policy of common-law judicial administration as our department of justice is actually constituted.

Long experience before elective courts in Indiana and in California has made Mr. Works an exceptionally competent witness. Hence what he says as to the abuses in impaneling juries in many states and the cause thereof (p. 50), of the causes of long and unprofitable cross-examinations (p. 54), of the relation between long trials and weak judges (p. 54), of the causes of the bad habits that have grown up in the trial of causes in so many state courts (p. 55), of lack of judicial courage as a cause of long holding of causes under advisement (p. 58), and of the relation between weak judges and the "state of the authorities" (p. 62), deserves to be read and pondered wherever the bench is elective. Even more are these things true where, as is now general, judges are chosen by a direct primary. Desire of sitting judges to "make a record" leads to the abuse of written opinions in the trial courts (pp. 67-68) and to unseemly displays for the edification of newspaper reporters. But, what is much worse, judges soon learn that the great point under such a system is not to offend any one, and this leads, for example, to laxity as to continuances (p. 47), and to toleration of many other time-consuming and expensive practices. Especially noteworthy are the remarks as to recent methods of canvassing for judicial office and judicial candidacy for political office (pp. 108-110).

Where so much that is good is put in such small compass, one hesitates to criticize. But it is to be regretted that Mr. Works did not give more effectiveness to his experience and reflection by looking into the modern literature of procedural reform more thoroughly. He says nothing about an administrative head of the judicial system, he does not notice the distinction between issue-pleading and notice-pleading, and so does not see how and why code pleading fell between them, and for English practice he appears to rely on Foulkes's *Action in the Supreme Court* (3 ed., 1884) and so is not aware of the great improvements made after 1890. Also, although he makes a good point with reference to the separate teaching of common-law pleading and code pleading (p. 20), he is not aware that James Barr Ames long ago compiled a book for students on the very lines he recommends. Perhaps we should not complain that he conceives the distinction between law and equity to inhere in the nature of things and to be beyond legislative reach (p. 19). For such views, and those with respect to the logical character of common-law pleading (p. 11) and the fixed and unchanging character of the common law as compared with the civil law (pp. 13-14), serve to prove to us that we are reading the book of a thoroughgoing common-law lawyer, and not the pronouncements of a (presumably) heterodox and impractical professor.

"Juridical Reform" deserves wide circulation and careful reading in and out of the profession.

ROSCOE POUND.

THE LEGAL OBLIGATIONS ARISING OUT OF TREATY RELATIONS BETWEEN CHINA AND OTHER STATES. By Min-Chien T. Z. Tyau. Shanghai: Commercial Press. 1917. pp. xxii, 304.

CHINA'S NEW CONSTITUTION AND INTERNATIONAL PROBLEMS. By Min-Chien T. Z. Tyau. Shanghai: Commercial Press. 1918. pp. xv, 286.

The reviewer is fortunate in being personally acquainted with the author of these two volumes and knows of the very important public service which Dr. Tyau is performing as the independently minded editor of the Peking daily *Leader*. The Chinese are attempting to develop in their country a true public opinion with regard to matters political and thus to lay a basis upon which the substance as well as the form of republican rule can be realized. In this movement Dr. Tyau is playing an important part. That, however, which gives especial value to the two volumes which he has published is that they are an addition to the very scanty juristic literature of China. Since the time of Confucius, some twenty-five hundred years ago, China has not lacked thoughtful treatises dealing with the art of Government as a branch of ethics, but studies by Chinese scholars in the fields of constitutional and international law have been very few in number. When one has mentioned Dr. Koo's "The Status of Aliens in China" the list is almost exhausted.

Of the two volumes by Dr. Tyau, much the more important is the one first listed. The study was prepared as a thesis for the degree of Doctor of Laws in the University of London and gives evidence of genuine scholarship. After a brief historical survey of China's relations with foreign powers, the topical method of considering the treaties themselves is adopted: agreements and conventions of a political character being discussed in Part I; treaties of an economic character in Part II; and treaties of a general character in Part III. The subtitles in Part I are: rights of intercourse, rights of representation, consular jurisdiction and extraterritoriality, concessions and settlements, leased areas, and right of preference. The subtitles in Part II are: rights of trade and residence, right to uniform tariff, cabotage, rights of navigation and inland waters, rights of trade and travel in the interior, rights of landholding, of railroad construction, mining exploitation, and loans. The treaties of a general character are discussed under the chapter headings: right of protection, religious toleration, reciprocity, most favored nation treatment, and treaty interpretation.

Space will permit only a general characterization of Dr. Tyau's work. It has been, upon the whole, well done. The arrangement is logical, original sources have been resorted to, and the conclusions of law are accurately drawn. The final impression which is left upon the reader's mind, and, as the reviewer can testify from personal experience, the correct one, is that the legal situation in China is an extraordinary complicated one. President Lowell has spoken of the Austrian-Hungarian Empire-Kingdom as a laboratory of political experiments. The same may be said of China with reference to her dealings with foreigners and their governments. As the writer has had occasion to say in a contribution to the *Far Eastern Review*: "To the student of international law and diplomacy China is one of the most interesting countries in the world. When a country is not only nominally sovereign but wholly autonomous in the management of its own domestic affairs, its international rights and responsibilities are easily determined by reference to the well-established principles of public law. But when, as in the case of China, we have a state which has permitted, or has been compelled to grant, the exercise within its borders of all kinds of extraterritorial privileges, when there exists within its limits political areas denominated 'Concessions,' 'Settlements,' 'Legation Quarters,' 'Treaty Ports,' 'Leased Territories,' 'War Zones,' 'Foreign Police Boxes,' 'Military Occupations' under the terms of secret military conventions,

and 'Spheres of Influence,' not to speak of a multitude of special arrangements with foreign Powers regarding commercial and industrial rights, railways and mines, loans and currency — when this is the situation we have a condition of affairs which provides a superabundance of material for discussions by the students of international jurisprudence."

Dr. Tyau's later volume, as its title indicates, deals primarily with the constitutional situation in China. It is by no means as important a contribution to political science as is his earlier work. In the main it is devoted to an analysis of the draft of a permanent constitution which the Chinese parliament discussed in 1916 and 1917, but upon which it did not come to a final agreement before it was for the second time dissolved by imperial mandate. And, it may be remarked, this instrument still remains unfinished, and China continues to be governed, avowedly at least, under the "Provisional Constitution" hurriedly drawn up in the early days of 1912. The portion of the volume dealing with international questions furnishes additional discussion of points covered in the earlier volume. The problems of treaty revision are specifically considered, and some attention is given to ameliorations of the international restrictions upon China's freedom of action, which Dr. Tyau hoped might be secured at the Paris Peace Conference — hopes that were doomed to disappointment. One statement may with confidence be made. If a League of Nations is established and takes its duties seriously it will find in China alone an abundance of material upon which to busy itself.

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THE LABOR LAW OF MARYLAND. By Malcolm H. Lauchheimer. Johns Hopkins University Studies in History and Political Science. Series XXXVII, No. 2. Baltimore: Johns Hopkins Press. pp. 163.

Mr. Lauchheimer's dissertation is a most timely and disinterested study in troubled waters. He has set out comprehensively and without the coloring of partisanship the labor law of a typical American State — typical, as he says, in the sense that it is neither among the most progressive nor the most backward. It is the law which governs the employment of the vast majority of American workers. It may, then, be reasonably supposed to set forth those principles of social justice for which we have heard our democracy eulogized in recent conferences, and to the support of which our voters have been earnestly summoned under the banner of "Americanism." The duty to examine it carefully is obvious.

Mr. Lauchheimer introduces his subject with a short review of the criminal statutes, from Edward III to Victoria, which sought to suppress or limit the workers' use of collective action. I think that he attaches too much importance to the fact of their repeal and the subsequent statutory legitimations of unionism. A legal attitude of five hundred years of fear and distrust of combination by labor is not eradicated by simple words of repeal. The repeal only changed the mode of its expression from formal criminal prosecutions to the use of the doctrine of implied malice in civil actions, and the consequent injunction and contempt proceedings. But from another point of view these statutes are important. They were the product of conditions and theories of the function of the state which the war has reproduced. The struggle to create governmental authority after the Wars of the Roses made all combinations within the state as jealously regarded as they were with us during the recent war, while our "mobilization of industry," like the Tudor experiment in state-directed production and trade, made combinations of labor seem peculiarly like preparations for rebellion. The Tudors, not being troubled with notions of *laissez*

faire or democracy, directed the force of the government at the act of combination; we leave that to private enterprise, and employ the police power only when the combination begins to function. But the importance of the legal attitude toward combination can only be appreciated and its continuance understood by turning to the civil rights and liabilities of the employer-employee relation. Mr. Lauchheimer sets these out clearly and concisely — perhaps too concisely, or at least too descriptively. For if one is of an inquiring turn of mind, the question must arise, How in the world did a people with senses of justice and humor come to make this arrangement law?

The explanation is in the two outstanding features of the nineteenth century, — the industrial revolution, and the gospel of individualism and the freedom of the will.¹ The vast material development due to the first of these made the all-absorbing legal conception of the century that of the property right. Everything was thought of in terms of property, — reputation, privacy, domestic relations,² and as new interests called for protection their success depended upon their ability to take on the protective coloring of property. The application of this theory to the claims of the worker was simple. His labor was property; the power to contract was property.³ But as it was in his labor and not his job that he had this valuable right, the immediate practicality of the theory was not apparent. It was only when he transformed his properties into a job that they had any value for him, but the right did not follow the transformation and he might have this new property taken away from him "for any reason or no reason." The law protected only the seeded ground; as soon as the crop had ripened, trespassing was encouraged in the name of freedom of trade. But it might be expected that even though the law did not make the job secure it would at least have made it safe. It might; but that would be to forget the great doctrine of free individual self-assertion. The law wanted the individual to be free to act as he chose; it was not going to cramp him with restrictions. If he was a bold spirit and wanted to work in dangerous surroundings, he should be permitted his thrill; and the fact that he knew of the danger was enough to raise the presumption that it was the breath of his nostrils. Likewise if his whim led him to work for starvation wages, or put his children in the factories, or to accept a method of payment which reduced him to a state of peonage, or to tolerate apparently innocuous but in reality grossly careless fellows in "his" shop, he might be incomprehensible but he must be kept free.⁴ And just as the employer respected his freedom, so he must respect the employer's freedom. The employer's desire to carry on business was also property which the law protected. The worker must not injure this property nor attempt to interfere with its owner's freedom in utilizing it as he chose.⁵

With the common law in this condition, the worker turned to trade unionism to escape what Lord Morley has called the "curse of industrialism," — insecurity. He gave up his whimsical freedom for the more substantial results of collective bargaining in wages and hours, while the sick and out-of-work bene-

¹ See Roscoe Pound, "The End of Law as Developed in Juristic Thought," 30 HARV. L. REV. 201.

² See, for instance, BOWEN'S CODE OF ACTIONABLE DEFAMATION, 275-278; also, Pollard v. Photographic Co., 40 Ch. Div. 345; Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 HARV. L. REV. 193; see also the cases on expulsions from social clubs, collected in Roscoe Pound, "Equitable Relief against Defamation," 29 HARV. L. REV. (640, 677-682).

³ For instance, Memo by Sir William Erle, appended to the REPORT OF THE ROYAL COMM. ON TRADE UNIONS IN 1869, p. lxxix. *Fraser v. People*, 141 Ill. 171, 181.

⁴ In this country the idea "ran behind all governments and all laws." See also *Lochner v. New York*, 198 U. S. 45; *Coppage v. Kansas*, 236 U. S. 1.

⁵ See *Regina v. Rowlands*, 2 Den. 364; *Regina v. Bunn*, 12 Cox, 316; *Regina v. Druiitt*, 10 Cox, 601; ERLE, LAW RELATING TO TRADE UNIONS, 74.

fits put a slight margin between him and the brink of absolute destitution. And, more intangible but no less important, he got a feeling of equality and self-respect which the free citizen who had touched his cap and taken what another free citizen chose to give him had never felt. But his only weapon was the strike, and this was certain to conflict with the doctrine of free individual self-assertion. Mr. Lauchheimer gives us the history of the conflict with complete lack of bias. It was a conflict of irreconcilable freedoms — the employer's freedom to carry on work and the employee's freedom to stop. The way out was found through the legal doctrine of constructive malice. A person might exercise his freedom for "lawful" ends even though it entailed injury to another, as in competition. He could not be permitted to do so, however, out of pure maliciousness. This is the doctrine of actual malice, and nothing could be clearer. From this it was only a short step to the conclusion that if the object of the action was not "lawful" it must be malicious — malice would be conclusively presumed from "unjustifiableness" — and the worker is back to his "rights" at common law.⁶ The refusal to see anything but individual property rights involved, the refusal, even after the legality of the union was admitted, to recognize and extend some sort of protection to the claims for which it stood, made the limits of the lawfulness which could justify a strike extremely narrow.⁷ Lord Lindley summed it up, "You cannot make a strike effective without doing more than is lawful."⁸ And more modern officers of the law would strike out the word "effective."

Of course, the resort to private war to secure one's interests is a primitive and wasteful process; but the mere suppression of it by force does not necessarily indicate a more civilized attitude. The real injustice and tyranny of the injunction lies in the fact that under the guise of law it forces the adjudication of the most far-reaching issues of the day by turning to a side issue where the interests of only one party are recognized, — the issue of property. If the common law, like the law administered by the War Labor Board, recognized the right to the recognition of the union, the right of the union to live and grow,⁹ the right to certain standards of living, to certain hours, to the test of reasonableness in factory rules and management, to a certain security in one's job, and if the law would enjoin employers who violated these rights, — then the injunction might in reality protect the interests of the consumer instead of acting to give a vested right to one class in its power over another.¹⁰

Mr. Lauchheimer's own reaction to the situation appears in the last chapter, *The State in Relation to Labor*. He sees the tendency of social pressure, law, and legislation to move in the direction of group contacts in industry, and feels that the law cannot stop short of forcing dealings between strong unions and strong employers' associations. Such things as workmen's compensation acts, minimum wage laws, factory acts, he sees as establishing a minimum for the protection of the conscientious employer or as simply using the power of the state to bargain for those workers who are not yet strong enough to protect themselves. But the movement is not to be toward paternalism or state capitalism, but toward a system of group *laissez faire*. We are to have strong, self-

⁶ Compare *Allen v. Flood*, 1898 A. C. 1, and *Quinn v. Leatham*, [1901] A. C. 495. Malice according to the findings of the jury existed in both cases, but the House of Lords held that motive was immaterial in the first case, where only individual action was considered, while it made the act unlawful when done by a combination in the second case. It is the influence of the old criminal statutes and centuries of distrust of collective action.

⁷ See a note in 31 HARV. L. REV. 482, collecting cases.

⁸ *Lyons v. Wilkins*, [1896] 1 Ch. 811, 820.

⁹ See *Boyer v. Western Union*, 124 Fed. 246.

¹⁰ See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, discussed in 31 HARV. L. REV. 648.

reliant groups which shall represent the various elements in production and shall compete with one another; and the state is to "step in" to see that they do not combine to exploit the consumer or carry their disputes to a costly extent. Perhaps it is idle to quarrel with supposed results in the theoretical end of doctrine; but as Mr. Lauchheimer drew his picture I was not impressed with force of the state's "stepping in." The state seemed to be in already, and between these burly groups to give very much the impression, mental attitude and all, of the Doormouse between the Mad Hatter and the March Hare. It must be a more active partner and play a more intelligent part, or it, too, will be dipped in the tea.

DEAN G. ACHESON.

WASHINGTON, D. C.

THE RELATION OF THE EXECUTIVE POWER TO LEGISLATION. By Henry Campbell Black. Princeton: Princeton University Press. 1919. pp. vii, 191.

After a cursory review of the formal law and actual practice of the governments of the world in respect to the relation of the executive power to legislation, Mr. Black proposes that the President of the United States present his recommendations to Congress by means of completely drafted bills which shall be received and considered in each house by a "Committee on Presidential Bills," with power to move a reference of any bill to "one of the standing committees to which it appropriately belongs," and to act as "guardian of the bill (save for its discussion in the standing committee) until its final passage or defeat." The adoption of this proposal, he says, "would put us back upon a basis of honesty," and "enable us to play the game openly and aboveboard, with candor and self-respect, without disguise or circumlocution, like men who love the splendor of noon and shun the miasmatic mists of twilight."

The author's recital of prevailing law and custom will be welcomed by those who lack access to the secondary works on which it is largely based. It is an undoubted convenience to have familiar knowledge on a special subject winnowed from more comprehensive works on government and set forth in a separate volume. Mr. Black's appreciation of the researches and judgments of his forerunners is acknowledged by frequent and often extended quotations from the works of Bryce, Lowell, Beard, Ford, Freund, Holcombe, Taft, Wilson, and others. The descriptive portions of the volume are unusually free from any intrusions of personal bias. Even in expounding his constructive proposal of legislative committees on presidential bills, Mr. Black does not charge our recent presidents with usurpation. He does, it is true, imply that in their participation in law-making they have not been "content to play the part for which the Constitution has cast them" and that they might have shown "more self-restraint and greater respect for the fundamental principles of constitutional government." But, on the other hand, he points out that his proposal requires no constitutional change, since "it will not be a question of bringing within the Constitution something which it does not now permit," but "merely acknowledging the existence of something which it does not forbid."

Mr. Black's formalism revolts at what he calls our "secret and subterranean and underhand and unacknowledged methods" — methods which, as he points out earlier, "are familiar to every one who reads the newspapers." He yearns to legitimize custom by adoption in enacted law. He plainly feels that Topsy's genetic process should not be imitated by institutions of government. Unfortunately for him, history is against him. Topsy's biological contribution would have been more accurate had it been applied to government rather than to herself. We should be kept quite busy if we insisted on making our formal law keep pace with our practice. First and foremost we should pass

amendments to the national and state constitutions authorizing the judiciary to pass on the constitutionality of acts of co-ordinate legislatures. It might be necessary to resubmit the Fourteenth Amendment to state legislatures whose legitimacy was not open to question. Attention should then be given to "senatorial courtesy," to presidential nominations and national party platforms, to tennis and kitchen cabinets and unofficial diplomatic agents, to presidential interference in industrial disputes, and to a number of other phenomena not mentioned in the Constitution and not foreseen by The Fathers. As soon as we were up to date, something might change and then we should have to begin again.

Mr. Black's philosophy is not rare. It finds its counterpart in a familiar and widely held attitude toward the common law. Nevertheless changes continue to make their way between the cracks which authenticated records leave open. On the whole it seems more useful to perceive the process and to guide or control it than to kick rhetorically against the pricks.

THOMAS REED POWELL.

COLUMBIA UNIVERSITY.

ON JURISPRUDENCE AND THE CONFLICT OF LAWS. By Frederic Harrison. With annotations by A. H. F. Lefroy. Oxford: Clarendon Press. 1919. pp. 179.

This is a reprint, without material change, of two lectures given by Frederic Harrison in 1878 as Professor to the Inns of Court: followed by annotations of Professor Lefroy, consisting chiefly of extracts from English authors since 1879, and a translation from Bluntschli. The lectures are simple; one must remember that they are forty years old, and that legal education in England was then at its lowest ebb. The last two, especially, are elementary and sketchy; they consist of remarks concerning the nature and history of the Conflict of Laws. Professor Lefroy apparently knows too much of that subject to think them worth annotating.

The two lectures on Austin's theory of Sovereignty and of Law are on the other hand acute and valuable. His ingenious explanation of Austin's theory—that it is false, of course, in general, but true to a lawyer's limited experience—should shock a follower of that apostle of exactly defined truth. "If the sovereign be really sovereign, it will be able to compel its own law courts to enforce its own laws. Therefore, *to the lawyer, and for purposes of law*, the sovereign is unlimited." Of Austin's definition of law he says: "This is only one way of looking at law. It purposely drops out of view other very important sides of law. And, it is obvious, there are some cases in which it is so exceedingly one-sided, and requires so much qualification and explanation, that it would be actively misleading if taken by itself. In fact, neither Austin's account of law, nor that of sovereignty, is to be taken as a *definition* strictly." Yet, it will be remembered, these "accounts" were carefully elaborated by Austin to delimit the use of terms he believed usually misapplied.

It is the lecture on The Historical Method in which the distinguished Positivist is most happy. His creed is thus stated: "For the lawyer the great interest always must be what is the law as it is. How it has become what it is, is a very useful inquiry. But this will become positively confusing if the subordinate inquiry is ever allowed to stand on equal terms with the main inquiry—the law as it is, as it is at any given time." So wrote the God of Law as it Is in 1879; and he added that "we have special disadvantages in using the historical method, in law, inasmuch as we have not got a symmetrical jurisprudence of any kind to control and direct it." And he foresaw impending the Romanization and codification of our law. In the forty years that have elapsed this historical method, in the hands of Thayer, of Maitland, and of Ames, has saved our law

from Romanization, has so clarified it as to make codification appear needless, has received the adhesion of a whole generation of English scholars, and has finished its work in America, to be succeeded by the present conscious effort to adapt the law, thus explained, to actual life. Harrison could not see that it is neither the past nor the immediate present, but the future, which is the true object of study; and that while the present, an absolute factor, throws little light on impending changes, the tangential factors of the past alone can enable one to predict the changes of the future. The chief object of education must be, to enable one to live and work in the future with continually better adaptation to the new conditions. Education, therefore, must enable one not merely to fix the point of present attainment, but to plot the curve of progress.

And so, despite Harrison's philosophical belittling of the Historical Method, his book, now an historical document, really throws light on the future by way of the past.

J. H. BEALE.

COUNTY ADMINISTRATION. By Chester C. Maxey. With an introduction by Charles A. Beard. New York: The Macmillan Company. 1919. pp. xxi, 203.

The title of this volume is apt to mislead the unwary. The book is not a study of county administration in general; it merely embodies the results of an inquiry made by the author into the county affairs of Delaware, a state which has only three counties in all. There are chapters on the existing county organization, on financial procedure, almshouses, highway administration, and so forth, with a statement of general conclusions at the end of the book.

Mr. Maxey's volume is the first of a series projected by the New York Bureau of Municipal Research with the particular object of releasing the study of actual government from "the bondage to legalistic tradition." Consequently it takes little account of laws, charters, or official reports, and devotes the bulk of its attention to data gathered from visits to county institutions and other "first-hand" information.

A study of this sort has its merits; also its limitations. Locally it may have considerable interest and value, but beyond the borders of Delaware it will not carry a great deal of enlightenment. We shall need a good many of these microscopic studies before we can safely generalize concerning the three thousand counties of the United States.

W. B. MUNRO.

PRINCIPES DE DROIT PUBLIC. By Maurice Hauriou. Second Edition. Paris: Sirey. 1916. pp. xxxii, 828.

This is a treatise on the theory of the state. For about a quarter of a century French universities have offered examinations in this subject to students seeking degrees in political science. This is one of the books resulting from this rather artificial demand. As it is not prepared for the purpose of teaching international law, constitutional law, or administrative law, or even for the purpose of describing the French governmental machinery, it might be supposed to contain little matter of interest to lawyers, either American or French. Yet this would be a wrong conclusion. The author, professor of administrative law and dean of the law faculty in the University of Toulouse, has not been able to dissociate himself wholly from the lawyer's point of view. The phraseology is, to be sure, metaphysical, and the thought carries one back to those schoolmen who in the Middle Ages ornamented theology. On almost every page one finds allusions to realism, nominalism, personification, individualism, subjective personality, objective individuality, and similar words and concepts.

More than a century ago Hallam thought that the discussion of realism and nominalism had become obsolete in theology; but he lived to learn his mistake.¹ In law, realism and nominalism have long been lively features of American discussion regarding business corporations. Now, as this volume shows, realism and nominalism are lively factors in European discussion regarding the nature of government; and not for the first time.² If Americans ever become interested in the respective merits of absolutism and syndicalism, there are parts of this volume which will be read with great interest, for the author, an orthodox believer in constitutional government, carefully maps out a middle path, using, however, the metaphysical vocabulary to which a lawyer objects save in cases of great emergency. As no such emergency has yet arisen in the United States, it seems enough to point out a number of passages of present interest.

In the introduction it is explained that there cannot be a state in the modern sense of the word unless governing power is separated from the ownership of property, and that hence the modern state has arisen since the termination of the feudal system. Thus it happened that the modern state arose after there already existed civilization and political organization, so that the modern state can be considered as the result of conscious reflection and will. It is also pointed out that one of the features of the modern state is the centralization of law, that centralization brings written law, that written law is more easily changed than customary law, that private property is regulated by customary law rather than by written law, that governmental power is more likely to be the subject of written law, that private property is more stable than governmental power, and that the ease of changing written law may result in too rapid governmental changes. By way of example, it is said that the French Revolution of 1789 by substituting written governmental law for customary law placed France in a position where revolutions would be easy, save that revolution is prevented to some extent by a high standard of political morality and to some extent by those difficulties in changing a written constitution which cause such a constitution to have an artificial resemblance to institutions created by custom.

Surely those points, found in the first dozen pages of the introduction, show that the book has interest even for an American lawyer. Yet the same reader would omit the next three hundred pages as too remote from his present modes of thought. There are in those pages, to be sure, frequent passages deserving attention, but they are almost inextricably interwoven with metaphysical discussions, appropriate and indeed requisite in a book designed to prepare candidates for examination.

After completing his treatment of objectivity, subjectivity, and personification, the author comes to considerations of a more practical nature, and here he thoroughly merits reading. Thus he develops the need of retaining local institutions and the danger that a centralized government will overthrow those institutions and create an overwhelming administrative machine (pp. 306-321, 588-614), and he discusses the relation between individual liberty and social necessity (pp. 380-392, 430-438, 491-545), the separation of civil and military power (pp. 441-455), and the importance of having a written constitution and of conceding judicial power to disregard unconstitutional acts of the executive and legislative departments (pp. 36-38, 642-646, 686-691). He gives a searching criticism of syndicalism (pp. 735-762), including a discussion of combinations of public officials (pp. 739-750), and concludes with an exposition of some social diseases and crises and possible remedies (pp. 773-798).

The two predominant thoughts characterizing the volume are a belief in the practical wisdom of conservatism (p. 41), and a recognition that as regards all

¹ HALLAM'S *MIDDLE AGES*, Chap. IX, Pt. II.

² Maitland's introduction to *GIERKE'S POLITICAL THEORIES OF THE MIDDLE AGES*.

governmental power there is need of an equilibrium (pp. xiv-xvi, 27-40, and *passim*), effected by checks and balances, to use the phrase so often applied to the system developed in the Constitution of the United States.

E. W.

BOOKS RECEIVED

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- THE NEGOTIABLE INSTRUMENTS LAW. By Joseph Doddridge Brannan. Third edition. Cincinnati: W. H. Anderson Company.
- THE ANNOTATED BLUE SKY LAWS OF THE UNITED STATES. By John M. Elliott. Cincinnati: W. H. Anderson Company.
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- THE LIFE OF JOHN MARSHALL. By Albert L. Beveridge. Three volumes. Boston: Houghton Mifflin Company.
- RICHARD COBDEN, THE INTERNATIONAL MAN. By J. A. Hobson. New York: Henry Holt and Company.
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DEPENDENT RELATIVE REVOCATION¹

SOME years ago I was accustomed to devote four lectures in the Harvard Law School to dependent relative revocation. Once, near the close of the third hour, a student from the rear of a large class asked, "Has this subject anything to do with dependent relatives?" It was some moments before I could regain the men's attention. I have since been wondering whether the joke was on the student, on me, or on Mr. Powell, who in 1788 gave currency to the phrase. It is the object of this paper to place the blame on Mr. Powell.

The expression is found in the books as early as 1788 in the first edition of "Powell on Devises," where the author says (p. 637):

"This principle, that the effect of the obliteration, cancelling, etc., depends upon the mind with which it is done, having been pursued in all its consequences, has introduced another distinction not yet taken notice of; namely, *that* of dependent relative revocations, in which the act of cancelling, etc., being done with reference to another act meant to be an effectual disposition, will be a revocation or not, according as the relative act is efficacious or not."

The expression was repeated in 1832 by Williams,² and later by Theobald,³ by Jarman's English editors,⁴ by Woerner,⁵ by Page,⁶ and in many cases.⁷

¹ I am indebted to my colleague, Prof. Edward H. Warren, for valuable suggestions in regard to this analysis.

² 1 WILLIAMS, EXECUTORS, 1 ed., 69.

³ THEOBALD, WILLS, 2 ed., 37.

⁴ 1 JARMAN, WILLS, 5 ed., 119. The idea, though without this expression of it, had appeared in the first edition. 1 JARMAN, WILLS, 1 ed., 121, 122 (1843).

⁵ 1 WOERNER, AM. LAW ADM., 1 ed., 90, 96; 2 ed., 94, 100.

⁶ PAGE, WILLS, §§ 263, 275-277.

⁷ Dickinson v. Swatman, 30 L. J. (P. M. & A.) 84 (1860); Goods of M'Cabe, L. R. 3 P. & D. 94 (1873); Goods of Horsford, L. R. 3 P. & D. 211 (1874).

Under this title the text writers have grouped and considered a number of cases more or less closely related. For instance: the testator destroys his will intending to make a new one, but does not, or the new document is invalid when executed; he tears up a revoking will under the impression that he thereby revives his first testament; he crosses out a portion of his will and interlines new matter which, being unsigned and unwitnessed, is of course of no effect; he makes a new will inconsistent with the old, which contains, or does not contain, a revoking clause, and the new will fails from defective execution or from inability of the devisee to take. [In some of the books⁸ there is also included the case of a second revoking will being set aside because the ground upon which the testator proceeded and which appeared in the will itself has turned out to be false. By other writers⁹ this class has been separately treated.

It is believed that this classification is loose and misleading, that the term "dependent relative revocation," while not entirely devoid of inherent sense, tends toward the treatment of different subjects under a single principle, and should be abandoned for more specific and discriminating nomenclature. Revocations ordinarily dealt with thereunder are, properly, either conditional revocations or revocations under a mistake. These two distinct classes may each in turn be considered from the point of view of (*a*) revocation by act to the document; (*b*) revocation in writing. To the consideration of conditional revocation by act to the document we now address ourselves.

I

CONDITIONAL REVOCATION BY ACT TO THE DOCUMENT

Let it be supposed that the testator tears up his will intending the act to be a revocation only upon the happening of a condition. The event anticipated never takes place. Is the will revoked? It is common knowledge that there is no revocation by act unless there is *animus revocandi*. If the testator in cleaning his desk destroys his will by accident, or if he "were to throw ink upon his

⁸ 1 WILLIAMS, EXECUTORS, 10 ed., 112, 113, 127, 128; 1 WOERNER, AM. LAW ADM., 2 ed., §§ 48, 51; PAGE, WILLS, §§ 275-277.

⁹ 1 JARMAN, WILLS, 5 ed., 147; THEOBALD, WILLS, 7 ed., 746.

will instead of sand," the testament is not affected.¹⁰ Parol testimony of the testator's intent is admissible, for one is not construing a writing, not altering the meaning of a document, but setting in its proper light an act.¹¹ It would have been a conceivable position for the law to take if it had said that, provided the act was done with *some* intent to revoke, the will would be held annulled, in spite of the testator's desire that the revocation should not be complete until some condition had been performed. If one is dealing with the state of mind of a dead man, it is dangerous to attempt to be too nice as to its condition; and therefore, as a rule of practice, any sort of intent to revoke shall be taken to be absolute. Though that state of the law is conceivable, it is more natural that many of the cases should purport to give full effect to the exact state of the deceased's *animus*. If this is the proper attitude of the law, as may well be, the courts should face the situation frankly, and seek in every case the exact mental condition of the testator at the time of the act.

The English decisions are, however, not wholly satisfactory. Conditional revocation by act is commonly represented in the courts by the case in which the testator tears up his will, intending that act to annul it only when he completes another will; where, in short, it is clear that the deceased did not intend a period of intestacy. Indeed, this is the only example of such a revocation that has been found. One of the earliest cases seems to be *Burtonshaw v. Gilbert* (1774).¹² The plaintiff claimed in trespass as heir and the defendant under a will of 1759. This will the testator in 1761

¹⁰ 1 WILLIAMS, EXECUTORS, 10 ed., 110; 1 WOERNER, AM. LAW ADM., 2 ed., § 48.

¹¹ 3 WIGMORE, EVIDENCE, § 1782.

It is no part of this article to discuss at length the question of the admission of declarations of the testator as to the intent with which the act was done. Declarations at the time of the act are admissible. 3 WIGMORE, EVIDENCE, § 1782. As to subsequent declarations, see 3 WIGMORE, EVIDENCE, §§ 1736, 1737; 26 HARV. L. REV. 159; 10 AM. & ENG. ANN. CAS. 535, note; 24 L. R. A. (N. S.) 180. In favor of their admission: *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976 (1914); *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487 (1913); *Managle v. Parker*, 75 N. H. 139, 71 Atl. 637 (1908); *In re Shelton's Will*, 143 N. C. 218, 55 S. E. 705 (1906); *Barfield v. Carr*, 169 N. C. 574, 86 S. E. 498 (1915). Against their admission: *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. Rep. 474 (1901); *In re Colbert's Estate*, 31 Mont. 461, 78 Pac. 971 (1904); *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442 (1901).

¹² Cowper, 49. See the earlier decisions of *Hyde v. Hyde*, 1 Eq. Cas. Abr. 409, and *Hide v. Mason*, 2 Eq. Cas. Abr. 776 (1734). The latter case seems to have turned on the intent of the testator.

destroyed, and at the same time made a will containing a revocation clause in which the devises varied from those in the former. Later the testator called for the second paper and sent for an attorney to make a third will. He died, however, before executing such a document, and the will of 1761 was found cancelled among his papers. Lord Mansfield found for the heir. The court dealt mainly with the question of the revival of the first will by the cancellation of the second. Lord Mansfield did not discuss the question of conditional revocation of the second will, though he said that the testator's reason for annulling the second was the making of a third. The court assumed without discussion an absolute revocation of the will of 1761. In *Winsor v. Pratt* (1821)¹³ the court of Common Pleas found no revocation where the testator cancelled parts of his will and inserted interlineations, intending to complete a copy of the amended document, which was drafted but never executed. The judges said it was entirely a question of the actual intent of the deceased, but found that intent on this evidence to be conditional. Certainly, on principle, no presumption of conditional revocation, can arise from the mere fact that at the time of cancelling the first will a second is intended. Yet *Winsor v. Pratt* may perhaps be supported on there being sufficient evidence of tentative cancellation only. But in 1828 *Goods of Appelbee*¹⁴ struck a discordant note. The testator caused the signature to his will to be struck through and made an interlineation, stating his intention to execute a copy of the will thus amended. This was never done. The court said,

"The signature of 'A' being struck through, is to be regarded as preparatory to the deceased making a new will — which he did not do; this must be considered, then, as only a conditional cancellation, and, consequently, not a revocation."

The evidence of condition is almost non-existent. There is considerably less of it than in *Winsor v. Pratt*, for in *Goods of Appelbee* the testator did much more to the will itself than in the earlier case. In *Winsor v. Pratt* the names of the witnesses and the signature of the testator remained intact; only a few clauses were amended. But in the case in the ecclesiastical court the acts to the document were of a distinctly definitive character. It is one thing to disre-

¹³ 5 J. B. Moore, 484.

¹⁴ 1 Hagg. Eccl. 143.

gard completely the conditional character of revocation on grounds of practical convenience. It is an entirely different matter to adopt a doctrine which is based on actual intent, and then to lay down a conclusive presumption of condition where none may have existed and where there is certainly no evidence thereof. *Goods of De Bode*¹⁵ (1847) carried this error still further in holding conditional a revocation which was proved merely by showing that the testamentary documents were found cancelled among the papers of the deceased and that the deceased at various times stated his intention of making a new will which was not found. It should be observed that both these cases were non-contentious, and decided on consent of all parties interested. In *Goods of Cockayne*¹⁶ (1856) the will was held not revoked, though mutilated. The decision is sound enough on the evidence of conditional intention. And the same may perhaps be said of *Goods of Eccles*¹⁷ (1862). In 1863 Sir C. Cresswell¹⁸ in effect overruled *Goods of De Bode*. Finally in a litigated case in 1905 Sir Gorell Barnes¹⁹ left it to the jury to say whether the intent of the testator was to revoke absolutely, irrespective of whether a new will was made or not, or whether the revocation was conditional on the making of a new will that was never executed. This is precisely the proper way to deal with the question. And although it is only the decision of a single judge, the ruling must be given greater weight than the earlier *ex parte* decisions.

The law in the United States places the whole doctrine of revocation with a new will in view upon the correct principle. The actual intent of the testator is to be sought in each case.²⁰

¹⁵ 5 Notes of Cases, 189.

¹⁶ *Dea. & Swa.* 175. See *Hyde v. Hyde*, 1 Eq. Abr. 409; *Williams v. Tyley*, Johns. V. C. 530 (1858); *Elms v. Elms*, 1 Swa. & Tr. 155 (1858); *Doe v. Perkes*, 3 B. & Ald. 489 (1820).

¹⁷ 2 Swa. & Tr. 600.

¹⁸ *Goods of Mitcheson*, 32 L. J. P. M. (N. S.) 202; and see *Goods of Parr*, 6 Jur. (N. S.) 56 (1859).

¹⁹ In *Dixon v. The Solicitor to the Treasury*, [1905] P. 42. See *Goods of Irvine*, 53 Irish L. T. 144 (1919).

²⁰ *Estate of Olmsted*, 122 Cal. 224, 54 Pac. 745 (1898); *McIntyre v. McIntyre*, 120 Ga. 67, 71, 47 S. E. 50 (1904) (*semble*); *Sanders v. Babbitt*, 106 Ky. 646, 51 S. W. 163 (1899); *Semmes v. Semmes*, 7 H. & J. (Md.) 388 (1826); *In re Frothingham's Case*, 76 N. J. Eq. 331, 74 Atl. 471 (1909); *Johnson v. Brailsford*, 2 Nott & McC. (S. C.) 272 (1820). See *Thomas v. Thomas*, 129 Iowa, 159, 105 N. W. 403 (1905); *Youse v. Forman*, 5 Bush (Ky.), 337 (1869); *Townshend v. Howard*, 86 Me. 285, 29 Atl. 1077 (1894);

II

REVOCATION BY ACT TO THE DOCUMENT UNDER A MISTAKE

If the testator cancels his will by act under the impression that he has made another valid testamentary disposition, it is evident that a revocation has actually occurred. If the court probates the will nevertheless, it must be on the ground that it is setting aside a completed act. Just as title passes to the subject matter of a sale induced by fraud or mistake,²¹ so here a legal transaction has taken place and can only be affected through the equitable jurisdiction of the court. The case differs essentially from the destruction by the testator of his will thinking it to be another document, for here no intent to revoke exists; while in the case first supposed there is no question but that the testator intends to revoke his will. He is, however, induced to do so by a misapprehension of law or of fact. It is entirely within the power of the Probate Court to refuse to set aside the revocation. There is no jurisdiction in equity to set aside a will for mistake.²² Authority for striking words out of a will for error is almost non-existent in the United States.²³ And in England until recently mistake was not a ground for omitting words in the Probate Court.²⁴ This jurisdiction, however, has been frequently exercised there of late years.²⁵ Yet in no case has this been done where the mistake was as to the inducement to make the will, or a bequest therein, as distinct from the *factum*, the existence of words in the will.

Safe Deposit & Trust Co. v. Thom, 117 Md. 154, 166-169, 83 Atl. 45 (1912); Banks v. Banks, 65 Mo. 432 (1877); *In re Raisbeck*, 52 Misc. 279, 102 N. Y. Supp. 967 (1906).

²¹ Cox v. Prentice, 3 M. & S. 344 (1815).

²² 26 HARV. L. REV. 212, 214.

²³ But see O'Connell v. Dow, 182 Mass. 541, 544, 66 N. E. 788 (1903); Waite v. Frisbee, 45 Minn. 361, 47 N. W. 1069 (1891); Bradford v. Blossom, 207 Mo. 177, 105 S. W. 289 (1907); Sherwood v. Sherwood, 45 Wis. 357 (1878). Compare Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499 (1904); Kennedy's Estate, 159 Mich. 548, 124 N. W. 516 (1910); Nelson v. McDonald, 61 Hun (N. Y.), 406, 16 N. Y. Supp. 273 (1891); Alter's Appeal, 67 Pa. 341 (1871); Gifford v. Dyer, 2 R. I. 99 (1852).

²⁴ Stanley v. Stanley, 2 J. & H. 491 (1862); SUGDEN, LAW OF PROPERTY, 196, 197.

²⁵ Goods of Duane, 2 Swa. & Tr. 590 (1862); Goods of Oswald, L. R. 3 P. & D. 162; Morrell v. Morrell, L. R. 7 P. D. 68 (1882); Goods of Gordon, [1892] P. 228; Goods of Moore, [1892] P. 378; Brisco v. Baillie Hamilton, [1902] P. 234; Vaughan v. Clerk, 87 L. T. (N. S.) 144 (1902). And see Rhodes v. Rhodes, 7 A. C. 192, 198 (1882); Goods of Hunt, L. R. 3 P. & D. 250; *In re Meyer's Estate*, [1908] P. 353.

Nevertheless in the case of revocation by act to the document both English and American courts have undertaken to relieve in cases of mistake. Have they done so on correct principles? If the revocation has actually taken place, and it is a question of setting it aside on equitable grounds assumed by the Probate Court, it would clearly not be equitable to restore the revoked will, if the testator, had he been fully informed in the premises, would have preferred the revocation to stand.

One of the earliest cases, and undoubtedly the most celebrated case of dependent relative revocation, is *Onions v. Tyrer* (1717).²⁶ Tyrer made a will of realty duly executed. He afterwards made another will, containing a clause of revocation, of the same land to new trustees but to the same uses. This will was witnessed by three witnesses, who signed out of the presence of the testator. The testator's wife under his direction destroyed the first will. Lord Cowper held that, though the second will was sufficiently attested under section 6 of the Statute of Frauds to be good as a revocation had the clause of revocation stood alone, the written revocation could not be effective when coupled with a devise invalid for want of execution.²⁷ The Lord Chancellor also resolved, speaking of the act of the testator's wife,

"in case it had been a good cancelling of the will at law, it ought to be relieved against, and the will set up again in equity, under the head of accident."

The first resolution will be discussed later. As to the latter, the court determined that it would take jurisdiction of mistake in revocation. This it might well have refused to do. But, having done so, the result is apparently correct. The two wills were so much alike that the testator, had he been informed of the true situation,

²⁶ 1 P. Wms. 343, 2 Vern. 741.

²⁷ In the report in 2 Vern. 742, the Lord Chancellor is quoted as follows: "that would not amount to a revocation, it being intended to operate as a will, and not otherwise as an instrument of revocation." The case of *Eggleston v. Speke*, 3 Mod. 258 (1689), had reached the same conclusion where the second will contained no revoking clause. And see *Ex parte Chester*, 7 Ves. Jr. 348 (1803). The question could not arise to-day under the Wills Act, 7 WM. IV. & 1 VICT. c. 26, § 20, in England, or under our statutes, which require, unlike STATUTE OF FRAUDS, § 6, that a revoking instrument must be executed in the same manner as a will or a codicil. See THEOBALD, WILLS, 7 ed., 747.

would have preferred the first will to an intestacy. Therefore the court properly refused to allow the revocation to stand.²⁸

In general, the later cases on revocation by act under a mistake fall into two classes. First, where the testator tears up his will thinking that he has made a second valid testamentary disposition, but in fact the second disposition is invalid for some reason, such as lack of attestation. Second, where the testator destroys a second will which revoked a prior will, thinking that he thereby revives the first.

*Locke v. James*²⁹ (1843) is a leading case of the former type. The testator, by will duly witnessed, devised realty to his son in fee charged with the payment of an annuity of six hundred pounds. The testator thereafter erased the word "six" in the gift of the annuity and wrote over it "two." Baron Parke, in holding that the original disposition was not affected, said:

²⁸ The case suggests two points of interest. First, equity is here relieving for mistake of law. The leading English case which decided that money paid under mistake of law could not be recovered is *Bilbie v. Lumley*, 2 East, 469 (1802). Lord Ellenborough, C. J., asked the plaintiff's counsel "whether he could state any cause where if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law?" Counsel made no answer, and the court accordingly found for the defendant. Yet *Onions v. Tyrer* (1717) had decided that there could be relief in equity for mistake of law. In *Perrott v. Perrott*, 14 East, 423 (1811), a testatrix made by deed an appointment under a power exercisable by deed or will. She then made a will which she erroneously thought was an effectual appointment. She then cut off the seal of deed and delivered it to a friend to do as she pleased with it, stating that "*it had been a plaguing thing to her; that the purport of it was fully met in her will, and that her will provided for it.*" Lord Ellenborough, not very long after *Bilbie v. Lumley*, decided that whether the mistake be of fact or law it destroyed the *animus revocandi* which could be treated as lacking.

Secondly, there is a line of English cases which hold that where it clearly appears that the destruction of the will is believed by the testator to be the destruction of mere waste paper for the reason that he believes it invalid or revoked there is no *animus revocandi*. In other words, to have effective cancellation the testator must think "I am killing a live thing." *Clarkson v. Clarkson*, 31 L. J. P. (N. S.) 143 (1862); *Giles v. Warren*, L. R. 2 P. & D. 401 (1872); *Goods of Thornton*, 14 P. D. 82 (1899). And see *Beardsley v. Lacey*, 78 L. T. (N. S.) 25 (1897). In Pennsylvania, however, it has been held that if the will is torn under the belief that it is invalid there is nevertheless a revocation. *Emernecker's Estate*, 218 Pa. 369, 67 Atl. 701 (1907). Assuming that these English cases are sound, it is by no means clear that *Onions v. Tyrer* falls within this doctrine. It does not appear but that the testator thought his will in full force in spite of the revocation clause in the new will when he directed its destruction, and by revocation by act he may have meant to make assurance doubly sure.

²⁹ 11 M. & W. 901.

"What the testator in such a case is considered to have intended is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all." . . . "The gift of this legal interest has not been cancelled, for the erasure was made *sine animo cancellandi*."

Baron Parke seems to consider that mistake prevents intent to revoke; in short, the revocation is, in this class of case, always conditional. But this is contrary to many things in the law; for example, a sale or conveyance induced by fraud or mistake, where it is often conceded that there is an intent to pass title. If we are to probate the original bequest, it should be clear that the deceased would not have revoked except on the supposition that the new act was valid. The inquiry should always be: What would the testator have desired had he been informed of the true situation? And there is no objection to going fully into parol evidence to ascertain his attitude, for one is not varying a writing but an act. It would be interesting to know how Baron Parke would have dealt with a similar substitution of a gift of £1 for a gift of £10,000. Yet this hard and fast rule of *Locke v. James* seems to be followed in England,³⁰ although in some cases³¹ the court purports to go into the intent of the testator; and in others³² the re-

³⁰ *Kirke v. Kirke*, 4 Russ. 435 (1828); *Short v. Smith*, 4 East, 418 (1803); *Sutton v. Sutton*, Cowp. 812 (1778); *Brooke v. Kent*, 3 Moo. P. C. 334 (1840); *Soar v. Dolman*, 3 Curt. (Eccl.) 121 (1842); *Simmons v. Rudall*, 1 Sim. (N. S.) 115 (1850); *Goods of McCabe*, L. R. 3 P. & D. 94 (1873); *Dancer v. Crabb*, L. R. 3 P. & D. 98 (1873); *Goods of Horsford*, L. R. 3 P. & D. 211 (1874); *Goods of Greenwood*, [1892] P. 7; *Estate of Irvin*, 25 T. L. R. 41 (1908); *Goods of Nelson*, L. R. 6 Eq. Ir. 569 (1872); *Miller v. Miller*, 34 CAN. L. J. 743 (1898). See *Stamford v. White*, 84 L. T. R. (N. S.) 269 (1901); *Drury's Will*, 22 N. B. 318 (1882).

³¹ *Brooke v. Kent*, 3 Moo. P. C. 334 (1840); *Goods of McCabe*, L. R. 3 P. & D. 94 (1873); *Stamford v. White*, 84 L. T. R. (N. S.) 269 (1901); *Drury's Will*, 22 N. B. 318 (1882).

³² *Goods of McCabe*, L. R. 3 P. & D. 94 (1873); *Estate of Irvin*, 25 T. L. R. 41 (1908). And see *Varnon v. Varnon*, 67 Mo. App. 534 (1896); *Gardner v. Gardiner*, 65 N. H. 230, 19 Atl. 651 (1889). In *Goods of Horsford*, L. R. 3 P. & D. 211 (1874), a curious and unjustifiable distinction was taken. There some of the amounts of the legacies and names of the legatees were obliterated by pasting over them slips of paper on which new amounts and names were written. The court held that it would infer dependent relative revocation as to the amounts but not as to the names. Accordingly the original will was probated as to the former but not as to the latter. Suppose the court had found underneath the latter slips the name of a near relative of the testator with whom he was on the most cordial terms. Suppose on one of the former "£1" was written, and underneath, "£10,000." For a later litigation over the same will, see *Ffinch v. Combe*, [1894] P. 191.

sult is right, for one may well imagine that the testator would have preferred the first will to an intestacy. In the United States *Locke v. James* has been followed in the few cases in which its principle is involved, and seems to be clearly law.³³

The second type of revocation by act under a mistake is illustrated by *Powell v. Powell*.³⁴ By his first will the testator left all his property to his grandson, and by his second, which contained a revoking clause, he left it all to his nephew. He later expressed his anxiety in regard to the second and tore it up, stating that he wished the earlier document to be his will. The court probated the second will. While the judge talked about the *animus revocandi* having only a conditional existence, and hence being lacking, he also justified the result as based on the clear intent of the testator. Though this is of course the proper inquiry in every case, it is submitted that an incorrect result was reached. There was some evidence of the testator's not caring for his nephew; and so far as the facts appeared the grandson would have profited by an intestacy. Therefore it would seem that the testator would have preferred no will to the second, which he destroyed. The rule of intent finds some support in *Dickinson v. Swatman*,³⁵ and in *Cossey v. Cossey*,³⁶ where the probate of the destroyed will probably more nearly effectuated the wishes of the testator than an intestacy, though this is not entirely clear.

³³ *Wolf v. Bollinger*, 62 Ill. 368 (1872); *In re Thompson*, 116 Me. 473, 102 Atl. 303, 306 (1917) (*semble*); *In re Penniman*, 20 Minn. 245 (1873); *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104 (1899); *Jackson v. Holloway*, 7 Johns. (N. S.) 394 (1811); *Varnon v. Varnon*, 67 Mo. App. 534 (1896); *Wilbourn v. Shell*, 59 Miss. 205 (1881); *Pringle v. M'Pherson*, 2 Brev. (S. C.) 279 (1809); *Stover v. Kendall*, 1 Coldwell (Tenn.) 557 (1860); *In re Knapen's Will*, 75 Vt. 146, 53 Atl. 1003 (1902). But in *Smith v. Runkle*, 97 Atl. (N. J.) 296 (1915), *aff'd* in 86 N. J. Eq. 257, 98 Atl. 1086 (1916), the judge of the Orphans' Court put the question on the correct basis, that of intention of the testator. In *Strong's Appeal*, 79 Conn. 123, 63 Atl. 1089 (1906), the testatrix by will exercised a power of appointment to her father for life, to her mother for life, to her sister for life, remainder in fee to her brother. Her father and mother died, her sister's circumstances improved. She said she would exercise the power of appointment for her brother alone. At her death her will was discovered torn lengthwise and at the top of the first page was found written "Superseded by a written one." With this will was an unsigned draft exercising the power of appointment in favor of the brother. If the first will was revoked, the property would go to persons in whom she was not interested. The court held that there was no revocation. The result is clearly sound, but there was of course a revocation, which should have been set aside for mistake.

³⁴ L. R. 1 P. & D. 209 (1866).

³⁵ 30 L. J. (P. M. & A.) 84 (1860).

³⁶ 82 L. T. R. (N. S.) 203, 16 T. L. R. 133, 64 J. P. 89, 69 L. J. P. (N. S.) 17 (1899).

A case somewhat difficult of classification may arise in this fashion:³⁷ The testator destroys his will, intending the act to be a revocation only when he makes another. He makes a new will thinking it valid; but it is not, for want of attestation. Is this a conditional revocation, or a revocation under a mistake? The answer must be found in the state of mind of the deceased. When a will is destroyed under the impression that there has been a second testamentary disposition, it is clear that the act is a revocation under a mistake. The testator does not say to himself, "This is a revocation *if* the second disposition is valid," for he assumes that it is. He revokes *because* something has happened; a legal transaction has taken place. In the first case supposed, however, it is submitted that the testator says to himself in fact at the time of the act, "This is a revocation if I make a later *valid* will," and not "when I draw up a particular document which I now have photographed on my mind."³⁸ Therefore, if the second document fails for want of attestation, there is no revocation.

A puzzling case, which oddly has not frequently arisen, may occur when after the testator's death a valid will is found in his possession torn, or indeed not found at all though known to have been executed and in his keeping; and a document purporting to be a later will but invalid for want of proper attestation is discovered among his papers. Here, obviously, a proper classification requires some knowledge of the order of events. If the tearing or destruction came after the second paper, it is a revocation under a mistake; if before, it is either an absolute revocation or a conditional revocation. It is submitted that no presumption as to the order of events can arise, and the revocation must be held effectual.³⁹ This situation must, however, be sharply distinguished from cases where the will is found with a partial cancellation and an interlineation over such mark.⁴⁰ It is fair to assume, in the absence of evidence, that

³⁷ The facts are suggested by *In re Thompson*, 116 Me. 473, 102 Atl. 303 (1917). Compare cases of failure of executory devise or bequest after the death of the testator. *Jackson v. Noble*, 2 Keen, 590 (1838); *Doe v. Eyre*, 5 C. B. 713 (1848); *Robinson v. Wood*, 27 L. J. Ch. (N. S.) 726 (1858); *Hurst v. Hurst*, 21 Ch. D. 278, 284-286, 290, 293, 294 (1882).

³⁸ Of course, if clear proof of the actual state of mind of the testator is forthcoming, that should control. The supposition in the text should only be made in the absence of evidence to the contrary.

³⁹ *Drury's Will*, 22 N. B. 318 (1882).

⁴⁰ See cases in note 33.

both these acts were part of the same transaction. This, then, is a case of revocation by mistake. Furthermore, here the chronological order of the acts is immaterial, provided they were performed on one occasion.

III

CONDITIONAL REVOCATION BY SUBSEQUENT INSTRUMENT

A revocation in writing, as a will in writing, may be conditional on a subsequent event provided the condition is clearly stated in the revoking instrument. This principle is recognized by statute in a few states,⁴¹ and in England and in Pennsylvania.⁴² But everywhere, if a condition appears in a will, it will be given effect,⁴³ and, if the condition is precedent and fails to occur, the will will not be probated.⁴⁴ There is no distinction in principle between a conditional will and a conditional revocation. If the condition is precedent and fails to happen, the revocation will not take effect.⁴⁵

IV

REVOCATION BY SUBSEQUENT INSTRUMENT UNDER A MISTAKE

A will cannot be set aside for mistake in either the United States or in England where the testator knew and approved its contents.⁴⁶ By the same token a revocation absolute on its face, the words of which the testator knows and approves, will not be set aside because the reasons which induced it are found to be based on false assumptions of fact or law. The testator is dead, and it is too dangerous to inquire what motives induced his action. This

⁴¹ CALIFORNIA, CIVIL CODE, § 1304; IDAHO, REV. CODE (1908), § 5741; NORTH DAKOTA, COMP. LAWS (1913), § 5672; OKLAHOMA, REV. LAWS (1910), § 8369; SOUTH DAKOTA, COMP. LAWS (1913), § 1028. UTAH, COMP. LAWS (1907), § 2758. See GEORGIA, ANNOT. CODE, § 3920.

⁴² *Goods of Hugo*, L. R. 2 P. D. 73 (1877); *Hamilton's Estate*, 74 Pa. 69 (1873); *Bradish v. McClellan*, 100 Pa. 607 (1882). The case of *Dougherty v. Holscheider*, 40 Tex. Civ. App. 31, 88 S. W. 1113 (1905), seems erroneous. See *Goods of Hugo*, L. R. 2 P. D. 73 (1877). Compare *Goods of Irvine*, 53 Irish Law Times, 144 (1919).

⁴³ 1 WOERNER, AM. LAW ADM., 2 ed., § 36; 1 WILLIAMS, EXECUTORS, 10 ed., 134 *et seq.* But the condition must appear in the will. *Sewell v. Slingluff*, 57 Md. 537 (1881).

⁴⁴ *Eaton v. Brown*, 193 U. S. 411, 24 Sup. Ct. Rep. 487 (1903); 1 WILLIAMS, EXECUTORS, 10 ed., 134-137.

⁴⁵ *Goods of Hugo*, *supra*. But see *Dougherty v. Holscheider*, *supra*.

⁴⁶ *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109 (1866); *Estate of Benton*, 131 Cal. 472, 63 Pac. 775 (1901); 26 HARV. L. REV. 214.

has to be done for the construction of the document; it should not be resorted to for alteration of it.

But suppose that the ground upon which the testator proceeded appears in the instrument itself. The only parol evidence then necessary to show the error upon which the revocation was based is the non-existence of that fact. May this be shown in the Probate Court to set aside the will of the testator? It has been suggested that under certain circumstances it may. A *dictum* in *Gifford v. Dyer*⁴⁷ is to the effect that "the mistake must appear on the face of the will, and it must also appear what would have been the will of the testator but for the mistake." It is submitted that jurisdiction in the Probate Court to set aside a will under these facts for mistake is not so objectionable from the point of view of violation of the [spirit of] the Statute of Wills or the parol evidence rule, as where the ground upon which the testator proceeded must itself be established by extrinsic evidence. But there is no authority for doing this,⁴⁸ except in cases of revocation.⁴⁹

This very question has appeared in two types of cases usually classified as dependent relative revocation. The first type originated with *Campbell v. French*⁵⁰ in 1797. There a codicil contained the following clause: "And as to the legacies or bequests given or bequeathed by my will to my sister, Margaret Bell's grandchildren, I hereby revoke such legacies and bequests; they all being dead." The legatees were in fact alive. Lord Loughborough said: "It appears to me there is no revocation, the cause being false." The case was followed on the same facts and on the same principle in 1839 in England.⁵¹ It has recently been affirmed in Ireland,⁵² where facts were slightly different but the doctrine the same. By a codicil the testatrix bequeathed certain legacies and directed that they be paid out of "my Victorian Bonds." Later she made another codicil, which began, "I find I have a sum of £700, Victoria 3 per cent stock, which I have not put into my will, and I wish to be disposed of as follows:" Upon its being shown that the

⁴⁷ 2 R. I. 99 (1852).

⁴⁸ See *In re Tousey's Will*, 34 Misc. 363, 69 N. Y. Supp. 846 (1901).

⁴⁹ See *infra*, notes 50-54.

⁵⁰ 3 Ves. Jr. 321.

⁵¹ Doe on the demise of Evans v. Evans, 10 Ad. & E. 228 (1839).

⁵² *In re Faris, Deceased*, [1911] 1 Ir. Ch. 469. See *Newton v. Newton*, 12 Ir. Ch. 118, 128-130 (1861); *Barclay v. Maskelyne*, 4 Jur. (N. S.) 1293 (1858).

bonds and the stock were identical the court held that the second codicil was conditional, and the earlier codicil was not revoked. On the other hand, in a case⁵³ involving rather unusual facts Mr. Justice Neville disapproved *Campbell v. French*, but cannot be said to have overruled it. In the United States one may venture to guess from the scanty authority that *Campbell v. French* would be followed on similar facts.⁵⁴ Yet three cases at least agree that, if, in spite of the erroneous assumption upon which the testator has expressly based his revocation, he must have known that assumption to be false because it was peculiarly within his knowledge, the revocation stands.⁵⁵

Should *Campbell v. French* be supported? It is clear that it cannot be unreservedly. The proper analysis is not that of conditional revocation, but of revocation under a mistake. The testator has not revoked "if they are all dead"; but "they being all dead," which is equivalent to "because they are all dead." This sort of revocation should be approached from the same point of view as the case of the revocation by act to the document through error. Decline to tamper with the revocation at all, if you please; but if you do tamper with it, set it aside only if that would meet the probable intention of the testator were it possible to call the error to his notice. And on the whole we are inclined to concede this jurisdiction to the Probate Court, provided its field of vision as to the preferences of the testator be confined as narrowly as possible to the testamentary papers. It needs no more proof than is ordinarily required to identify the legatees in any will to show the error of the testator where he makes a second will to this effect: "Since my son is dead, I revoke my devise to him and leave my property to Harvard College." In most cases the setting aside of the second paper, on proof that the son is still alive, would meet the intent of the testator without exposing the will to the dangers of an excursion into extraneous facts.⁵⁶ For such an inquiry should be excluded

⁵³ *In re Churchill*, [1917] 1 Ch. 206, 210.

⁵⁴ *Whitlock v. Vaun*, 38 Ga. 562 (1868); *Mordecai v. Boylan*, 6 Jones Eq. (N. C.) 365 (1863); *Gifford v. Dyer*, *supra*.

⁵⁵ *Giddings v. Giddings*, 65 Conn. 149 (1894); *Hayes v. Hayes*, 21 N. J. Eq. 265 (1871); *Mendinhall's Appeal*, 124 Pa. 387 (1889); as where the testator revokes expressly a legacy because he has sold the subject matter, or provided the legatee with a permanent home.

⁵⁶ This case must be sharply distinguished from that of a testator who revokes a devise to a son "because he has gone to China," where the son has in fact gone to

as contrary to the spirit of the Statute of Wills. And therefore, even if it could clearly be shown that prior to the second will the testator had quarreled bitterly with his son and would on no account have left him money even if he had known him to be alive, such evidence should be excluded. In order to give the Probate Court a jurisdiction to achieve the intent of the testator, we must be willing to accept an occasional instance of injustice for the sake of a sound result in a majority of the cases. If, however, such quarrel appeared in the testamentary papers the court may well, the question of intent on the face of the documents being doubtful, decline to exercise its extraordinary jurisdiction. The revocation should then stand.

An early decision of Lord Hardwicke points to a distinction which has been taken if the revocation is expressly founded on advice or belief.⁵⁷ The testator made a will by which he gave his real and personal estate to a charity. He made a codicil stating that, being doubtful whether by the late Mortmain Act his devise of realty would be good, and being desirous to confirm it in that case and not otherwise, he gave so much of his estate as could not pass by his will to his nephew. He later made "*another codicil reciting the former and the will, and that being advised, that his devise to the charity was void as to the real estate, though not as to the personal, and being desirous to continue it, and to make farther provision for better support thereof,*" he gave his personal estate to the charity and his land to his nephew. The devise to the charity was not within the act. Lord Hardwicke refused to set aside the second codicil. He said the testator must have meant to revoke irrespective of the soundness of the advice, for otherwise the second codicil was meaningless, as the first would have accomplished his purpose. And, furthermore, grounding the codicil on *advice* was different from grounding it on *fact*, for the testator might well have wished to settle once for all a question upon which he recognized a doubt. And, again, his personal estate might have increased to a sufficient fund for a charity. The case has been approved by text-writers as making a special case for "advice." The testator is apparently

China but the testator erroneously imagined that his residence there would invalidate the will made in his favor. The exact ground upon which the testator proceeded does not appear on the face of the will. See *Skipwith v. Cabell*, 19 Grat. (Va.) 758 (1870).

⁵⁷ *Attorney Gen'l v. Lloyd*, 1 Ves. Sr. 32 (1747).

supposed, in using this word, to be settling a doubtful question, and not to be making the later disposition conditional.⁵⁸ *Attorney General v. Lloyd* has been approved in three cases.⁵⁹ It was doubted and a contrary result reached in *Thomas v. Howell*⁶⁰ in 1874, where gifts by will of two hundred pounds to twenty charities were followed by a codicil in these words: "Presuming and believing that the rental of my estate will produce from £16,000 to £18,000, I desire the four executors named at the top of the will, will appropriate £4000 more to the established institutions of the country, making it together £8000." Vice Chancellor Malins said that *Attorney General v. Lloyd* "was a very peculiar case," and if it "had to be decided now, the decision would be the other way." He refused to double the legacies when the "supposed state of things was an entire mistake." The soundness of dealing with such revocations as based on mistake must depend upon whether the words, "since I am advised," or "since I believe," are to be construed "since I am advised, and since I suppose the advice to be true" or "upon the assumption which I believe to be correct."⁶¹ If these expressions are to be so interpreted, as it is submitted they should be, then Lord Hardwicke's distinction must be considered too refined. It can only be justified on the somewhat strained reason given by him that by using the term "advice" the deceased wished to settle a doubtful question. Of course the result in *Attorney*

⁵⁸ POWELL, DEVISES, 548; 1 JARMAN, WILLS, 6 Am. ed., 147; THEOBALD, WILLS, 7 ed., 751.

⁵⁹ *Newton v. Newton*, 12 Ir. Ch. 118, 129-130 (1861). *Attorney Gen'l v. Ward*, 3 Ves. Jr. 327 (1797), where the testatrix by codicil gave to A a legacy given by her will to the children of B "as I know not whether any of them are alive and if they are well provided for." The children of B were not allowed to take, though alive. And see *Skipwith v. Cabell*, 10 Grat. (Va.) 758 (1870). Of course if the testator does not state that he is acting on advice the court will not listen to extrinsic evidence that he did so act. *Dunham v. Averill*, 45 Conn. 61 (1877).

During the Civil War a Southern lady revoked by codicil gifts by an earlier instrument to Northerners "in consequence of the state of the country," which words appeared in the codicil. She had been told that if she gave property to Northerners it would be confiscated under the Sequestration Act of the Confederate States. The court cited *Attorney Gen'l v. Lloyd* with approval and refused to meddle with the revocation. The decision is clearly sound, for what there was in the state of the country which induced her to alter the legacies did not appear on the face of the will. *Skipwith v. Cabell*, 10 Grat. (Va.) 758 (1870).

⁶⁰ L. R. 18 Eq. 198.

⁶¹ 1 JARMAN, WILLS, 6 Am. ed., *147, note k. See *In re Prevost's Estate*, 107 Atl. (Pa.) 388 (1919).

General v. Lloyd may well stand on the other reasons given by the court.

The second type of case of revocation by writing executed under a mistake has arisen more frequently than the first. In its simple form it is illustrated as follows: The testator devises his property to A by will. By a second instrument he revokes the first will and leaves the property to a devisee, for instance a corporation, which is incapacitated by law from taking. As soon as the will is proved it is at once clear that the testator has revoked under a mistake; and this indeed is shown without further resort to extrinsic evidence than is required in the proof of any will. Now it has been said that the doctrine of dependent relative revocation does not apply if the second disposition fails, not from the infirmity of the instrument but from want of capacity of the beneficiary to take.⁶² This statement, which is admitted by those making it to be difficult to support,⁶³ is probably due to an attempt to reconcile *Onions v. Tyrer*⁶⁴ with *French's Case*, the complete report of which is:

"If a man devise land to one, and then devises to the poor of a parish which is void because they do not have capacity to take, yet this is a revocation."⁶⁵

It must be observed that there is no express clause of revocation in this second will, and so the question is presented whether you can say that the intent, which is duly signed and witnessed, to do away with the earlier devise persists in spite of the invalidity of the new disposition to transfer property. Does the revocation depend upon a duly executed declaration of intent, or upon the annulling force of a valid testamentary disposition? One naturally turns to

⁶² 1 WILLIAMS, EXECUTORS, 10 ed., 113. See *Tupper v. Tupper*, 1 K. & J. 665 (1855).

⁶³ See authorities in preceding note; and also THEOBALD, WILLS, 7 ed., 746, 747.

⁶⁴ 2 Vern. 742, 1 P. Wms. 343 (1716).

⁶⁵ ROLL. ABR., Devise (O) 4. This case was followed in *Roper v. Radcliffe*, 10 Mod. 230; and see *Baker v. Story*, 23 Weekly Rep. 147 (1875). But see *In re Fleetwood*, L. R. 15 Ch. D. 594, 609 (1880). Compare *Ex parte Ilchester*, 7 Ves. Jr. 348 (1803); *Pillary v. Subammal*, 32 T. L. R. 118 (1915); 1 POWELL, DEVISES, 3 ed., by JARMAN, 594, note. The weight of authority in the United States is to the contrary. *U. S. Fidelity Co. v. Douglas*, 134 Ky. 374, 120 S. W. 328 (1909); *Lougee v. Wilkie*, 209 Mass. 184, 95 N. E. 221 (1911); *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193 (1890). Compare *Estate of Marx*, 174 Cal. 762, 164 Pac. 640 (1917). *Contra*, *Hairston v. Hairston*, 30 Miss. 276 (1855) (*semble*); *Teacle's Estate*, 153 Pa. 219, 25 Atl. 1135 (1893) (*semble*); *Carpenter v. Miller*, 3 W. Va. 174 (1869).

the form of the Statutes of Wills.⁶⁶ Under the Statute of Frauds, Wills Act, Illinois and New York statutes, it may well be said that the second instrument "declares" the revocation or "declares the intention to revoke" even though it fails to dispose of property. And it is submitted that the same result, though not so obviously, should be reached in Massachusetts.⁶⁷ This suggested result, however, should be subject to the principles of relief for mistake indicated below. Now in *Onions v. Tyrer* there was a will validly executed to pass real estate. The testator, to change his trustees, made another will, by which he revoked all former wills and devised the realty to new trustees, but to the same uses. The second will was sufficiently executed so far as the revocation clause was concerned but not as to the dispositions.⁶⁸ The case was a peculiar one, which cannot, under modern statutes of wills, occur at the present day.⁶⁹ The third resolution dealt with the element of revocation by act, which was a factor in the case.⁷⁰ The first resolution held that as the execution was not valid for a will, it could not be valid as to the revocation clause. It is odd that the revocation clause, though validly witnessed, should be held inoperative. The court did not place the ineffectiveness of this clause on the ground of relief for accident, as it did in the third resolution. Had the court done so, its conclusion might be justified upon principles about to be considered. This part of the case, then, must be deemed a peculiar bit of construction of a peculiar provision of

⁶⁶ "By some other will or codicil in writing, or other writing declaring the same." STAT. 29 CAR. II, c. 3, VI (1676): "By another Will or Codicil executed in manner herein-before required, or by some Writing declaring an Intention to revoke the same, and executed in the Manner in which a Will is herein-before required to be executed." STAT. 7 WM. IV. & I. VICT., c. 26, § XX (1837); KENTUCKY STAT., § 4833 (1915). "By some other will, testament or codicil in writing, declaring the same," etc. ILLINOIS, ANNOT. STAT. (1913), PAR. 11558, c. 148, § 17. "By some other writing signed, attested and subscribed in the same manner as a will." MASSACHUSETTS REV. LAWS (1902), c. 135, § 8. "By some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed." NEW YORK CONSOL. LAWS (1909), Decedent Estate Law, § 34.

⁶⁷ But see *Lougee v. Wilkie*, 209 Mass. 184, 95 N. E. 221 (1911); *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193 (1890).

⁶⁸ See STAT. 29 CAR. II, c. 3, VI. Compare *Barksdale v. Barksdale*, 12 Leigh (Va.) 535 (1842).

⁶⁹ But compare a recent case of a soldier's will, *Goodman v. Goodman*, [1919] P. 229.

⁷⁰ See p. 343, *supra*.

the Statute of Frauds in regard to revocation. It is due, then, to an attempt to reconcile *French's Case* with this first resolution, which is of special application only, that we find the books taking a distinction between the second disposition failing for lack of execution, and failing for incapacity of the devisee.

Indeed the English cases do not bear out the distinction. In *Tupper v. Tupper* (1855)⁷¹ the testator after a profession of religious faith left property to charities. He later by codicil expressly revoked these gifts and left in lieu thereof a legacy to a charity which was invalid. The court indicated that whether there was a revocation or not depended on intent, yet it was not sure but that the testator intended to revoke in any event. The revocation accordingly remained in force. In *Quinn v. Butler* (1868)⁷² there was by a first will a valid exercise of a power of appointment given to the testator, who later by will expressly revoked the earlier exercise and made a second, which was void as an improper exercise of a non-exclusive power. The court allowed the revocation to stand, because, although the question depended on the intent of the testator, it was not clear that he would not have preferred the revocation to stand. It would seem, indeed, from the recent decision in *Bernard's Settlement* (1916)⁷³ that this line of cases is merely another example of the principle of revocation under a mistake. A woman exercised a power of appointment in favor of her children and issue by appointing to her six daughters equally. By a third codicil, which expressly revoked the absolute interest so given to one of the daughters, she dealt with that child's share, though in its favor, in such a way as to violate the rule against perpetuities. The court said, "Did the testator intend by the second appointment to revoke in any case the prior appointment, or did he really only intend to revoke it for the purpose of carrying out the alteration made in his second appointment and without having any intention of revoking the previous gift except for the purpose of the altered appointment?" The court found it reasonably clear that the testatrix would have preferred the first appointment to none for that daughter, and set aside the revocation. This attitude is the proper method of approach. As soon as the will is proved,

⁷¹ 1 K. & J. 665.

⁷² L. R. 6 Eq. 225.

⁷³ [1916] 1 Ch. 552. See also *Goodman v. Goodman*, [1919] P. 229.

it is evident, without any resort to parol evidence, that the testator has labored under a mistake. It is wrong to call it a conditional revocation. He has not revoked "provided," he has revoked absolutely, but has been induced to do so by a misapprehension. That the mistake is one of law is immaterial.⁷⁴ The Probate Court should either decline to meddle with the situation or, as it has done in England, take jurisdiction to set aside the revocation, provided it is reasonable to believe from the face of the documents that the probable desires of the testator would be thus achieved. And it should be immaterial whether the second document contains or does not contain a clause of revocation. In a situation, then, as is presented by *French's Case*, the result of the American cases⁷⁵ may sometimes be reached by the method of relief for mistake.

The actual results in *Quinn v. Buller* and *Bernard's Settlement* are right. The decision in *Tupper v. Tupper* is more doubtful. So religious a priest as the testator might well have preferred the charities of the first will as objects of his bounty than next of kin. The guiding principle, however, should be: let the revocation stand unless it is reasonably clear without resort to extrinsic evidence that the deceased would have preferred the first will to an intestacy.

In *Laughton v. Atkins* (1823),⁷⁶ a case not directly involving revocation under a mistake, the court nevertheless said:

"A second will, inconsistent with the first, perfect in its form and execution, but incapable of operating as a will on account of some circumstance *dehors* the instrument, may nevertheless be set up as a revocation of the first."

This expression, twenty years later repeated in a Pennsylvania case,⁷⁷ became the basis of the two leading American cases, *Hairston v. Hairston*⁷⁸ (1855), Mississippi, and *Price v. Maxwell*⁷⁹ (1857), Pennsylvania. In both decisions the second document contained an express clause of revocation and a new provision, which failed because of a rule of law. In both the court allowed the revocation

⁷⁴ See *supra*, note 28.

⁷⁵ See *supra*, note 65.

⁷⁶ 1 Pick. (Mass.) 535, 545.

⁷⁷ *Jones v. Murphy*, 8 W. & S. (Pa.) 275, 300 (1844); See 1 LOMAX, 52.

⁷⁸ 30 Miss. 276.

⁷⁹ 28 Penn. 23.

to stand, as the will failed only because of matter *dehors* the instrument. This in *Price v. Maxwell* at least seems to have resulted in defeating the testator's desires. Each case has been approved in its own state,⁸⁰ and by some other authorities.⁸¹ On the other hand, *Rice County v. Scott*⁸² (Minnesota) and *Security Co. v. Snow*⁸³ (Connecticut) place the whole question on the intent of the testator, and both cases reach a correct result. The language in the Minnesota case leaves something to be desired. The opinion uses the terms "implied condition" and "unconditional," whereas it must be kept steadily in mind that the situation is one of mistake.

If these observations have not clarified a small corner of the law of wills, may they at least show that once again the panacea of a sonorous phrase or a foreign word⁸⁴ has tended only to obscure the common law, and to confuse judges, text writers, and at least one professor of law.

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⁸⁰ *Vining v. Hall*, 40 Miss. 83, 107 (1866); *Jones v. Murphy*, 8 W. & S. (Pa.) 275, 300 (1844); *Teacle's Estate*, 153 Pa. 219, 25 Atl. 1135 (1893); *Melville's Estate*, 245 Pa. 318, 91 Atl. 679 (1914). But see *Rudy v. Ulrich*, 69 Pa. 177 (1871).

⁸¹ *Dudley v. Gates*, 124 Mich. 440, 83 N. W. 97 (1900); *Gossett v. Weatherly*, 5 Jones Eq. (N. C.) 46, 53 (1859) (*semble*); PAGE, WILLS, § 277. 1 REDFIELD, WILLS, 3 ed., 364. See *Barksdale v. Hopkins*, 23 Ga. 332, 343 (1857).

⁸² 88 Minn. 386, 93 N. W. 109 (1903).

⁸³ 70 Conn. 288, 39 Atl. 153 (1898). But see *Blakeman v. Sears*, 74 Conn. 516, 51 Atl. 517 (1902).

⁸⁴ *Dehors*. Compare Bacon's Maxim 25 (sometimes 23), "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*;" and Prof. J. B. Thayer's comment thereon, "... there seemed to be a complete pocket precept covering the whole subject. When this was found clothed in Latin, and fathered upon Lord Bacon, it might well seem to such as did not think carefully that here was something to be depended upon. The maximum caught the fancy of the profession, and figured as the chief commonplace of the subject for many years. . . . it still performs a great and confusing function in our legal discussions." THAYER, PRELIM. TREATISE ON EVIDENCE, 472.

THE RIGHTS OF IDEAS—AND OF CORPORATIONS

I.

THERE are some relics of German misty theorizing which western political science will do well to sweep away,—and of which it may nevertheless very easily forget to disembarass itself. One is that huge Brocken-spectre, the State Grandmother — the thin and incoherent dream that Universal Insurance can take the place of Universal Responsibility. Responsibility can never be dispensed with: the true alternative is whether we shall be responsible to courts or to Overseers. Another is the idea that by calling monopolies “property,” we invest them with some kind of universal world-wide sacredness. Another is the cloudy film of speculation which attributes to corporations a real existence comparable in the main with that of persons. It is proposed to examine some of the implications of such a doctrine.

It cannot be doubted that it is pretty firmly rooted in our minds. In these strenuous and hurried days, shorthand phrases are inevitable. We speak of the “X corporation,” and visualize it in our minds as an entity, vague but single; redolent of board-rooms and russia leather, perhaps, rather than of forges and oil-cans; but nevertheless a single purposeful, sentient entity. We do not realize, and for the ordinary purposes of our accounts and forecasts we do not need to realize, that we are speaking in mere metaphor. There is no rather vast and elusive simple personage, scheming, feeling, wishing, hating, affectionate, behind that “X corporation” label: — just a set of miscellaneous people, with varying and contradictory desires, bent upon doing the best for their own individual interests, exercising very various degrees of power, and acting within the limits marked out by legislation.

The metaphor of personality is convenient: but it may be misleading.

Let us disclaim, however, the extreme dogma that there is nothing in a corporation beyond (1) the persons who are its members and managers, and (2) the legislative *fiat* which invests with peculiar consequences certain of their acts. Apart from legislative

interposition, there is something — a mystical something. There is something about a private club, particularly when it has a history. Grillon's: the Kit-Cat Club: the Recamier Salon: each has a character of its own. There is something about a school, a family, a regiment, a ship. There is something about an anthem: a symbol: a patent. There is a faint "something" about the commonest insurance corporation, such as are turned out by the dozen from the government factory of such objects. But do not let us fall into the error of calling that something "personality." There is much more personality about a cat or a dog.

Mr. Englehardt has written in a *spirituel* fashion of the Rights of Animals. And it is the present critic's conviction that such Rights exist, no less than the Rights of lunatics. But it is a long step from that to the Rights of Ideas.

The importance of the point is mainly, though by no means entirely, constitutional and international. When constitutional and international documents speak of "persons" and their rights, do they mean human beings, or do they mean to include ideas as well?

There is a tendency at the present day to take the metaphor at its face value — to argue hurriedly that "persons" of course includes "juridical persons," "artificial persons" as well as "natural persons." So much are we the slaves of words, we feel satisfied that things whose names look so much alike must somehow be approximately the same in nature, and entitled to the same consideration. So it is natural to forget that the juridical person is — though a real thing — a very different thing.¹

There is a certain community of sentiment among all civilized peoples as to the feelings and desires of human beings, and their relations to those in authority. It is a very slender and scanty common understanding: but such as it is, it exists. Everybody knows what hurts: everybody knows what insults beyond endurance! Everybody knows what is universally regarded as intolerable and uncalled-for interference by the powers that be. There is a certain consensus on the irreducible minimum of human rights.² If this minimum is infringed, there is cruelty and op-

¹ Cf. 4 LAURENT, DROIT CIVIL INTERNATIONAL, 176, § 82.

² Cf. A. H. SNOW, 8 AM. J. OF INT. L. (1914), 191. The learned author proceeds to suggest that the United States are inevitably driven to impose their own conception

pression, serving to afford foreign nations, or at any rate those directly affected, a title for interference.

But there is no such common consensus as to what Ideas are entitled to support, sustenance and furtherance.

For their support, sustenance and furtherance an individual state may set aside funds and may clothe persons with powers and liabilities. It may do this on its own account, or in pursuance of a general policy of encouraging private persons to devote their property to such ends. But there is no reason whatever why other nations should consider themselves bound to imitate its patronage of those particular ideas. And it is not a reason, but a camouflage, when the idea is called a person.

It is a somewhat paltry begging of the question to say that "A person is that which is by law invested with rights: corporations are by law invested with rights; therefore corporations are persons." It is only in shorthand phrase that the corporation is invested with rights. The only entities who can really be invested with rights are natural persons.³ Only those who can feel and desire can have rights in any intelligible sense. Mill, in a celebrated passage, brings this out very clearly. "When people talk," he says, in effect, "of 'the good of agriculture,' 'the good of the Church,' 'the good of education,' 'the good of art,' they really mean simply the good of particular human beings."

This feeling lay at the root of the English history of corporations. The first kind of English corporation was apparently the departed saint: and this was a very real person to the lawyers and people who considered his or her Rights.

It was in the name and on behalf of the personal and individual Saint that the corporeal Abbot or Prior with his chapter began to function as a corporation: and in general the Abbot could say as a matter of practical politics — "*le monastaire, c'est moi.*"

II. ELEEMOSYNARY CORPORATIONS AND TRUSTS

The attribution of personality to business corporations was a matter of slow evolution. Parallel with it there proceeded the

of fundamental individual rights upon other peoples. That seems to go too far. A community of angels might do better than endeavor to force the world to behave angelically.

³ 4 LAURENT, *DROIT CIVIL INTERNATIONAL*, 209, § 101. Laurent remarks that the

virtual attribution of personality to charitable trusts: in fact, it may be said that the last-mentioned development was much the more rapid of the two. For by the time of Queen Elizabeth, the enforcement of trusts in favor of charities had become so regular and frequent as to require statutory regulation⁴—whilst as yet the trading corporation had made its appearance only in the form of a few chartered companies. The position of the trustees of charities is no doubt very different from that of the directors and managers of corporations: and for that reason many charities are and always have been incorporated. But the common feature remains, that in each case machinery is provided for withdrawing property from individual use, and putting it at the disposal of an Idea. Formulated by the dead, or by the living, a charitable trust or an eleemosynary corporation is the embodiment of an Idea. It is mere machinery by means of which the state secures the more or less perfect performance of a particular intention. If that intention is disappointed,—and the state often disappoints it itself, by remodelling the purposes of the corporation—no living individual is in pocket one cent the worse off: all that is, or may be, injured is the sentiment, favorable to the Idea, of miscellaneous persons.

There may be apparent exceptions to this statement. Those who have been in the past the individual objects of charity, and those who have in the past been its salaried dispensers, may have a certain interest in the funds of the trust or corporation. But it is not a legal interest. The child of a person who is despoiled of the bulk of his property loses its allowance, its expectations, and perhaps its educational prospects. But these disappointments are not legal injuries. The only person entitled to complain is the parent himself. If an almshouse is abolished, the almsman and the nurse may complain respectively of the loss of their comfort and their job. But they have no right to the comfort and the job. They are the objects of miscellaneous or deceased benevolence. If any other nation declines to believe in the beneficence of almshouses,—if it denies the almshouse Idea—it is at perfect liberty to decline to facilitate the scheme mapped out by its neighbor.

Code Napoléon never uses the term “*personne civile*” and nowhere accords the enjoyment of civil rights to “*fictions*.” *Ibid.* 152, § 72.

⁴ The well-known statute, 43 Eliz. c. 4.

Just in the same way, it may deny the Monarchical Idea, the Hospital Idea, the Medical Research Idea, the Medical Research Restriction Idea — even the Anti-Slavery Idea: for as long as coolie “indentured” labor subsists, no nation can be blamed for frankly calling the dwellers in its compounds “slaves.”

That the particular Idea in question has many adherents who warmly believe in it, in the country of incorporation, can make no difference. Many English people are interested in the Coliseum and Mr. Bryan. But that does not make either Mr. Bryan or the Coliseum an entity which the British government is entitled to have preserved intact. Not even if British subjects should have subscribed to a fund to repair the ruin, or to testify their admiration for the statesman, will such a result follow.

If, therefore, property is formed, or acts are done, in a certain territory the benefit of which is claimed for a “juridical person” incorporated abroad, all that is meant is that somebody, for some reason of his own, demands that the local sovereign shall see that the property is applied, or the acts regarded in a particular way marked out by some foreign sovereign. But there is no common consensus of international opinion that the wishes of a deceased person, or of a heterogeneous body of subscribers, should necessarily be carried out. There is certainly no rule that a given country is bound to recognize the power of testation. More and more it is coming to be recognized that some limit to this power is the only just method of redressing inequalities of fortune: — and if some limit, why not an extreme limit? Nor is it any the more bound to recognize the putting of personal property into mortmain.

This can be seen quite plainly when it is an unincorporated trust that is in question. No matter if the trust formed was contributed by foreigners and vested in foreign trustees: if the objects are not recognized by the law of the land, the law of the place where the property is situated is not bound to give effect to them. By its own theories of private international law it may be led to do so: but it may equally well adopt a theory which does not have that result.

It is not like the case of an agent, who is intrusted by the subscribers with their money, in order to apply it as they wish. They can recall their agent and resume their property. But the definite

devotion of property to an Idea divests its former owners of any proprietary interest in it. It is at the service of the Idea. All who are interested in the Idea may in varying degrees be interested in its fate — but it is not their property, and no diversion of the fund to other uses will amount to that confiscation of property which is reprobated by the universal conscience. That a charitable trust exists by favor of the sovereign, and is capable of being diverted at his will is a commonplace. Then is one sovereign, into whose power the funds may come, under any obligation to defer to the wishes of the one in whose power they originally were? It may be very proper and decent to do so: but is it necessary? If an emissary of a trust formed to establish an art gallery in Baratania goes to Utopia to purchase pictures, is Utopia bound to let him do so, because the art-gallery is called a “person,” and “persons” must be admitted to buy and sell? No “person” really buys: the pictures are devoted to certain uses in Baratania instead of remaining private property in Utopia. And to prevent that is not to hinder any “person” from “buying.”

Take even the case of a trust of funds locally situated in Italy, established by a living Italian to provide a public garden in Ithaca, New York, and carried into effect by a deed executed in New York transferring the funds to trustees. There is no reason why the Italian courts should enforce the trust, nor why the Italian donor, repenting of his gift, might not be maintained in or restored to his control over it by the Italian courts, without any international incident being created. The disappointment of Ithaca people is not their despoilment. The fund is not their property, though they may derive some benefit from it. To argue to the contrary is to maintain the universal obligation and validity of trusts: *i. e.*, to claim that foreign nations shall observe a strange law; which is not a claim any one could wish to make.

But the “personality” of a corporation comes in to obscure the issue. We can see that there is no “nationality” in a trust. In the last resort, the country to pronounce on the destination of property is that which has the property actually within its borders, or which has within its borders persons upon whom effective pressure can be put to bring it there. In discussing the validity of a trust disposition, charitable or other, the nationality or domicile of the donor is of not the slightest importance. Nor is the

nationality of the *cestuis que trustent* nor the place of charitable benefaction. The only important questions are — where are the trustees, and where is the money? Similarly with regard to the acts of trustees: it is open to any country to decline to recognize the trust relation, or any modifications of right arising out of it, in other countries.

Though there is an international obligation to respect property, there is no international obligation to respect the subtle complications and divided responsibilities of trusts. Any country may consider all trusts as precatory trusts.

No one country establishes a trust, and leaves other countries to deal with it on that footing. The parties declare their intention, and the various countries, on an equal footing, say severally what they will make of it. They are practically unfettered in doing so: provided that they do not wantonly deprive an alien individual of his property. And it is by no means clear that forfeiture for an attempt to alien into mortmain would be wanton. Indeed, the contrary would seem the better opinion.

But one country does establish the corporation; and the fact lends color to the popular supposition that the incorporated charity has a distinct national character, entitling "it" to the privileges and protection of a citizen. But let us analyze exactly what takes place. We have, no more and no less than before, the devotion of property to an idea, in accordance with the desires of a fluctuating body of people, and perhaps in accordance with the desires of the government itself. But the fact that the government, or the law, purports to establish a new entity, an "artificial person," should not be allowed to obscure the fact that, in reality, it does no more than it accomplishes when it recognizes a charitable trust. No more in kind, that is: in degree it generally goes considerably farther. All that it does, in essence, is to clothe the persons who are carrying out the idea with certain powers, liabilities, and immunities which they would not otherwise possess or be subject to. And there is no reason in the world why other countries should imitate it in this respect. It has not created a person: it has merely set an example.

It might just as well enact that horses and donkeys were to be regarded as "subhuman persons," if duly admitted to registration and managed by committees, — and then demand that they

should be received everywhere on the footing of citizens, and admitted to sue and to acquire property. They might also, perhaps, be admitted to vote, by their committees, at home!

It is speciously urged by some writers that the corporation is created to subserve the purposes of the state: that natural persons have rights to a claim to protection only inasmuch as they subserve the purposes of the state: and therefore that both are alike modes of the state's activity and equally to be respected by foreign powers. Such a view might have had weight with some before the *débauche* of the state in 1918. It may still be held *sub rosâ* by the Treitsches and Bernhardis. But if democracy means anything beyond mere Bolshevism, it means the supreme value of the common private man. The events of the past four years are a flat denial of the doctrine that people exist for the sake of states and not states for the sake of people. When a state is permitted to interpose on behalf of an oppressed citizen, it is not because the victim is useful to it, but because he is a man.

In his suffering all the world has a share. Because of his humanity, all nations applaud the interference to save him from arbitrary brutality: not because he is a potential tax-payer or brigadier-general of Atlantis or Ruritania. A world of states might be imagined, in which the occupation of every soul was with the grandeur and glory of the various states to the exclusion of all thought of the individual. But it is not our world.

III. PUBLIC CORPORATION

But there are certain foundations in which the state is not only intrusted, but in which it finds a mode of carrying out its own activities. Of this kind are towns and cities. In their functioning, it is difficult to see anything less than a form of the public activity of the state. For, consider that it is open to any one to reside in the town: to walk in its streets: to use its fountains: to invoke its police. A fluctuating and heterogeneous population enjoy, in various measures, the benefits of its existence. No individual specially is identified with them. They are open to any of the public who are in a position to profit by them. The same may be said of great professional corporations established for public purposes. In these cases, although the corporate body may, by municipal law, be considered, for the sake of convenience,

separate from the state, yet by natural law, and internationally, it must probably be considered as inseparably bound up with it. In some countries, government dependents or officials have a corporate character — and this is true of some British administrative offices, such as the Board of Trade, the Local Government Board and the Charity Commissioners, which, if I am not mistaken, all have a common seal with perpetual succession, and perhaps may possess property independently of the Crown. Clearly these are, internationally, nothing other than the state itself. Local corporations such as towns and cities are no less limbs of government because they specialize in locality rather than in subject matter. It is for the benefit of all comers of French nationality that the municipality of Nice is kept up — not for the benefit of the individuals who at the moment occupy or own its houses. History obscures the point. We are so familiar with the contests between the Crown and the municipal corporations which formed an outstanding feature of the history of the later English Stuarts, that we forget that the close municipal corporation of the seventeenth century was a totally different thing from the municipality of our day. It would not be untrue to say that the private profit of the corporators was a considerable factor in the outlook of many, if not most, of the municipal corporations of that past age.

But at the present day, it is difficult to refuse concurrence to the opinion that the rights and liabilities of such public corporations are in essence the rights and liabilities of the state.

"Counties, cities, and towns exist only," says the Supreme Court, "for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will."⁵

If we are disturbed by the recollection that cities and towns can and do sue each other, we may quickly be reassured by the remembrance that colonies do the same. It is strange to those Britons reared in the doctrine that the Crown is present and identical in all parts of its dominion, to find the colony of South

⁵ *Ry. Co. v. Otoe County*, 16 Wall. (U. S.) 667, 676 (1872); approved, *Stewart v. Kansas City*, 239 U. S. 14 (1915); 4 LAURENT, *DROIT CIVIL INTERNATIONAL*, 248, § 125; 252, § 127.

Australia suing the sister colony of Victoria. In point of law, it amounts to the King in South Australia suing himself a few hundred miles away: and although legislation has made such an anomaly possible in Canada, nothing but a certain sheeplike docility to suggestion has provided for it in Australia.⁶ Such a process resembles the cook suing the butler for a declaration that the household allowance should be spent less on the wine-cellar and more on the kitchen. And the detached attitude towards each other displayed in recent days by government dependents in England itself suggests that in the not remote future we may be exhilarated by the spectacle of the Home Office suing the Agricultural Department, and the War Office suing the Local Government Board.

Now, is an Idea any the more entitled to respect abroad, because it is the state's Idea?⁷ It is impossible to give an easy credit to this position. The state's existence is one thing — its fancies are another. Its channels of life and administration — its towns, its ruling powers, its armed forces — are entitled to respect. But — knowing how gullible it is in matters of more subtle texture — we may find it difficult to say that it is entitled in the opinion of man-

⁶ *South Australia v. Victoria*, [1914] A. C. 283. The government of New Zealand was, under a more coherent conception of constitutional law, held in 1876 incapable of being a party to an action. Nothing had incorporated it: it was a mere mode of the exercise of the powers of the Crown. The constitutional understanding that these powers would be exercised agreeably to the wishes of the local legislature in no respect alters the legal position. *Sloan v. New Zealand*, L. R. 1. C. P. D. 563 (1876). "What is the thing called the governor and government of the colony of New Zealand? . . . We cannot have substituted service on somebody representing something which does not exist. There is an individual who for the time being is the governor of New Zealand; there are certain persons carrying on the government; there are probably a secretary, and a treasurer, and an attorney-general and others, and there are the members of the representative assembly and council who constitute the legislature; but to call them a corporation seems an abuse of language. We must take notice that there is no such corporation as a governor and government of New Zealand." Per James, L. J., same case. The Australian Constitution Act (STAT. 63 & 64 Vict., c. 12) has not introduced a different system in the case of Australia: the power to resign territory is vested in the provincial parliaments; and it would seem strange if their governments could deal with it over their heads, by collusive litigation. In Canada the position is really different: legislation has enabled the provinces to litigate, and to that extent has invested them with a corporate character. (See, *e. g.*, REV. STAT. OF CANADA, c. 140, § 32 (1906).) The Australian federal parliament has power (*ibid.* § 9 (78)) to provide for similar litigation, but apparently had not done so when *South Australia v. Victoria* was decided.

⁷ That is, in reality, the idea of some one who is or was in authority.

kind to any special respect for its ideas. When we remember that Nahum Tate was, and that Algernon Swinburne was not, poet laureate of England — that the government designed the Crystal Palace of 1851 and the Albert Memorial in Hyde Park, London — that the bureaucratized universities of Germany lighted the match that set the world in a flame these five years back — we may stop short of concluding that by the universal consensus of mankind everything governmental is (except in the worst sense of the term) respectable.

It may be supposed, therefore, that public corporations not directly concerned with the work of conducting the national life must be relegated to share the lot of other corporations constituted for similar ends by less imposing agencies.⁸

IV. TRADING CORPORATIONS

When we come to the Trading Corporation we find an entity which in many ways closely resembles the unincorporated trust. If we can imagine a partnership created by trust deed of the capital we approach very near the conception of a trading corporation. The perpetual succession which the corporation postulates is supplied in the latter case by the principle that "a trust shall never fail for want of a trustee." Except for small and technical advantages, such as the facility of dealing with shares instead of miscellaneous property, and the simplicity of litigating with one imaginary person⁹ instead of a thousand real ones, the only remarkable feature of a trading corporation is the limited liability of its members. It is a mere device by which a state confers on traders particular powers and immunities on particular terms. In *Continental Tyre & Rubber Company, Ltd. v. Daimler Co., Ltd.*,¹⁰ the most scientific lawyers of Great Britain were led to recognize that the essence of a joint stock company is not its empty shell — the form bestowed on it by some particular state, carrying certain immunities and regulations — but the substantial reality operating it: the persons who are its shareholders and directors, and who control and profit by its business. Just as Joseph Story had hinted

⁸ 4 LAURENT, *DRIT CIVIL INTERNATIONAL*, 253, § 128.

⁹ This convenience can equally well be secured by a rule of court. Cf. *RULES OF ENGLISH SUPREME COURT*, Order 16, rule 9.

¹⁰ L. R., [1916] 2 A. C. 307.

a century before, at the possibility that behind a "Society for the Propagation of the Gospel in Foreign Parts," the court might be forced to see the individuals who constituted that society, so the House of Lords in the *Continental Tyre Case* felt bound to look behind the English veil of registration, and to see whether enemies were not lurking there. In other words, they treated the "juridical person" as what it really is — a shorthand expression for peculiar rights and liabilities. They declined to be misled by phrases, and to ignore, in a pedantic literalizing of metaphor, the living human beings for whom, and for whom alone, the company had its being. Registration as a limited company only exempted them from full liability to pay their debts, and in minor ways made their commitments by their agents somewhat different from that of a partnership firm.

Now there is no reason why any other country should feel bound to recognize these special varieties from the ordinary law in its own territory, merely because the corporators have secured them, by registration as a company, in some other state. And this is essentially what the claim for the recognition of juridical persons abroad amounts to. It amounts to a claim of privilege. Convenient privilege, it may be; but privilege none the less. No foreign state is bound to accede to it: unless all privilege is property.

There are many difficulties, which can only be hinted at here, when private profit and the public service are combined. The chartered companies, the establishment of which has been the traditional policy of England (perhaps, if we remember the Darien Company, we may say of Scotland also) in undeveloped countries: public utility corporations: "garden city" or "public-house" corporations: — such organizations as these are of a complex and perplexing character. In part they embody actual state functions: in part they embody a mere idea affected by the state: in part they exist for mere private gain. Their emancipation from direct government control must always, I think, prevent their assimilation to direct public activities. That leaves it comparatively unimportant to determine their precise classification. The element of private gain seems decisive, if a decision be called for. And it is also important to notice that the government as a rule disclaims all pecuniary responsibility for the acts of those agencies which it has set on foot.

V. NATIONALITY AND DOMICILE. WAR CONDITIONS

It may confidently be denied, therefore, that a corporation, in general, can have either a nationality or a domicile.¹¹ The supposed necessity that it should have either arises simply from a confused supposition that the corporation must imitate at all points a natural person.

Nationality is a matter of allegiance. And a corporation has — *pace* the *ex parte* deliverance of Mr. Alfred Lyttleton in the case of the Netherlands South Africa Railway — no power of rendering aid and comfort to anybody. Its directors can; but that is another story. Domicile is in origin and principle a matter of having a home and spending an income.¹² And a corporation cannot enjoy Queen Anne furniture nor drink claret. Not even a metaphor worshiper could quite realize that brilliant conception — though he might in words formulate it as an axiom.

In fact, the corporation need have neither domicile nor nationality. Those who have endeavored to fix it with one or the other have wandered in the wilderness of bleak uncertainty. Sometimes the thunderous voice of the law of the place of incorporation has sounded in their ears: sometimes the lightning flash of the place of exploitation has revealed to them another rule: again, the gleam has shown them the calm Olympia of the spot where the Board meets and control is exercised. Some have looked for domicile — others for nationality — others have not been particular which — others have said that for corporations domicile is nationality. But really they have given themselves unnecessary trouble. The dominant reason for desiring to fix corporations with one or the other attribute is fiscal. The state sees what is called a person and

¹¹ Since writing this article, I find that much of what I had to say is expressed a great deal better in 4 LAURENT, DROIT CIVIL INTERNATIONAL, § 72 *et seq.*, § 119 *et seq.* As I have never seen these views put forward in English, the present article must be regarded, for what it may be worth, as a corroboration rather than a reflection of the Belgian jurist's opinions.

¹² This grounds the true distinction between "domicile" and "house of trade" as criteria of the liability of goods to capture as enemy property. The proprietor of a "house of trade" *makes* money. The domiciled citizen *spends* it. If war-domicile meant carrying on business, there would be no need for the conception of "house of trade." In fact, the two are complementary. Cf. "Trade Domicile in War" in 21 JURIDICAL REV. (Edinburgh), 209.

forthwith desires to tax it. Tax depends in many countries on domicile: consequently a domicile must be found for each corporation. The state seizes goods as prize: nationality is in many countries the test of prize — consequently, every corporation must have a national allegiance.

There is no such necessity. In prize, it may not unjustly be held that the infection of a hostile share condemns the whole. That has not been the Anglo-American way — but it is a possible way. The Anglo-American way is to distinguish the interest of the enemy and to confiscate it alone. The joint property of friends and enemies was so dealt with in *The Eenrom*¹³ and *The Vreede Scholtys*.¹⁴ It ought not to be difficult to discriminate between the interest of friends and enemies in goods which are the property of corporations. As to taxation, the necessity of attributing to corporations a domicile or a nationality is more apparent than real. The shareholders are never taxed twice over on the same grounds in the same country, in their corporate and in their individual capacity. It only requires an enactment that carrying on business in the realm is a ground of taxation, to make the corporators liable. There is no need to attribute a fictitious domicile to the corporation because the corporators are not domiciled in the taxing area. It only needs that their liability be placed on its true ground.

The interesting question which arises as to the effect of war on a corporation, nobody seems inclined to tackle *au fond*. The attempt was long made to evade the necessity by the facile method of attributing to the corporation an independent nationality of its own — usually that of the place of incorporation.¹⁵ Candidly, the present writer, when considering the problem twenty years ago,¹⁶ was very strongly impressed by its difficulty. But much stronger was the impression of its urgency. If the doctrine of non-intercourse with alien enemies — to mention only one feature — was not to be emptied of content, it was clearly impossible to allow friends and enemies to work together in the bonds of peace under

¹³ 2 C. Robinson, 1 (1799). See also *The Kinders Kinder*, *ibid.* 88 (1799).

¹⁴ 5 C. Robinson, 5 n. (1804). (The property was actually documented as the property of the enemy; and probably this is the reason why the court said that a stricter rule might be applied if the shipment were made *after* the outbreak of war.)

¹⁵ See, e. g., in England the *dicta* in *Driefontein v. Janson*, L. R., [1902] A. C. 484.

¹⁶ INTERNATIONAL LAW IN SOUTH AFRICA, chap. 6.

the veil of a home-registered company. It appeared to me, and still so appears, that it is neither fair to the enemy to exclude him from control, while playing with his money, nor, on the other hand, possible to admit him to that intimacy of communication which control necessitates. The conclusion seemed to be imposed that the dissolution of the corporation was imperative: just as in the case of a partnership. The only criticism which I have seen of this attitude is that it ignores the difference which exists in practice between a partnership and a corporation. In practice, it is urged, shareholders do not interfere in the management. I confess this surprises me. Are there not such things as sleeping partners? Do not shareholders occasionally prove restive at annual general meetings? The only substantial difference, as it seems to me, is that a partnership is *ipso facto* dissolved by war, whilst a corporation cannot be liquidated except by some judicial process. If the friendly corporators move in the matter, there seems to me a plain case for reconstruction — unless we frankly avow the principle of confiscation of the enemy's private property. If, however, they do not move, it is a more difficult case. It is impossible to allow the enemy shareholders a *locus standi*: the proper course would appear to be for the sovereign authority to sequester their interests (which, in a sense, are its own)¹⁷ and to apply for liquidation. The capital may not all be paid up, or there may otherwise be liabilities attaching to the shares, and it is contrary to justice that the enemy subjects should be committed to incurring these in their absence. Little authority, indeed, seems to exist as regards the proprietary results of the forced dissolution of partnership itself which supervenes on war. As a contract, the partnership disappears; and as a mandate it ceases to exercise any effect. But as a title to property there seems some difficulty in estimating the effects of its dissolution. Do the continuing partners in fact absorb the assets, subject to a liability to account? Under a régime of sequestration and as is inevitable in a prolonged war, there is little difficulty: and perhaps sequestration will be the rule in the future. But in the absence of any such governmental step it is hard to see what becomes of the partnership

¹⁷ They constitute a material guarantee for the performance of the eventual terms of peace.

assets, unless (as seems to have been the old theory of the law) they fall automatically to the state. Much more difficult — in the absence of all judicial guidance — is it to say just what ought to become of enemy shares and corporation assets. To leave them to follow the fate of the corporation is plainly to allow the friendly interests (which may be nearly *nil*) and the friendly managers (who may be agents merely) to speculate with their co-shareholders' or employers' money. That superficially attractive course is really quite inconsistent with any ostensible principle of equality between friend and enemy. It would seem the ideal course, to force the corporation into liquidation by denying all validity after the outbreak of war, to the acts of corporations having enemy shareholders (or, perhaps better, to allow any member of the public to apply for liquidation). It will be said that this is a highly inconvenient course, and doubtless so it is: the remedy is for the government to interpose and forthwith take under its control the enemy holdings. The highly inconvenient alternative will secure its performance of this moral duty, which it might otherwise neglect. The value of the enemy holding will thus be stabilized at the outset of hostilities, and rendered independent of the subsequent fluctuations of trade. At the same time, the enemy holders will be released from all responsibilities incurred in the future. The only alternative is what appears to the writer the unjust one of holding the enemy persons bound by proceedings over which they have no control, and in which their interests will not be considered, — or, if anything, will be regarded with a hostile eye. I regret this conclusion: it is cumbrous, but it seems imperative.

The only logical alternative is to abolish the principle which declares the illegality of intercourse with the enemy. And this is a principle which has just been applied to an extent far exceeding its scope in any previous war. Nations have prohibited even the receipt of payment from the enemy,¹⁸ and have placed inter-

¹⁸ Contrary to the *dictum* in *Allen v. Russell*, 3 AM. L. REG. 361, "If an enemy within the rebel lines should order his agent in this state to pay a debt, contracted lawfully before the war, with property or money, I am not aware of anything wrong in this according to the public law of war. Goods might be seized when passing, but the appropriation of property or money already here, is not prohibited to the payment of debts to our people, is not only honest, but takes so much of the funds of rebels to another use. . . ."

course with enemies under heavy criminal penalties: — both quite novel features.

Doubtless this has been due to the impression (dating from about 1850) that it injures the enemy to strike at our own trade with him, rather than to the old idea, as expressed by Story and Stowell, that all communication implies the possibility of danger. But there seems little likelihood of that impression being weakened or dispelled. The position of the enemy shareholder, therefore, urgently calls for due consideration.

What, moreover, is the proper attitude of neutral states to such corporations when admitted to function within their borders? Is the rule against intercourse between belligerents a rule of international law to which the neutral is bound to give effect by dissolving, or (what is the same thing)¹⁹ regarding as dissolved, companies containing mutually hostile elements? Is a partnership of a domiciled Italian and a domiciled German *ipso facto* dissolved in Barcelona where they reside and carry on the whole of its business? Or where their Spanish agent does so? When we have solved this question, we shall be in a position to approach the further problem of the light in which a corporation in which Americans and Germans are shareholders, and which is incorporated (a) in America or Germany, (b) in Spain, (c) in Sweden, ought to be regarded at Madrid. *A priori*, one would say that recognition of the corporation at all by the Spanish law is really equivalent to a special kind of incorporation in Spain — and that it rests entirely with the Spanish government and legislature to say whether the presence in its membership of persons belonging to mutually hostile nations is or is not a cause of dissolution.

VI.

These considerations are put before the learned reader with the greatest diffidence: and rather as matter for inquiry than as the final expression of conclusions. What is, however, insisted on is the vital importance of discarding fictions, — of piercing through the semblance of things to realities, — and of refusing to be deterred by difficulties and considerations of temporary practical convenience from arriving at the true dictates of justice. Above

¹⁹ 4 LAURENT, DROIT CIVIL INTERNATIONAL, 231, § 119.

all, it is imperative that the jurist should not submit to be dragged weakly submissive at the chain of metaphor.

Of course, for particular municipal purposes, it may be a convenient fiction to attribute nationality to a corporate body. It may even be possible to force one's own particular code-words on the public at large. But so long as the general body of mankind finds a marked difference between a human being and a set of regulations, so long will it be improper to assume that the same name includes them both. Convenience is mighty — but when it begins to obscure the outlines of justice, it must perforce come down from its pedestal.

T. Baty.

BARRISTER-AT-LAW, INNER TEMPLE.

IMPLIED-IN-FACT CONTRACTS AND
MUTUAL ASSENT

IN a very discerning and helpful article, Professor Williston has illuminated the topic of mutual assent in contracts.¹ His thesis that, in the case of express contracts, mutual assent is something which, in the United States at least, has come to be ascertained by the application of an objective rather than a subjective test is accepted here as conclusively demonstrated, and an attempt will be made merely to pursue a little further his suggestion that it is not desirable to separate from the law of contracts and group under the head of quasi-contracts all those obligations which do not meet the subjective meeting of minds test. As he points out, both contracts and quasi-contracts are obligations imposed by law.

"On no view can any liability be imposed in any other way. To distinguish into two categories obligations imposed by law in accordance with the mental assent of the parties, and obligations imposed by law in accordance with the natural meaning of the acts of the parties but without mental assent, is undesirable unless the law attaches consequences to one category which it does not attach to the other."²

Assuming that statement to be fundamentally sound, how are we to discriminate those contracts where the subjective test of a meeting of minds — a harmonious and full mental accord — does not exist from what we know as quasi-contracts? The answer to that question necessitates a consideration of what the courts actually do in enforcing contracts and quasi-contracts, regardless of what they think they are doing.

The first thing that strikes an observer of court action in the two fields of contracts and of quasi-contracts concerns the law of damages. The accepted normal measure of damages in quasi-contracts is the amount of the unjust enrichment of defendant at the plaintiff's expense, while in the law of contracts it is the damage to plaintiff, within the restrictions set by proximate cause, the rule of *Hadley*

¹ Williston, "Mutual Assent in the Formation of Contracts," 14 ILL. L. REV. 85; *Id.*, WIGMORE CELEBRATION LEGAL ESSAYS, 525.

² *Id.*, 14 ILL. L. REV. 95; *Id.*, WIGMORE CELEBRATION LEGAL ESSAYS, 535.

v. *Baxendale, etc.*, and regardless of whether defendant gains or loses by the breach.³ Wherever, therefore, the courts apply the contract rather than the quasi-contract measure of damages and objective tests of the existence of a contract are accepted, the courts necessarily assert that they are dealing with a contract rather than a quasi-contract. If the contract measure is proper, then it is a contract that is enforced even though the court may consider it a quasi-contract.

Professor Williston attempts to demonstrate in the above-mentioned article that dissimilarities between the attitude of equity and that of the common-law courts in cases where the subjective test of a contract is not met can be accounted for, as far as reformation and rescission of contracts are concerned, without drawing the conclusion that equity affirms that the subjective test should determine the existence of contracts. No doubt, those who are imbued with the idea of various regions of conflict between law and equity will be inclined to insist that he fails to make such a demonstration; but one who looks upon equitable waste, to take perhaps the most extreme case, as not conflicting with legal waste but as evidencing merely the chancellor's reaction against unconscionable conduct permitted by the law's inadequacy, will be quite satisfied that in granting reformation and rescission, as well as in denying specific performance, in cases where sufficient surprise and hardship result from the lack of satisfaction of the subjective test requirement, the chancellor is not denying the general soundness of the objective test applied by the law judges but is controlling the application of that test, and bringing it more nearly in accord with the subjective test, in order to prevent clearly unjust results. It is of course not to be denied that some chancellors have been, and that some still

³ It will be noticed that the "normal measure of damages" is mentioned. That is because some writers class as quasi-contractual some obligations to which a different measure from the normal is applied. As will be seen later, sometimes the contractual measure is applied to alleged quasi-contracts. It is a thesis of this article that such an application, if proper, is a complete demonstration that such alleged quasi-contracts are really some kind of contracts. For quasi-contracts a very definite measure of damages exists:

"Where, however, the recovery is based not upon a real, though unexpressed contract, but upon an unjust enrichment of the defendant; that is, where the cause of action is in quasi-contract, the amount of recovery should strictly be limited to the unjust enrichment conferred upon the defendant by the plaintiff's labor." Beale, "The Measure of Recovery upon Implied and Quasi-Contracts," 19 YALE L. J. 609, 620.

are, consciously applying the subjective test of a meeting of minds, but it seems clear that the decisions which they hand down do not require that exclusive test for their support. A chancellor who adopts the objective test of a meeting of expressions as in general satisfactory will almost always decide the same way that a chancellor applying the subjective test does. Even an objective test judge, whether a chancellor or a common-law judge, must concede that the perfect contract is one which meets the subjective test as well as the objective and must deprecate too great divergence from the subjective.⁴ However that may be, the giving or withholding of equitable relief seems to be of practically no assistance to us on the vexed problem of what border-line obligations are properly to be denominated contractual and what quasi-contractual. Rather, it is the law of damages that casts the first satisfactory light on that troublesome question. It seems incontrovertible, and cannot be too often emphasized, that if the normal contractual measure of damages is properly applied to the recovery on an obligation, it is a contract that is enforced; if the normal quasi-contract measure of damages is properly applied, then it is a quasi-contract that is the basis of action.⁵

⁴ Accordingly, we have rescission at law in some cases where expressions meet but intentions do not. See WILLISTON ON SALES, § 656. On snapped-up offers from the law court's point of view see *Hudson Structural Steel Co. v. Smith & Rumery Co.*, 110 Me. 123, 85 Atl. 384 (1912), where there was rescission at law with a *quantum meruit* recovery. In rare instances we have even the equivalent at law of reformation in equity: "The power of equity to reform contracts has been to some extent usurped by courts of law, in fact, though not in name; for the result attained by a court of equity may frequently be reached by a court of law by simply admitting evidence of the actual intention of the parties and enforcing the bargain which the parties intended to make." WILLISTON ON SALES, § 655. Chancellors and law judges, with variations, apply both objective and subjective tests. As Professor Williston has pointed out at the end of the article above mentioned: "Equity may indeed grant relief in certain cases from a contract to one who apparently assented thereto without actual mental assent, and may deny the adverse party a remedy for the enforcement of the contract though the acts of the parties indicated assent, but equity will not do this universally in such cases; and, therefore, to form a separate category of all cases of expressed or apparent mutual assent when there was no mutual mental assent is as misleading in equity as at law." 14 ILL. L. REV. 95; *Id.*, WIGMORE CELEBRATION LEGAL ESSAYS, 535. There is no doubt a difference in degree in the attitude of chancellors and that of law judges toward the subjective and the objective tests, but that difference is not so great as to make chancellors apply only the subjective test.

⁵ Here it may be noted that the recent attempt, evidenced in WOODWARD'S QUASI-CONTRACTS, pp. 1-2, to push out of quasi-contracts and into judgments, carriers, etc.,

Among contracts which do not meet the subjective test but do meet the objective, Professor Williston mentions those where there is negligent expression of assent (as where a writing is signed or accepted without examination), those made through interpreters who misinterpret, or through telephone operators who fail to repeat messages properly, those where the telegraph company transmits the offer inaccurately, those where there is satisfaction of an unliquidated claim because the creditor, though refusing to treat a check sent by the debtor for acceptance in satisfaction as satisfying the claim, nevertheless cashes the check, and those where in taking from a store an article the price of which he has inquired, the buyer says, "I decline to pay the price you ask, but will take it at its fair value." The last two instances, like cash sales, may not be cases of contract at all, possibly being satisfaction without accord or sale without contract and so having no juristic significance except as protests against lawlessness, though, as is true of cash sales and of satisfactions of debts, they normally fall in the broader field of agreement. Then, too, all courts would not agree in the solution of the various instances mentioned by Professor Williston. Indeed, practically all of the instances given by him of objective but not subjective test contracts are denied by influential courts to be cases of contracts or other enforceable obligations. Like the cases which hold that an offer of reward made by a private person may be accepted and the reward recovered by one who does the act specified in ignorance that the offer has been made,⁶ they fail to receive universal approval.⁷ Nevertheless, in the jurisdictions where these several situations are held to give rise to contracts, they necessarily give rise to contracts which fail to satisfy

various obligations which Professor Ames, for instance, deemed quasi-contractual, must find its justification primarily in the difference between the rules for measuring damages applicable to those obligations and the ordinary quasi-contract damages rule.

⁶ For some cases so holding see *Eagle v. Smith*, 4 *Houst. (Del.)* 293 (1871); *Dawkins v. Sappington*, 26 *Ind.* 199 (1866); *Sullivan v. Phillips*, 178 *Ind.* 164, 98 *N. E.* 868 (1912); *Russell v. Stewart*, 44 *Vt.* 170 (1872). See *Gibbons v. Proctor*, 64 *L.T. (N. S.)* 594 (1891). For offers of reward under a public statute deemed accepted under such circumstances, see *Auditor v. Ballard*, 9 *Buch. (Ky.)* 572 (1873); *Mosley v. Stone*, 108 *Ky.* 492, 56 *S. W.* 965 (1900); *Smith v. State*, 38 *Nev.* 477, 151 *Pac.* 512 (1915); *Board v. Davis*, 162 *Ind.* 60, 69 *N. E.* 680 (1904).

⁷ The weight of authority is probably against the cases in note 6. See 1 ELLIOTT ON CONTRACTS, 64.

the subjective test.⁸ Moreover, there is one situation universally accepted where only by the objective test is there a contract. Cases where an offer was made by mail to be accepted by the mailing of a letter of acceptance and where, before the letter of acceptance was mailed, the offeror frantically but ineffectually sent letters of revocation of the offer which, however, did not reach the offeree until after the acceptance was mailed, are recognized everywhere as genuine contracts, but are such by the objective test alone. They fail utterly to meet the subjective test, being express contracts where the minds of the parties do not meet. While contracts where the minds of the parties do not meet are numerically few in number, as compared with that great body of contracts where both minds and expressions meet, they deserve a special name. It remains for somebody to suggest a satisfactory one.⁹ For the purpose of this article it will serve to refer to contracts as consisting of (1) meeting-of-the-minds contracts and (2) no-meeting-of-the-minds contracts. There are express contracts of both kinds.¹⁰

⁸ Cases where a principal is held bound by contracts which are within the so-called apparent scope of the agent's authority, but which the principal in fact forbade the agent to make, should probably be mentioned here. It is not meant to controvert Professor Mechem's thesis that by apparent scope of authority must be meant either (1) incidental and usual powers "which, it is presumed, attach to the express authority, unless the principal has made known a contrary intention (these, however, as has been pointed out, are not simply apparent; they are objectively real until the contrary has been made known);" or (2) estoppel of the principal. *MECHEM ON AGENCY*, 2 ed., § 721. All that is meant is to suggest that an objective rather than a subjective test is applied, as, in general, is true in the case of other contracts by estoppel, and, also, in the case of contracts where the so-called offeror acts by way of joke but the offeree reasonably accepts in earnest.

⁹ It was at one time the hope of the writer of this article that we could borrow terms from the civil law and could unite in calling those contracts which meet the subjective test consensual contracts, and those which do not meet the subjective test, but do meet the objective, constructive contracts. See article on "Constructive Contracts," 19 *GREEN BAG*, 512. But the continued insistence of the English writers upon constructive contracts as the proper name for what we call quasi-contracts and the fact that the phrase "constructive trust" is applied to equitable obligations akin to quasi-contracts, has made that hope grow faint. In order to keep the facts which are to be observed from being lost sight of in a possible dispute as to names, an attempt is made in this article to get along without a resort to distinctive names, even though the attempt necessitates the use of cumbersome phrases.

¹⁰ It should be noted that this differentiation of names in no way violates the position taken by Professor Williston as to categories in the sentences quoted on the first page of this article, for what he was opposing there was labeling express merely-objective-test contracts quasi-contracts. There can be not the least objection to an orderly arrangement and classification of contractual obligations, as such.

But why talk about such distinctions with reference to express contracts alone? Do we not have a similar situation with reference to implied-in-fact contracts? It would seem so, but the conclusion is not so clear because of the very nature of implied-in-fact contracts. Subjective and objective tests are much more difficult to apply to silent doers than to those who speak or write offers and acceptances. Nevertheless, something may be done, but, before that something is undertaken, a start must be made toward the differentiation of implied-in-fact contracts from quasi-contracts. In view of what we have concluded about express no-meeting-of-the-minds, *i. e.* merely objective test, contracts, we naturally turn to the law of damages for help. If in a given situation of conduct where there is no express contract we find the courts enforcing an obligation and applying the contract measure of damage rather than the quasi-contract measure, then we must say that they really find and enforce a contract implied-in-fact. Moreover, we must not be surprised if we find, as was the case with express contracts, that there are meeting-of-the-minds implied-in-fact contracts and no-meeting-of-the-minds implied-in-fact contracts.

When it is said, for instance, that "nothing is plainer than the proposition that the distinction between express and implied contracts lies not in the nature of the undertaking, but in the mode of proof,"¹¹ the implied contracts meant are the meeting-of-the-minds implied-in-fact contracts, sometimes called "tacit" or "inferred" contracts.¹² Examples of these may even be found

¹¹ Somerville, J., in *City Council of Montgomery v. Montgomery Water Works Co.*, 77 Ala. 248, 254 (1884).

¹² "A contract is said to be inferred where the intention of the parties is not expressed in words, but may be gathered from their acts and from surrounding circumstances. In these cases, the law enforces what it deems to have been the intention of the parties." ADDISON'S LAW OF CONTRACTS, 11 ed., 447.

In *Smith v. Moynihan*, 44 Cal. 53, 62-63 (1872), Wallace, C. J., said: "In general an implied contract, in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being in the mere mode of proof by which they are to be respectively established. The law will imply that a party did make such a stipulation as under the circumstances disclosed he ought, upon the principles of honesty, justice, and fairness, to have made. Of course all the circumstances actually surrounding the parties in the particular transactions are to be carefully considered before this implication of a promise is to be indulged."

In *Woods v. Ayres*, 39 Mich. 345, 350-351 (1878), Graves, J., said: "Neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the

among situations treated by some writers as quasi-contractual. Take, for instance, the question whether recovery may be had for services performed by one member of a household for another.

mode of substantiation and not in the nature of the thing itself [citations]. To constitute either the one or the other the parties must occupy towards each other a contract status and there must be that connection, mutuality of will and interaction of parties, generally expressed though not very clearly by the term 'privity.' Without this a contract by implication is quite impossible. . . .

"The parties must be consenting bargainers personally or by delegation, and their coming together in contract relation must be manifested by some intelligible conduct, act, or sign. If not, no contract is shown [citations]. The privity essential to a contract must proceed from the will of the parties. There may be a privity by operation of law where no privity of contract exists."

In *People v. Dummer*, 274 Ill. 637, 640-641, 113 N. E. 934 (1916), Cartwright, J., said: "A contract may be implied where an agreement in fact is presumed from the acts of the parties, and this is the proper meaning of an implied contract. An illustration of such a contract is where one performs services for another under circumstances showing that they were not intended to be gratuitous and the services are accepted."

In *Ramsden & Carr v. Chessum & Sons*, 110 L. T. 274 (1913), Lord Chancellor Haldane said: "If A. brings goods to B. to be used in work which B. is doing, and B. knows that A. has brought them, not as a gift but as expecting to be paid for them, and B. uses these goods in his work, then *prima facie* B. is liable to pay the price of the goods."

In *Wojahn v. National Union Bank*, 144 Wis. 646, 667, 129 N. W. 1068 (1911), Marshall, J., said: "The general rule is that if a person performs valuable services for another at that other's request, the law implies, as matter of fact, the making of a promise by the latter and acceptance thereof by the former to pay the one performing the service the reasonable value thereof [citations]. If one merely accepts services from another which are valuable to him, in general, the presumption of fact arises that a compensation equivalent is to pass between the parties, and the burden of proof is upon the recipient of the service to rebut such presumption if he would escape from rendering such equivalent. The burden may be much more easily lifted in such a case than in the case of there being a request for the performance. . . ."

Professor Corbin has suggested that this true meeting-of-the-minds implied-in-fact contract is really one form of express contract. He says: "A contract implied in fact is a true contract based upon a real agreement of the parties. It differs from an express contract only in the evidence necessary to establish its existence and its terms. In reality a contract implied in fact is an express contract, for intentions can be *expressed* as clearly by actions as by words." Corbin, "Quasi-Contractual Obligations," 21 YALE L. J., 533, 546-547. No doubt that is a possible way of looking at them, but it is also possible to emphasize their inferred-as-a-fact nature, as the courts have done. The situation, therefore, is not like that which existed when the courts were pronouncing the non-contractual obligations now known as quasi-contracts to be contracts implied in law and when the courts were, accordingly, demonstrably in error. Instead of dealing with a truth having only one aspect, as was the case in that instance, we have here a double-aspect truth. In a sense the inferred as a fact or tacit contract is expressed by conduct, but in a sense also it is implied-in-fact. It would seem to be hopeless, therefore, to attempt to get rid of the term implied-in-fact as applied to these true contracts enforced because of conduct expressions.

Recovery is usually denied because of a presumption of an intention by one party to give the services or of a lack of intention by the other to pay for them. That is a factual presumption or demonstration. If recovery is allowed, it is always on the basis of a contract measure of damages, namely, the reasonable value of the plaintiff's services, and not of the quasi-contract measure of the actual enrichment of defendant, — usually, of course, there is no difference between the two measures, — and it is allowed because of a demonstration of an express contract of employment or of an inferred-as-a-fact contract, the latter being found sometimes from a presumption of intention to charge and to pay, and sometimes from various circumstances of the household arrangements making it reasonable to find a contractual intent.¹³

But there is another kind of implied-in-fact contract, or of implied-in-fact part of a contract, as the measure of damages applied to that kind shows. Take, for instance, the case of implied warranties. It is submitted that despite the consensus of opinion to the contrary, they are in nature implied-in-fact, whether they be regarded as parts of the express contract or as having a separate existence.¹⁴ It often happens that the business experience and legal information of the parties is such that they know that their bargain will give rise to an implied warranty, in which case the implied warranty is clearly a meeting-of-the-minds implied-in-fact contract, but it also often happens that such is not the case. Where it is not, the courts will not permit the defendant to show that he never thought of himself as warranting; indeed, nothing short of an express assumption of risk by the plaintiff, or an express refusal of defendant to warrant, will contradict the implied warranty by the defendant.¹⁵ If, then, in the last-mentioned situa-

¹³ See, for instance, *In re Pauly's Estate*, 174 Ia. 122, 156 N. W. 355 (1916); *Morton v. Rainey*, 82 Ill. 215 (1876) (*cf.* *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583 (1895)); *Covey v. Rogers*, 85 Vt. 308, 81 Atl. 1130 (1912); *Estate of Rohrer*, 160 Cal. 574, 117 Pac. 172 (1911). For a clear statement of the rule, see *Disbrow v. Durand*, 54 N. J. L. 343, 24 Atl. 545 (1892).

¹⁴ See article on "Change of Position as a Defense in Quasi-Contracts — The Relation of Implied Warranty and Agency to Quasi-Contracts," 20 HARV. L. REV. 205.

¹⁵ "There are implied contracts in the strict sense of the term. . . . Such a contract requires, the same as an express contract, the element of mutual meeting of minds and of intention to contract. The two species differ only in methods of proof. One is established by proof of expression of intention, the other by proof of circumstances from which the intention is implied as matter of fact. The implication arises upon

tion the implied warranty is an implied-in-fact contract, it is a no-meeting-of-the-minds implied-in-fact contract. That it is such a contract rather than a quasi-contract, seems to be shown by the fact that a quasi-contract unjust enrichment measure of damages for its breach is not applied, but instead the very measure of damages which would have been applied if it had been an express warranty is applied. The courts, to be sure, constantly speak of an implied warranty as an obligation implied-in-law rather than as one implied-in-fact, but the explanation of that attitude of the courts is simple. Like perhaps most law teachers, the courts do not yet realize that there are these no-meeting-of-minds implied-in-fact contracts, but that such contracts exist would seem to be proven by the measure of damages applied. They are contracts which are implied-in-fact by the courts for the reason that if the parties had thought about the matter, presumably, in view of general business experience and legal rules, they would have made an express contract to the same effect.¹⁶ Implied war-

legal principles and is conclusive in the absence of something efficiently displacing it, as a presumption of law. Unlike the latter, it being an implication of fact though springing into existence as matter of law, it is rebuttable." Marshall, J., in *Wojahn v. National Union Bank*, 144 Wis. 646, 666-667, 129 N. W. 1068, 1077 (1911).

¹⁶ "It not unfrequently happens, however, that in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and, consequently, where no intention has been expressed by them, or can be inferred from their acts. In such cases the law prescribes their respective rights and liabilities according to the dictates of justice — that is, of general expediency — and according to what it is presumed their intention would have been, had they had these circumstances in their consideration when they made the contract." ADDISON'S LAW OF CONTRACTS, 11 ed., 447, seemingly referring to such contracts as "implied contracts properly so called." It is probable that in this language, which seemingly expresses what is urged above as constituting a no-meeting-of-the-minds implied-in-fact contract, the author quoted was simply describing so-called conditions implied-in-law in contracts. The interesting controversy as to the nature of such conditions — see COSTIGAN, *THE PERFORMANCE OF CONTRACTS*, 8, note — has only a remote bearing on the problem here considered. While it is acknowledged, as indeed Professor Gray's clear statement of the matter requires (GRAY, *THE NATURE AND SOURCES OF THE LAW*, § 702), that "construction" is a word which covers both (1) the ascertainment of what the parties actually intended by their writings and (2) the deduction of what they would have intended if they had thought of the matter which has arisen, and so must be held to have provided for, if they used language broad enough to include that probable intention, and while, accordingly, it is admitted that in that second sense of the word "construction" conditions implied-in-law in contracts may be said to be found by construction, the primary meaning of construction, and the general meaning of those who say that conditions implied-in-law are found by construction (witness HARRIMAN ON CONTRACTS, 2 ed., § 315), is that at the time the contract was made the parties

ranties are founded upon the implied facts of general business experience and understanding — implied because people in general, and not necessarily the particular parties concerned, when acting understandingly and fairly, normally agree upon such an assumed factual basis — and the difficulty of statement which results in calling them implied by law comes from the fact that in a given case the minds of the parties may not have met on the point, and from the further fact that the judges infer the business understanding and make the implied warranty rule without leaving the implication to be made in each case by the jury. As they are dealt with, from the damages as well as from the pleading point of view, in the same way as express warranties, they are clearly contracts rather than quasi-contracts and, since they cannot be regarded as express contracts, must fall under the heading of implied-in-fact contracts until we can get a better contract nomenclature.¹⁷

Once it is admitted that there are some no-meeting-of-the-minds, *i. e.* merely objective test, implied-in-fact contracts, a most interesting series of problems arises. For instances, may there be such a no-meeting-of-the-minds implied-in-fact contract, or a meeting-of-the-minds implied-in-fact contract, where the parties endeavor to

actually thought about the matter to be decided. To avoid the false conclusion that the parties did think about what they really did not, it seems proper to deny that conditions implied-by-law are arrived at by construction. There is construction, of course, but what is done is done not necessarily because the parties intended it to be done but despite the fact that they never thought about it. It may be asked, Why be so insistent to keep these ought-to-be conditions from being covered by the word "construction" and yet be so willing to include ought-to-be implied-in-fact contracts under the heading of genuine contracts? Practical consequences furnish the answer in both cases. It may not involve erroneous consequences in the case of wills, for instance, to call two very different things construction. As to that, no opinion is here expressed. But it does involve such erroneous consequences in the case of contracts, — intention conditions must be clearly marked off from what are called conditions implied by law but are really equitable defenses, — so there a discrimination must be made. It does not involve erroneous consequences to include both meeting-of-the-minds implied-in-fact contracts and no-meeting-of-the-minds implied-in-fact contracts under the heading of genuine contracts, and the measure of damages applied to both calls for such inclusion.

¹⁷ Implied warranties have their tort aspect as well as their contract. That is another reason for confusion in regard to them. See WILLISTON ON SALES, § 197. In view of his article mentioned in note 1, *supra*, Professor Williston would doubtless to-day change somewhat his statement in that section of the nature of implied warranties when looked at from the contracts point of view. The courts *feel*, even if they do not *say*, that implied warranties are actual contracts, as, again, the measure of damages applied proves, yet often such warranties meet only the objective test.

enter into an express contract but, because of some essential error, do not succeed and yet, thinking that they have a contract, proceed with performance until they find that the express contract does not exist? At first sight, logic seems to say that if there is an attempt to get an express contract and that fails, there can be no implied-in-fact contract — implication perhaps not being reasonable where what the parties were attempting is demonstrated — but such logic negatives at the most only a meeting-of-minds implied-in-fact contract, and may not be persuasive even to that extent. If there is no meeting of minds on the express contract there would seem to be none on an implied-in-fact contract as to the whole of the matter which the express contract was to cover; but that is no reason for saying that there is not a meeting-of-the-minds implied-in-fact contract as to part of that matter, or even that there is not a no-meeting-of-the-minds implied-in-fact contract as to all, if it seems fair to have either. Take, for instance, the most interesting Massachusetts case of *Vickery v. Ritchie*.¹⁸ In that case Knowlton, C. J., stated the facts as follows:

“This is an action to recover a balance of \$10,467.16, alleged to be due the plaintiff as a contractor, for the construction of a Turkish bath house on land of the defendant. The parties signed duplicate contracts in writing, covering the work. At the time when the plaintiff signed both copies of the contract the defendant’s signature was attached, and the contract price therein named was \$33,721. When the defendant signed them the contract price stated in each was \$23,200. . . . The contracts were on typewritten sheets, and it is supposed that the architect accomplished the fraud by changing the sheets on which the price was written before the signing by the plaintiff, and before the delivery to the defendant. The parties did not discover the discrepancy between the two writings until after the building was substantially completed. Each of them acted honestly and in good faith, trusting the statements of the architect. . . .

“The auditor found that the market value of the labor and materials furnished by the plaintiff, not including the customary charge for the supervision of the work, was \$33,499.30, and that their total cost to the plaintiff was \$32,950.96. He found that the land and building have cost the defendant much more than their market value. The findings indicate that it was bad judgment on the part of the defendant to build such a structure upon the lot, and that the increase in the market value

¹⁸ 202 Mass. 247, 248, 249, 254, 88 N. E. 835 (1909).

of the real estate, by reason of that which the plaintiff put upon it, is only \$22,000."

The opinion stated that "In this case there was no express contract. The plaintiff's right is to recover upon an implied contract of an owner to pay for labor and materials used upon his property at his request" and ended as follows:

"The right of recovery depends upon the plaintiff's having furnished property or labor, under circumstances which entitle him to be paid for it, not upon the ultimate benefit to the property of the owner at whose request it was furnished.

"It follows that the plaintiff is entitled to recover the fair value of his labor and materials."

By "implied contract" the court should have meant a contract implied-in-fact, whether it did so or not, for the measure of damages adjudged was the market value of the labor and materials furnished by the plaintiff, *viz.*, \$33,499.30, rather than the increase in the market value of the land, *viz.*, \$22,000, resulting from the erection of the bath house. The case was not like the cases of rendering personal services in a business or becoming a daughter in the home, where the court, because of the difficulty of proving enrichment, may possibly adopt the rule of thumb of market value of the services, or the estimate placed on the services by the parties themselves, if the express contract fails of enforcement for other than lack of agreement as to compensation, and yet may possibly rationally insist that a quasi-contract rather than an implied-in-fact contract is actually being recognized and enforced.¹⁹ *Vickery*

¹⁹ See *Fabian v. Wasatch Orchard Co.*, 41 Utah, 404, 125 Pac. 860 (1912), asserting that where services are performed by the plaintiff under a contract not in writing as required by the Statute of Frauds and the defendant relies on the statute, the reasonable value of the services and not the profit or gain resulting to the defendant should be recovered. The court emphasized the fact that the services were rendered and accepted in performance of a contract. And see *Waters v. Cline*, 121 Ky. 611, 617, 618 (1905), where a niece had rendered her uncle the services of a daughter under a contract not in writing as required by the Statute of Frauds, the oral contract being that in return for her services he was to will her an \$8000 farm with \$4000 in buildings and stock and give her \$5000 to run it. In Kentucky part performance will not take a contract out of the Statute of Frauds, but a supposedly quasi-contract recovery was allowed. The court declared that "in this character of cases the contract measure of the consideration which the defendant has received is the only measure which will approximate justice between the parties. . . . Her presence in their home, with her music, joyousness and dutiful attention, transformed it. Who can measure this in

v. *Ritchie* was a case where there was a clear showing of the actual enrichment and a clear showing of the still greater value of the labor and materials. The selection of the contract implied-in-fact measure of damages necessarily was an assertion that there was an implied-in-fact contract, even though the court may have thought, as some suppose that it did, that it was enforcing a quasi-contractual obligation.²⁰

But let us pursue the matter a little further and ask whether, apart from the question of damages, and as a matter of principle, it is not fair to regard *Vickery v. Ritchie* as a case of implied-in-fact contract. In the first place, the only thing lacking to an express contract is assent as to the contract price. That "only thing" is of course a very big thing, and error as to it is, from the express contract point of view, essential or fundamental error. Still we know that there are many genuine contracts where the contract price is not agreed upon and where the rule of the reasonable value of the services or property is applied. Some are inclined to call such a genuine contract implied-in-fact, because the big fact of the rate of compensation is implied, but the writer thinks it sounder to call the contract express with an implied-in-fact term, just as we treat contracts which do not fix a definite time for performance as express contracts, although the rule of reasonable time is supplied by the court.²¹ However that may be, is it not clear that the situa-

dollars and cents? It is presumed that Cline knew what it was worth to him . . . We know of no adequate standard to value the consideration which he enjoyed under the contract, except that he himself fixed."

The reader will notice that the word "possibly" is used in the sentence in the text. The writer does not agree that the courts may adopt in a given case the contract rule of damages because of the inconvenience of making an estimate of enrichment and yet properly insist that a quasi-contract rather than an implied-in-fact contract is being passed upon. If there is, as in the case of *Waters v. Cline* the court thought there was, actual impossibility of making even an approximate guess of value, then there really is no enrichment in the quasi-contract sense and it would seem that an implied-in-fact contract, or something akin to one, is enforced when the express contract measure of damages is applied.

²⁰ For cases applying a similar rule of damages to that in *Vickery v. Ritchie* to cases of extra work done outside of an express contract, see article by Professor Beale on "The Measure of Recovery upon Implied and Quasi-Contracts," 19 YALE L. J., 609, 620. On pages 620 and 621 Professor Beale emphasizes the difference between the measure of damages upon "a real though unexpressed contract" and the measure upon a quasi-contract.

²¹ See 2 ELLIOTT ON CONTRACTS, §§ 1550, 1628. In view of the language used by the courts it is of course arguable whether the implication of a reasonable time for per-

tion in *Vickery v. Ritchie* is much the same as such a contract—so much so that, despite the mistake, the contract implied-in-fact theory of the case is the sound one? Of course, in *Vickery v. Ritchie* that conclusion was reinforced by the fact that the reason why the work and materials did not add more to the value of the land, *i. e.*, did not enrich defendant more, was that it was poor business judgment on his part to put a Turkish bath establishment on that land; but apart from the justice of making defendant pay for his own poor judgment, if such it was, though he supposed he was to pay only \$23,200.00 and though the value added to the land was actually \$22,000.00, it is quite arguable that the contract is essentially implied-in-fact. Since there was action by one who intended to charge taken at the request of one who intended to pay—the

formance is one of fact or is a condition for performance implied by law. For instance, in *Ellis v. Thompson*, 3 M. & W. 445, 456 (1838), Alderson, B., said: "There is no specification in the contract as to the time when the delivery is to take place, and therefore the law would imply that the delivery should take place within a reasonable time; and it is a question for the jury at the trial, and this was the question put to them, how the reasonable time, which is an implied part of the contract, is to be ascertained." In *Ehinger v. Baizley Iron Works*, 248 Pa. St. 309, 310, 93 Atl. 1074 (1915), Potter, J., said: "It is, however, well settled, that where no time is fixed by the parties for the performance of a contract, the law will fix a reasonable time."

In *Liljengren, etc. Co. v. Mead*, 42 Minn. 420, 424, 44 N. W. 306 (1890), Mitchell, J., said: "Where a contract is silent as to the time of performance, the law implies that it was to be performed within a reasonable time; and, if the contract be in writing, parol evidence of an antecedent or contemporaneous oral agreement is inadmissible to vary the construction to be thus legally implied from the writing itself."

In *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 497, 142 Pac. 1163 (1914), Ellis, J., said: "It is elementary that if a contract specifies no time, the law implies that it shall be performed within a reasonable time. 9 Cyc. 611. It is also well established that the legal effect of a written contract though not stated in terms in the writing itself, but left to be implied by law, can no more be contradicted, changed or explained by extrinsic evidence, than if the legally implied effect had been expressed in the written terms."

Since the parties must have thought of the time of performance, it would seem as if actual construction—the inference of fact of actual intention—is resorted to when a reasonable time for performance is implied. The correct way of stating the matter would seem to be that of Rogers, Circuit Judge, in *Allegheny Valley Brick Co. v. C. W. Raymond Co.*, 219 Fed. 477, 480 (1914), namely: "As no time for performance is specified in either contract the implication is that a reasonable time was intended." If, then, the parol evidence rule prevents a showing that what actually was intended was a specific time, that does not mean that the implication of a reasonable time is one of law rather than of fact, for the parol evidence rule prevents such a showing when the contract expressly provides for performance in a "reasonable time." See *Jenkins v. Lykes*, 19 Fla. 148 (1882); *Coon v. Spaulding*, 47 Mich. 162, 10 N. W. 183 (1881).

elements of an implied-in-fact contract—the assertion that an implied-in-fact contract actually existed, and so the court should have done as it did in applying the implied-in-fact contract measure of damages, is clearly permissible. Indeed, is it not possible that what the court enforced is fairly to be called a meeting-of-the-minds implied-in-fact contract—an imperfect, not a perfect one, to be sure—rather than a no-meeting-of-the-minds implied-in-fact contract? An obligation enforced because the plaintiff did what the defendant requested, under circumstances showing that both parties expected plaintiff to be compensated, and because, for some reason, the express contract intended did not come into existence or is incapable of enforcement, is clearly more consensual than nonconsensual, and if, in its enforcement, the consensual measure of damages is applied, it is clearly to be classed as consensual. The minds of the parties, and their expressions by conduct, meet in large part even if the parties are surprised, and one of them is shocked, to find themselves bound by an implied-in-fact contract when they sought, and mistakenly thought they had, an express contract. While it is perhaps sounder to call it a no-meeting-of-the-minds implied-in-fact contract, it has a meeting-of-the-minds aspect.

It may forestall objection to note here that since the measure of damages applied in a given case shows whether the courts are enforcing a contract or not, one might rest content with reporting the facts without questioning their right to exist. But the writer asks for no such intellectual abnegation. That the contract measure of damages, applied in a given situation where there is no express contract, is the proper measure, must be demonstrated for the existence of an implied-in-fact contract to be approved. The contractual right justifies the measure of damages, not the measure the right. A demonstration that the measure of damages is properly applied in the instances of implied-in-fact-contracts considered in this article cannot be undertaken here, though the nature of that demonstration is foreshadowed in the foregoing discussion of *Vickery v. Ritchie*.

Take, for another instance of an implied-in-fact contract not generally recognized as such, the case of *Turner & Otis v. Webster*.²² There the express contract failed because of ambiguity, the plain-

²² 24 Kan. 38 (1880).

tiff thinking he had offered to take three dollars for watching for a twenty-four hour day certain attached property and the attaching creditors thinking the offer was of one dollar and a half for such a day. The court emphasized the fact that defendants employed plaintiff to do the very work that he did and knew that he did it, and, while it said that there was no express contract to enforce, declared that "Justice is done to all parties by ignoring any promise or understanding as to compensation and giving to the laborer reasonable compensation for the work done, and requiring the party receiving the benefit of such work to pay a just and reasonable price therefor." Justice is done by emphasizing that everything actually performed took place in a full meeting of minds with only the matter of pay undetermined and by concluding, in effect, that an implied-in-fact contract existed. The parties *meant* to have an express contract; they got one implied-in-fact and, perhaps, though that is arguable, it is fairly to be called a meeting-of-the-minds implied-in-fact contract.

The implied-in-fact contract principle is exemplified in other situations. Take the case of "snapping up" too low an offer or bid knowing that the offeror has made a mistake and then, after getting performance, insisting on paying the erroneously offered low price. Even if it be thought that there cannot properly be said to be even an imperfect meeting-of-the-minds implied-in-fact contract in such a case, why is it not a situation calling for the finding and enforcement of a no-meeting-of-the-minds implied-in-fact contract? The thing done is done at request, is the very thing attempted to be contracted about, payment for it is contemplated — all these are tests of implied-in-fact contracts — and, if defendant is to be denied his unfair advantage under the express contract, clearly the implied-in-fact contract measure of damages is the sound one to apply.²³ The plaintiff should not be compelled to show defendant's enrichment and should recover even if defendant was not enriched.

²³ It was applied in *Tyra v. Cheney*, 129 Minn. 428, 152 N. W. 835 (1915). - Compare *San Francisco Bridge Co. v. Dumbarton Land & Imp. Co.*, 119 Cal. 272, 51 Pac. 335 (1897). "He who rescinds a contract — which the defendant does by rendering its performance impossible — must re-establish the other party in his *status quo*." *Dodge, J., in George M. Newhall Engineering Co. Ltd. v. Daly*, 116 Wis. 256, 263, 93 N. W. 12 (1903). That is the contract measure of damages, *viz.* to make the plaintiff whole. The quasi-contract measure is directed at keeping the defendant from being unjustly enriched.

The Statute of Frauds has produced a situation which has led at least one court to enforce an implied-in-fact contract. The Statute of Frauds cases have been mentioned in note 19, *ante*, but a more detailed statement of *Fabian v. Wasatch Orchard Co.*²⁴ should be made. The plaintiff was a merchandise broker who had rendered services for the defendant in advertising defendant's products and soliciting and obtaining orders for the same. The contract provided for brokerage charges by the plaintiff, but, since it was not to be performed within one year and was not in writing, it was unenforceable under the Statute of Frauds. The defendant insisted that the orders for defendant's goods obtained by plaintiff were at prices less than the cost of manufacture and hence the defendant was not enriched, but instead was the loser, by plaintiff's services. The trial court gave plaintiff a judgment for the reasonable value of the services which had been rendered by the plaintiff and had been received and accepted by the defendant. This judgment the Supreme Court affirmed, saying:

"We think the well-established rule is that, where one who, not in default, on faith of and in accordance with a contract unenforceable because within the statute of frauds, but not *malum prohibitum* nor *malum in se*, has, in pursuance of the contract, rendered services for the adversary party, who, with knowledge or acquiescence, accepted them and received the benefit of them and repudiated the contract, he may recover on a *quantum meruit* the reasonable value thereof — not the profit or gain resulting to the adversary party by reason of the transaction, nor the loss suffered or sustained by the other, but compensation for the reasonable value of the services rendered by the one and accepted and received by the other."²⁵

It is significant that the first case cited by the court for that statement is *Vickery v. Ritchie*, *supra*, which of course is not a Statute of Frauds decision, but which is, as we have seen, an im-

²⁴ 41 Utah, 404, 410, 125 Pac. 860 (1912). Compare *Stout's Adm'r v. Royston*, 32 Ky. L. Rep. 1055, 107 S.W. 784 (1908). But see *Boone v. Coe*, 153 Ky. 233, 154 S.W. 900 (1913).

²⁵ It is not often where services are performed at request with the expectation of both parties that the services will be paid for that the court is asked to inquire into whether the services actually did enrich the defendant. For a case where the inquiry showed that there was enrichment, see *The Olympia*, 181 Fed. 187 (1909). We are not interested here in ascertaining whether under the facts of the case there should have been a recovery. The case is adversely criticized in 24 HARV. L. REV. 408.

For an implied-in-fact contract case where the court seemingly unnecessarily demonstrated actual enrichment of defendant by plaintiff's services, see *Wojahn v. Nat'l Union Bank*, 144 Wis. 646, 129 N.W. 1068 (1911).

plied-in-fact contract decision. Whether it is not a violation of the Statute of Frauds to enforce an implied-in-fact contract, instead of a quasi-contract, may be arguable, but that the Utah court did enforce an implied-in-fact contract, and probably a meeting-of-the-minds implied-in-fact contract, would seem to be clear.²⁶

Another situation presenting a similar problem arises out of impossibility of performance of contracts. In *Moore v. Robinson*,²⁷ the defendant, a lawyer, had been paid \$600 in cash and been given a note for \$400 under a contract to defend and secure the acquittal of the plaintiff's brother, who was then under indictment for possessing and passing counterfeit money. The defendant's contract, made in January, provided that he should secure the acquittal and

²⁶ Here, again, most courts will fail to see that it is the implied-in-fact contract, rather than the express contract, for which enforcement is asked. For an instance, see *Boone v. Coe*, 153 Ky. 233, 154 S. W. 900 (1913), where, in overruling an earlier Kentucky case, *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384 (1910), which had allowed a plaintiff who suffered loss by defendant's refusal to perform to recover, although the defendant was not enriched thereby, the court said (p. 239): "The statute says that the contract of defendant made with plaintiffs is unenforceable. Defendant, therefore, had the legal right to decline to carry it out. To require him to pay plaintiffs for losses and expenses incurred on the faith of the contract without any benefit accruing to him would, in effect, uphold a contract upon which the statute expressly declares no action shall be brought. The statute was enacted for the purpose of preventing frauds and perjuries. That it is a valuable statute is shown by the fact that similar statutes are in force in practically all, if not all, of the states of the Union. Being a valuable statute the purpose of the law-makers in its enactment should not be defeated by permitting recoveries in cases to which its provisions were intended to apply." No doubt there can be no recovery on the express contract, but is it inconsistent with the purpose of the statute to enforce an implied-in-fact contract? Perhaps, and even probably, but the court did not consciously face that question.

It may be asked why an implied-in-fact contract is not enforced in cases like *Dowling v. McKenney*, 124 Mass. 478 (1878); *Banker v. Hendersen*, 58 N. J. L. 26, 32 Atl. 700 (1895), where the labor of the plaintiff was expended on his own property, which he was to turn over in its finished form to the defendant under the oral contract, and he was denied any recovery. See *Boone v. Coe*, 153 Ky. 233, 154 S. W. 900 (1913). The real question, however, is whether it is ever allowable to enforce an implied-in-fact contract where the express contract is not in writing, as required by the Statute of Frauds. If it is not, then clearly *Dowling v. McKenney* and *Banker v. Henderson* are sound decisions, for the defendant was in no way enriched by plaintiff's labor on plaintiff's own property, however damaged plaintiff may have been, so no quasi-contract existed. On the other hand, if an implied-in-fact contract is to be enforced in any of these Statute of Frauds cases — and *Fabian v. Wasatch Orchard Co.*, *supra*, necessarily asserts that one is — then maybe we should revise our estimate of such decisions as *Dowling v. McKenney* and *Banker v. Henderson*. The question is more complicated than the one raised in *Vickery v. Ritchie*, for the spirit and the letter of the Statute of Frauds are difficulties in the way of enforcing an implied-in-fact contract.

²⁷ 92 Ill. 491 (1879).

complete release of the plaintiff's brother from said charge and that the brother should be set at full liberty at the next June term of court, and it was "specially" agreed that, if the plaintiff's brother should not be released by July 1, the time when the note was payable, the defendant would pay back to plaintiff the \$600 and deliver to him the \$400 note. Without the fault of either plaintiff or defendant, the plaintiff's brother did not appear for trial at the June term or any term, and was not tried upon nor released from the charge against him. The court said that since, under the contract, the defendant was to retain the money and the note only upon the happening of the legal acquittal of plaintiff's brother upon a trial, the defendant must refund, but that

"what appellee [the defendant] in good faith did, pursuant to the terms of the agreement, before ascertaining that its performance had become impossible, he is entitled to compensation for, and this should be deducted from the \$600. The balance appellant [the plaintiff] is entitled to have judgment for."

The court did not consider whether the contract was illegal and did not give any reason for allowing a deduction from plaintiff's contract of the reasonable value of defendant's services. Manifestly that deduction was not allowable on any orthodox quasi-contract basis, since plaintiff was not enriched by the services, which were rendered in behalf of plaintiff's brother. The deduction can be supported, if at all, only on the theory that the services of the defendant were rendered at the plaintiff's request, with an intent that the plaintiff should pay for them, and that, although the particular purpose of the express contract was frustrated by impossibility, "equally a surprise to both" parties, occasioned by the act of the plaintiff's brother, that frustration, while giving plaintiff certain express contract rights, also made it fair for the court to give the defendant what was in effect a set-off or counterclaim on an implied-in-fact contract.²⁸

²⁸ For the purpose of this article, it is immaterial whether *Moore v. Robinson*, *supra*, is wholly consistent with *Siegel Cooper & Co. v. Eaton & Prince Co.*, 165 Ill. 550, 46 N. E. 449 (1897), and *Huyett & Smith Manufacturing Co. v. The Chicago Edison Co.*, 167 Ill. 233, 47 N. E. 384 (1897), which hold that there can be no recovery on a *quantum meruit* or otherwise for a part performance of an entire contract. They are, after all, minority decisions in the United States as to the effect of impossibility on contracts. See WILLISTON'S *WALD'S POLLOCK ON CONTRACTS*, 537, note 21.

Other illustrations of the sound possibilities of the novel explanation of court action here advanced might be given, but this article does not purport to exhaust the authorities, nor even to mention many of them, and does not pretend to canvass all possible situations, so probably it is wise to consider, in closing, only the light which the foregoing explanation throws on the interesting question of whether, where a plaintiff is given the alternative of suing a defendant in wilful default under an express contract either for the normal express contract measure of damages or for some special measure of damages, his choice is between an express contract remedy and a quasi-contractual one, or whether it is merely between alternative remedies on the contract. As Professor Woodward has pointed out,²⁹ the question is whether the only primary obligation is the obligation to perform the express contract and hence the only primary right the right to such performance. There *may* be several primary rights, one to the performance agreed, another to performance under an implied-in-fact contract to pay reasonable compensation for what is done at request if later there is repudiation by the defendant, regardless of whether the defendant is actually enriched, and still another to have the defendant hand over to plaintiff any enrichment secured by defendant at plaintiff's expense through the performance. Again, the measure of damages helps us to a conclusion. In some cases, at least, it seems clear that the implied-in-fact theory is necessarily adopted, because the recovery is not at the express contract rate and is not reduced to the amount of defendant's enrichment.³⁰ If there is an implied-in-fact contract primary right, the fact, if it be a fact, that it comes into existence at the time of the repudiation of the express contract, need not make it an alternative right on or under that express contract, and the same thing is true of a quasi-contractual right if one exists and if

²⁹ WOODWARD, QUASI CONTRACTS, § 260.

³⁰ See 13 C. J. 694. "But where, as in this case, the plaintiffs are prevented from performing the contract, they are entitled to recover, if at all, what their work and labor is worth, whether it was of value to the defendant or not." Cahill, J., in *Mooney v. York Iron Co.*, 82 Mich. 263, 265, 46 N. W. 396 (1890), quoted with seeming approval in *Jenson v. Lee*, 67 Kan. 539, 73 Pac. 72 (1903).

"... but, where the party suing is not responsible for the breach, neither the right nor [the amount of the recovery] depends upon the measure of benefit received by the party guilty of the breach." McGrath, J., in *Hemminger v. Western Assurance Co.*, 95 Mich. 355, 358, 54 N. W. 949 (1893). See note 23, *supra*.

it is more worth while for the plaintiff to base his action on it. It would seem as if there are three primary rights and not merely one, though they may date from different times. It is quite as easy to say that as to say that there is only one primary right — that on the contract — with several remedial rights.³¹ In any event, in Michigan, in view of the cases cited in note 30, there would clearly seem to be at least two primary contract rights, one on the express contract and one on the implied-in-fact contract, with the plaintiff compelled to elect which he will enforce.

In order that it may not be forgotten that the law of trusts presents a problem on all fours with this, the writer wishes to repeat what he wrote several years ago in a book review discussion of the implied-in-fact contract problem, namely:

“Perhaps an illustration from another subject will make clearer the point here attempted to be stated. Take the so called case of a resulting trust in land, where the grantee makes an oral promise to hold in trust. A pays the purchase price for land to B, the grantor, and has the title conveyed to C in fee, C not being related to A, and the conveyance being made to C on C’s oral promise to hold in trust for A. In the absence of the statute of frauds, a court of chancery would say: ‘This is an express trust and will be enforced as such.’ But the English statute

³¹ The fact that the right to recover the amount of defendant’s unjust enrichment arises because the plaintiff’s expectation that the defendant would perform in full under the contract has been disappointed, does not seem enough to brand the right as contractually remedial. The reasons of circumstance which cause quasi-contractual rights to arise have nothing to do with their nature as rights. Both contract and non-contract situations may result in redressable unjust enrichment, and the nature of the obligation enforced is the same no matter which kind of situation gives it rise. The only satisfactory way to distinguish a quasi-contractual obligation from a contractual, now that both the form of the action and the lack of a meeting of the minds of the parties leave us in doubt, is by the rule of damages applicable in the given case. If, as in this case of a choice of remedies for repudiation of an express contract, the measure of damages where the one remedy is pursued is contractual and where the other is pursued is quasi-contractual, there would seem to be no profit in talking of the right vindicated by the quasi-contractual damage recovery as a remedial contract right. In England the express contract’s repudiation, and in the United States either that contract’s repudiation or its substantial breach, would seem to be but a circumstance precedent to the coming into existence of the quasi-contractual primary right. The breach of contract but discloses the fact that defendant has been unjustly enriched through plaintiff’s performance, and, while such breach is the occasion of the quasi-contractual right arising, the remedy is not on that account one on the contract. So, too, if a true analysis of the situation discloses behind the express contract an implied-in-fact contract, the remedy on it is not one on the express contract, but, instead, we have still a third primary right to enforce.

of frauds provided, and the American statutes have similar provisions, that trusts of land not 'manifested and proved' by writing, signed by the proper party, or by such party's will, shall be 'of none effect,' and because of that statute, the express oral trust cannot be enforced. That, however, does not preclude action by chancery, for in the absence of the express oral trust and of any evidence of a gift as intended, chancery would have indulged the presumption of fact of a trust relationship between C and A, and even the presence of the express oral trust, since that express oral trust is unenforceable, will not prevent the same presumption. At any rate, that is the judicial way of regarding the matter, even though it may be somewhat artificial. Such a presumed trust is an implied in fact trust, since the presumption is rebuttable, and it can and will be enforced because the English statute of frauds, which made 'of none effect' express oral trusts, and the American statutes modeled on it, dispensed with the necessity of a writing 'where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law,' and because this kind of resulting trust is deemed to be covered by that language. Back of the express oral trust is held to be that implied in fact trust ready to take effect if and when the express oral trust cannot. (*Robinson v. Leflore*, 59 Miss. 148. See *Brennaman v. Schell*, 212 Ill. 356.) The implied in fact resulting trust is not the same as the express oral trust, although it may be treated like an express trust so far as the application of the statute of limitations is concerned. (*Lufkin v. Jake-man*, 188 Mass. 528. See *Whetsler v. Sprague*, 224 Ill. 461.) Now, suppose for some reason — say a statute enacting that the payer of the purchase money shall not enforce a resulting trust — this implied in fact resulting trust also must be ignored. Then a constructive trust for the payer of the money, the oral *cestui* defrauded by a retention of the property by C, should be enforced if C acquired the title with an intent not to perform, and also — though in view of the statute against resulting trusts supposed this next statement is arguable on principle as well as on the authorities — if C acquired title with honest intent, but in addition to refusing to perform the oral trust, has appropriated to his own use the trust *res*. Thus it has been held that back of the express oral trust, and ready to take its place when a failure of justice would otherwise occur, was and is the implied in fact resulting trust, and it seems that back of that, ready for the emergency caused by the statutory interference with the resulting trust, was and is the implied by law constructive trust.³² In a similar way it may yet be held expressly that

³² On the general trust problem see Stone, "Resulting Trusts and the Statute of Frauds," 6 COL. L. REV. 326; Costigan, "Trusts Based on Oral Promises to Hold in

back of an attempted but imperfect express contract, or of an express oral contract unenforceable because of the statute of frauds, there is an implied in fact contract to pay the reasonable value of services rendered or materials furnished, regardless of enrichment or loss, and that back of the implied in fact contract, in reserve in case something makes that implied in fact contract unenforceable, lies the obligation implied in law on the ground of unjust enrichment known as the quasi-contract.³³ The courts have paved the way for that very view.

"To recapitulate, there would seem to be at least two kinds of anomalous contracts, namely: 1. Those which under the sensible and efficient 'rules of the game' of making contracts are recognized and enforced as contracts despite the lack of a genuine meeting of minds; and 2. Those which are implied in fact because the attempt of the parties to form an express contract proves ineffectual, because they learn of their failure to enter into an express contract only after they have gone so far with performance that the *status quo* cannot be restored and because the rule for measuring damages which is to be applied if the contract implied in fact view is adopted is the just rule for the case. No one has yet advocated that the first kind of anomalous contracts should be dealt with apart from other contracts; and, on the other hand, hardly anybody has yet come to realize that the second kind exists, for the second kind is still regarded as a quasi contract to which justice requires that a contract measure of damages shall be applied."³⁴

And now, perhaps we may venture to consolidate our gains. It was conceded at the start that Professor Williston is absolutely right in his contention that the no-meeting-of-the-minds express contracts — the objective but not subjective test contracts — are properly to be denominated contracts instead of quasi-contracts, and the reason for that concession was that on their breach the normal contract measure of damages is applied. But that same reason has led us to the further conclusion that there are genuine implied-in-fact contracts of both the meeting-of-the-minds and the

Trust, to Convey, or to Devise, Made by Voluntary Grantees," 12 MICH. L. REV. 423, 515.

³³ Compare *National Granite Bank v. Tyndale*, 176 Mass. 547, 57 N. E. 1022 (1900), where a married woman who had avoided her notes because made payable to her husband's order and indorsed by him was held liable on the original debt created by the loan to her. That original contract obligation was back of the notes ready to take their place in the emergency which arose.

³⁴ From a book review in 8 ILL. L. REV. 68, 73, 74. That material in a book review is practically buried is the excuse for printing it here.

no-meeting-of-the-minds varieties.³⁵ That conclusion is quite unorthodox and doubtless will draw protests both from writers on contracts and from writers on quasi-contracts; but there it is. Mere protests will not avail against a *prima facie* case made out by the aid of the law of damages. Perhaps the protests will be more against the use of the phrase implied-in-fact than against the idea here covered by the phrase. If so, the protests may quickly be eliminated by the adoption of a new name. The phrase implied-

³⁵ The enlarged view of implied-in-fact contracts here advocated may lead to greater charity in the consideration of what have been deemed strictly express contract cases. The case of *Wheeler v. Klaholt*, 178 Mass. 141, 59 N. E. 756 (1901), for instance, has offered serious difficulty from the express contract point of view. There the express offer was to sell for "net spot cash at once" shoes which belonged to the offeror but by mutual mistake of the parties were in the possession of the offeree, the offer specifying that the offeree should return the goods "immediately" or "at once" if the offer was not accepted. Though net spot cash was not forthcoming, the court held that the jury could find from the silence of the offeree, and his failure to return the shoes for about a month, the previous relations of the parties calling for speech, an acceptance of an offer to sell, with payment, presumably, to be due at once without demand. That would seem to be binding the parties by a contract different from that contemplated by the express offer, but it may perhaps be an instance of a no-meeting-of-the-minds implied-in-fact contract, the conduct of the offeror being such that it must receive the interpretation "Unless you send the cash or else in a reasonable time return the goods, you will be deemed to buy them and we shall hold you for the price," and the offeree's silence and failure to return the goods in a reasonable time having the significance which the jury may see fit to attach to it. It is not intended here to defend the decision, but merely to suggest that as an implied-in-fact contract decision it is understandable, though as merely an express contract decision it is incapable of comprehension, let alone of support. The recognition of merely objective test implied-in-fact contracts throws the light of understanding on many otherwise dark decisions, even if it does not lead to sympathetic appreciation of them. It may even supply the proper solution of the troublesome problem of what shall be the effect of an attempted revocation of an offer of unilateral contract where the notice of revocation comes after the offeree has started to accept and while he is still continuing to perform the acts of acceptance. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 34, note 39; McGovney, "Irrevocable Offers," 27 HARV. L. REV. 644, 654-663; Wormser, "The True Conception of Unilateral Contracts," 26 YALE L. J. 136; Corbin, "Offer and Acceptance and Some of the Resulting Legal Relations," 26 YALE L. J. 169, 195-196. The case of an attempted revocation of an offer to an indefinite number of persons by advertisement in the newspapers is, perhaps, one which must be handled, as Sir Frederick Pollock says it was in *Shuey v. United States*, 92 U. S. 73 (1875) by judicial legislation (WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 23), but the case of an offer to a known person or to known persons might well be disposed of, without violation of principle, by permitting the offer of unilateral contract to be revoked prior to substantially complete performance of the acts called for and yet preventing real hardship to the offeree, in cases where an adequate quasi-contractual obligation cannot be found, by enforcing an implied-in-fact contract to compensate the offeree for what he has done for the offeror at the latter's request.

in-fact is used in this article because, so far, we have names for only two kinds of actual contracts, namely, express contracts and implied-in-fact contracts. If the name implied-in-fact will not serve to cover tacit no-meeting-of-the-minds contracts, our merely objective test implied-in-fact contracts — what the writer would prefer to call constructive implied-in-fact contracts³⁶ — by all means let us have a new name that will satisfy;³⁷ but for want of an accurate name we must not class as quasi-contracts those obligations which the measure of damages properly applied for their breach demonstrates to be genuinely contractual, even though the courts do constantly refer to them as implied by law.

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³⁶ See note 9, *supra*.

³⁷ Occasionally an attempt is made to place under quasi-contracts not only what are here called no-meeting-of-the-minds implied-in-fact contracts, but also some of the meeting-of-the-minds implied-in-fact contracts, by changing the definition of quasi-contracts. See WOODWARD, QUASI CONTRACTS, §§ 7, 8, which substitutes the word "benefit" for "enrichment." Compare Corbin, "Quasi Contractual Obligations," 21 YALE L. J. 533, 550, where the words "either specifically" may possibly serve the same purpose. But that method of handling the difficulty leaves to the whims of individual judges the application of one measure of damages or the other. To say to a judge, for instance, that he may shift from "benefit" to "enrichment" or *vice versa*, as his mood may suggest, is dangerous. The measure of damages applied in a given situation should be a reasoned consequence of the real nature of the primary right. While it is in the main the argument of this paper that the courts are misnaming certain obligations by calling them quasi-contractual when they are really implied-in-fact, as the measure of damages shows, that argument, which might otherwise be deemed a placing of the cart before the horse, is based on the fundamental assumption that the proper measure of damages actually is applied in the instances cited and to be supported. The measure adopted in *Vickery v. Ritchie* was proper because the real nature of the primary right, as our discussion of the case shows, was contractual. The main point made in this paper is that a contractual measure of damages can be defended only if there is in fact a contract, and, accordingly, wherever a contractual measure of damages properly is allowed, a contractual primary right is recognized and enforced. Nothing will be gained and much confusion of thought will result if the definition of quasi-contracts is broadened to cover some implied-in-fact contracts. It would seem to be much better to revise the old definition of implied-in-fact contracts, or else to identify and name a third class of genuine contracts, and then to apply to a given situation that measure of damages, contractual or quasi-contractual, which sound legal reasoning, rather than erratic impulse, indicates to be proper. We shall get right results only if we have an accurate scientific classification.

STATE SOCIALISM AND THE SCHOOL LAND GRANTS

IN the year 1904 Professor A. V. Dicey made the significant and, what in the light of the present situation in Great Britain may now be termed, the prophetic statement, "We all of us in England still fancy at least that we believe in the blessings of freedom, yet, to quote an expression which has become proverbial, 'To-day we are all of us socialists.'" ¹

If this statement was and is true of England, it is also to-day true in a great many of our western states; and though in none of them do the farmers and the people generally believe in pure socialism, which, as we understand it, is the government ownership and control of all of the agencies of production, they are strenuously insisting upon that control in all cases where they are not individually affected and their personal ownership is not liable to be called into account.² In some of these states, noticeably North and South Dakota, experiments are already being inaugurated which, if unsuccessful,—and many of them are sure to be unsuccessful,³—will be disastrous in their consequences, and will not only squander the public resources of the present, but will impose an immense burden of taxation upon those of the future. To the average man in the East the movement is only an interesting experiment which he is perfectly willing shall be tried at the expense of the people of a state other than his own. To the thoughtful

¹ This statement was, we believe, also paraphrased by Professor Dicey in a lecture before the Harvard Law School into the words "Scratch an Englishman and you will find a socialist."

² It is a noticeable fact that the socialist movement in North and South Dakota and the neighboring western states in no way involves farm lands, and that the socialistic orators seem sedulously to avoid the subject. Nor do the employers' liability acts cover farm labor, though it is a matter of common knowledge that the accidents to employees upon the farms far outnumber those in the factories and on the railroads.

³ The state of North Dakota, for instance, has by constitutional amendment and legislative enactment authorized the erection and maintenance of state-owned elevators, mills, packing-houses, stockyards, creameries, cheese factories, insurance companies, and banks, and has by constitutional amendment given to the legislature and to the municipalities the power to engage in any industry that they please.

men and women of the states affected, however, the situation is entirely different, for there is a love of home and a state pride even in the West, and the disruption of government and the squandering of his state's resources are matters in which no honest man can feel unconcerned.

In the past, however, the conservative citizen has in a large measure remained silent and has allowed the seeds to be sown and the doctrines of discontent and of socialism to be everywhere preached without any protest on his part or any attempt to inculcate in the minds of the voters the principles of sane economics. He has left all of the propaganda to the socialist and to the agitator. He has even in many instances allowed conditions to arise which have created discontent, and has sown the wind which has now become the whirlwind. This silence has in part been due to the habitual, but none the less criminal, indifference of the average business and professional man to public affairs. It much more, however, has been due to his ignorance of constitutional law and of the powers of the federal courts and of the federal government and to the false feeling of security which this ignorance has entailed. He has led himself to believe that no matter how radical the legislation may be and no matter how radically a temporary majority may seek to amend the constitution of his own state, the provisions of the Federal Constitution which deny to a state the right to deprive any person of life, liberty, and property without due process of law, and which guarantee to each state a republican form of government, can always be relied upon, and that, at some time or other, the federal authorities and the federal courts will come to his relief. His ever present illusion is that the guaranty of a republican form of government prohibits a state from engaging in what he calls "private business," and that state socialism is antagonistic to the fourteenth amendment, and generally to the spirit, if not the letter, of the Federal Constitution, and will be ultimately checked by the might of the federal power.

In these conclusions the conservative has reckoned without his host. It has been held by both the state and the federal courts that

"Courts are not at liberty to declare a statute unconstitutional because, in their opinion, it is opposed to the fundamental principles of republican government, unless those principles are placed beyond legislative en-

croachment by the constitution; or because it is opposed to a spirit supposed to pervade the constitution, but not expressed in words, or because it is thought to be unjust or oppressive, or to violate some natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights are protected by the constitution.

"Except where the constitution has imposed limitations upon the legislative power, it must be considered as practically absolute; and to warrant the judiciary in declaring a statute invalid they must be able to point to some constitutional limitation which the act clearly transcends."⁴

It is a recognized principle of constitutional law that, except where limitations are imposed by the federal or state constitution, the power of the legislature is unlimited and practically absolute, and that therefore it covers the whole range of legitimate legislation. The general rule is that if limitations upon its exercise are not found in the constitution they do not exist. It is sometimes said that an act cannot be opposed to the spirit of the constitution; "yet the spirit of a constitution is to be collected chiefly from its words."⁵

It is one thing to seek by state legislation to prevent a person from conducting any lawful business that he pleases and which is not harmful to the general public. It is quite another thing for the state itself, and for imagined purposes of public good, though leaving the individual, except as to state competition, as free as

⁴ Mitchell, J., in *State v. Corbett*, 57 Minn. 345, 59 N. W. 317 (1894); *State ex rel. Linde v. Taylor*, 33 N. D. 76, 86, 156 N. W. 561 (1916).

⁵ *Sturgis v. Crownshield*, 4 Wheat. (U. S.) 122, 202 (1819); *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358 (1905). See also *People v. Fisher*, 24 Wend. (N. Y.) 215, 220 (1840); *State v. Turner*, 37 N. D. 635, 164 N. W. 924, 936 (1917). "The public policy of a state is to be found in its constitution and statutes, and only in the absence of any declaration in these instruments may it be determined from judicial decisions. In order to ascertain the public policy of a state in respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned. All questions of policy are for the determination of the legislature, and not for the courts, and there is no public policy which prohibits the legislature from doing anything which the constitution does not prohibit." 6 R. C. L. 109. *Hunter v. Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. Rep. 40 (1907); *Red "C" Oil Manufacturing Company v. Board of Agriculture of North Carolina*, 222 U. S. 380, 32 Sup. Ct. Rep. 152 (1912).

before, to enter into such a business. Although, it has been stated to be

"The right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed on all persons of like age, sex and condition. This right may in many respects be considered a feature of our republican institutions."

And again,

"... every republican government is in duty bound to protect all of its citizens in the enjoyment of equality of rights,"⁶

the cases which have asserted this doctrine were only concerned with infractions on the personal liberty and industrial freedom of individual classes and of the right of one man to the same treatment that was afforded his neighbors. None of them passed upon or considered the rights of the state itself. Nowhere, indeed, is there any federal holding that, provided the individual citizen is protected in his personal rights and the representative form of government is preserved, the state, that is to say the citizens as a whole, may not engage in any business or enterprise that it pleases.⁷ It has even been held that

"Whether a state has a republican form of government is a political and not a judicial question, and therefore is to be determined not by the courts but by the political department of the federal government, that is by the Congress, and the decision of Congress is binding on every other department and cannot be questioned in any judicial tribunal."⁸

Even though the social programs of the western states may be revolutionary in their nature and are largely brought about by means of the initiative, the referendum, and the recall, which as a means of law making are in themselves dangerous to property rights, subversive of a stable government, and in their essential

⁶ *Dent v. State of West Virginia*, 129 U. S. 114, 121, 9 Sup. Ct. 231, 232 (1889); *Minor v. Happersett*, 21 Wall. (U. S.) 162 (1874); *United States v. Cruikshank*, 92 U. S. 542 (1874).

⁷ Such, however, was the holding of the state court in *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331 (1894).

⁸ 6 R. C. L. 44; *State v. Summers*, 33 S. D. 40, 144 N. W. 730 (1913); *Luther v. Borden*, 7 How. (U. S.) 1, 12 (1849); *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. Rep. 890, 1009 (1900); *Pacific States Tel. & Tel. Co. v. State of Oregon*, 223 U. S. 118, 32 Sup. Ct. 224 (1912); *Kiernan v. Portland*, 57 Ore. 454, 111 Pac. 379, 112 Pac. 402 (1910).

nature unrepresentative, it is quite clear that no comfort can be obtained from the federal guaranty of the republican form of government. The measures indeed are democratic and not monarchical; popular and not aristocratic. They still leave room for many of the representative features of the real republic. Though indeed the term "Republican" was frequently used in the debates and discussions which led up to the adoption of the constitution as an opposite to and as contrasted with a pure democracy, and so implying a representative form of government, it was so used in speaking of the new and central government alone, and it can be hardly possible that the framers of the national charter concerned themselves with or sought to control the local policies of the several states except in so far as it was necessary to formulate an interstate Monroe Doctrine which should guarantee for the union that which President Monroe afterwards guaranteed for the whole continent. The guaranty, in short, related to the form of government and source and center of ultimate sovereignty, and not to the economic policies which the sovereign majority might see fit to inaugurate. It had no relation to property rights. It was not a bulwark against socialism or collectivism, but against aristocratic and monarchical institutions. Its scope was clearly outlined by Madison when in *The Federalist* he said:

"In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic, or monarchical innovations. The more intimate the nature of such an union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist, that the forms of government under which the compact was entered into, should be *substantially* maintained."⁹

When we come to the fourteenth amendment we find a stronger argument for the conservative but one which we believe will hardly be sustained by the courts. Here again we come to the question of state sovereignty, and the difference between the powers of the federal government, which are merely delegated, and those of the state legislatures and constitution-making bodies, which are original and inherent.

It is of course generally conceded that public revenues can only

⁹ THE FEDERALIST, No. 43, p. 286.

be raised for public uses, and that a tax which is levied for any other purpose deprives the payer of property without due process of law.¹⁰

It by no means follows, however, that a state is denied the right to engage in or to levy taxes for the maintenance of an industry which was formerly private and which perhaps might even now be carried on by private enterprise, for the federal courts have already everywhere sustained statutes and constitutional provisions which have authorized the states, and even their municipalities, to engage in and to support, not only by special assessment but by general taxation also, improvements and industries such as irrigation districts, swamp reclamation schemes, municipal fuel yards, public sewers, gas and electric light plants, heating plants and similar enterprises, and have evinced a decided willingness to leave to the states themselves the determination of what is and what is not a public use.¹¹

It is true that in the early case of *Loan Association v. Topeka*¹² the Supreme Court of the United States appeared to limit the right of taxation to matters pertaining to the machinery of government, and to sanction its use, if for industrial purposes at all, then only for such as "have been customarily and by long course of legislation levied;" but the statement is after all merely *dictum* and the decision is an old one. The case, indeed, has been followed by many others which impose no such limitations, and by that of *Jones v. City of Portland*,¹³ where the same court said:

¹⁰ *Loan Association v. Topeka*, 20 Wall. (U. S.) 655 (1874).

¹¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56 (1896); *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. Rep. 663 (1884); *Davidson v. New Orleans*, 96 U. S. 97 (1877); *Jones v. City of Portland*, 245 U. S. 217, 38 Sup. Ct. Rep. 112 (1917); *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 9 Sup. Ct. Rep. 553 (1889).

¹² 20 Wall. (U. S.) 655, 665 (1874). Among other things the court said: "And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they [the courts] must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use and be proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

¹³ 245 U. S. 217, 38 Sup. Ct. Rep. 112 (1917). See also cases cited in note 11, *supra*.

"The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State. *Citizens Saving & Loan Association v. Topeka*, 20 Wall. 655.

"The act in question has the sanction of the legislative branch of the state government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the Supreme Judicial Court of the State upon the authority of a previous decision of that court. *Laughlin v. City of Portland*, 111 Maine, 486.

"The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the State passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is vested in this court, local conditions are of such varying character that what is or is not a public use in a particular State, is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the State upon what should be deemed a public use in a particular State is entitled to the highest respect."

The particular act which was under consideration in this case was one which provided for the establishment of municipal wood-yards which should sell fuel at cost. We can hardly believe that the Supreme Court of the United States will make a distinction between a municipal and a state industry, or between a woodyard and the elevators, flour mills, packing houses, storage plants, cheese factories, banks, and other enterprises which are provided for in the socialistic programs of the western states.

If Congress may levy a prohibitive tariff (which of course is paid by the consumer) upon foreign manufactured goods in order that the manufacturing interests of the nation may be encouraged, it is difficult to see why the state may not levy direct taxes upon its citizens for the promotion of publicly owned enterprises which the majority of its citizens believe, however fatuously, will tend to encourage their paramount industries and obtain fair prices for their products. Taxation, it may be conceded, can only be used

for public purposes, but it will be hard to prove to the Supreme Court of the United States that a public purpose is not subserved by the maintenance of an industry which is owned by a state and from which the state derives all the profits. There can at any rate be no question that up to the present time the federal courts have generally left the questions of what are and what are not public uses, and what are and what are not the legitimate spheres of state enterprise and of state endeavor, to be determined by the state electorates, the state legislatures, and the state courts.

At least one federal district judge has held that such enterprises are public and has told us that:

"The line of legislative power has been steadily advanced as society has come to believe increasingly that its welfare can best be promoted by public as distinguished from private ownership of certain business enterprises. Laws which at one time were held invalid, have at a later period been sustained by the same court. No judge can investigate judicial decisions rendered during the past ten years without being impressed with the rapid extension of state activity into fields that were formerly private. The twilight zone that separates permissible from forbidden state action is broad. Business which will seem to one court to be public will seem to another to be private. . . . McQuillin on Municipal Corporations, section 1809, and the fifth edition of Dillon on Municipal Corporations, volume 3, section 1292, which contain the last word of text-writers on the subject, solemnly inform us that cities cannot be authorized to establish publicly owned coal and wood yards, because that would be using the taxing power for a private purpose. The next edition of these works will strike out this language and inform us that such yards are permissible, because they are for a public purpose and are publicly owned, citing *Jones v. Portland*, 245 U. S. 217. . . . Thus 'can' succeeds 'can't' in this field of law so rapidly that one can hardly tell which word he is looking at.

"What may be done by the state to protect its people and promote their welfare cannot be declared by *a priori* reasoning. New evils arise as the result of changing conditions. If the state remains static, while the evils that afflict society are changing and dynamic, the state soon becomes wholly inadequate to protect the public. The state must be as free to change its remedies as the evils that cause human suffering are to change their forms."¹⁴

¹⁴ *Amidon*, District Judge, in *Scott v. Frazier*, 258 Fed. 669 (1919).

The only instances, indeed, where the federal courts have interfered have been where the tax was sought to be levied for the aid of industries or projects which were privately owned,¹⁵ and it is quite clear that the question to be determined is not, was the business or enterprise formerly considered to be a private one, or is it even now capable of private management, but is the state or municipality itself the real owner, and is it acting for itself alone and not for the benefit or profit of some private individual?

But is there no hope in Israel? Can nothing be saved from the burning? How about the magnificent school land grants of the western states? If these and the funds derived therefrom can be saved as a guarantee of the permanence of popular education and of the Americanism of the West, and as a heritage not only to the children of the citizens of the present but to those of the generations yet unborn, many will be content. They will be satisfied to allow the experiments to be tried, and, if they fail, for the dancer to pay the fiddler in the shape of an increased present taxation and a present industrial ruin.

The danger to these grants and to these funds lies in the temptation to invest recklessly in the securities of state and municipal owned industries, many of which must necessarily fail, to divert the moneys from their proper funds in order that they may be loaned to such enterprises and swell the general balances of the state which will be constantly drawn upon, and perhaps, and in order that these funds may be replenished, to sell the lands themselves at lower figures than would otherwise have been obtained. The danger, we believe, is very apparent. It can, however, we also believe, be met and overcome by a rigid insistence, by those who are authorized to insist, upon the simple law of contracts and of trusts.

An example of the grants under consideration is furnished by those which are contained in the Congressional Act of February twenty-second, 1889, and which authorized the creation of the states of North Dakota, South Dakota, Montana, and Washington. Among other things this act provided:

¹⁵ *Loan Association v. Topeka*, 20 Wall. (U. S.) 655 (1874); *Allen v. Inhabitants of Jay*, 60 Maine, 124 (1872); *Cole v. La Grange*, 113 U. S. 1, 15 Sup. Ct. Rep. 416 (1884); *Dodge v. Mission Township*, 107 Fed. 827 (1901); *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442 (1882).

"Sec. 10. That upon the admission of each of said States [North Dakota, South Dakota, Montana, and Washington] into the Union, sections numbered sixteen and thirty-six in every township of said proposed States . . . are hereby granted to the said States for the support of common schools. . . ."

"Sec. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. . . ."

"Sec. 14. That the lands granted to the Territories of Dakota and Montana by the act of February eighteenth, eighteen hundred and eighty-one, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the States of South Dakota, North Dakota, and Montana respectively, if such States are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States . . . but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said States severally, and the income thereof to be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the Territory of Washington, as, together with the lands confirmed to the vendees of the Territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in like manner to the State of Washington for the purposes of a university in said State. None of the lands granted in this section shall be sold at less than ten dollars per acre. . . ."

"Sec. 16. That ninety thousand acres of land, to be selected and located as provided in section ten, of this act are hereby granted to each of said States, except to the State of South Dakota, to which one hundred and twenty thousand acres are granted, for the use and support of agricultural colleges in said States, as provided in the acts of Congress making donations for such purposes.

"Sec. 17. That in lieu of the grants of land for purposes of internal improvements made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, the following grants of land are hereby made, to wit:

"To the State of South Dakota: For the school of mines, forty thou-

sand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for State normal schools, eighty thousand acres; for public buildings at the capital of said State, fifty thousand acres, and for such other educational and charitable purposes as the legislature of said State may determine, one hundred and seventy thousand acres; in all, five hundred thousand acres.

"To the State of North Dakota a like quantity of land as in this section granted to the State of South Dakota, and to be for like purposes, and in like proportion as far as practicable.

"To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for State normal schools, one hundred thousand acres; for agricultural colleges in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a State reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the State, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

"To the State of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for State normal schools, one hundred thousand acres; for public buildings at the State capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred thousand acres."

An example of the acceptance by the several states is also furnished by the Constitution which was adopted by the state of North Dakota as a prerequisite to its admission into the Union, and which among other things provides:

"Sec. 153, Art. 9. All proceeds of the public lands that have heretofore been, or may hereafter be granted by the United States for the support of the common schools in this state; all such per centum as may be granted by the United States on the sale of public lands . . . shall be and remain a perpetual fund for the maintenance of the common schools of the state. It shall be deemed a trust fund, the principal of which shall forever remain inviolate and may be increased but never diminished. The state shall make good all losses thereof."

"Sec. 159. All land, money or other property donated, granted or received from the United States or any other source for a University, School of Mines, Reform School, Agricultural College, Deaf and Dumb

Asylum, Normal School or other educational or charitable institution or purpose, and the proceeds of all such lands and other property so received from any source, shall be and remain perpetual funds, the interest and income of which together with the rents of all such land as may remain unsold shall be inviolably appropriated and applied to the specific objects of the original grants or gifts. The principal of every such fund may be increased, but shall never be diminished, and the interest and income only shall be used. Every such fund shall be deemed a trust fund held by the state, and the state shall make good all losses thereof."

"Sec. 162. The moneys of the permanent school fund and other educational funds shall be invested only in bonds of school corporations within the state, bonds of the United States, bonds of the state of North Dakota or in first mortgages on farm lands in the state, not exceeding in amount one third of the actual value of any subdivision on which the same may be loaned, such value to be determined by the board of appraisers of school lands."

"Sec. 165. The Legislative Assembly shall pass suitable laws for the safe keeping, transfer and disbursement of the state school funds; and shall require all officers charged with the same or the safe keeping thereof to give ample bonds for all moneys and funds received by them, and if any of said officers shall convert to his own use in any manner or form, or shall loan, with or without interest or shall deposit in his own name, or otherwise than in the name of the state of North Dakota or shall deposit in any banks or with any person or persons, or exchange for other funds or property any portion of the school funds aforesaid or purposely allow any portion of the same to remain in his own hands uninvested except in the manner prescribed by law, every such act shall constitute an embezzlement of so much of the aforesaid school funds as shall be thus taken or loaned, or deposited, or exchanged, or withheld, and shall be a felony; and any failure to pay over, produce or account for, the state school funds or any part of the same entrusted to any such officer, as by law required or demanded, shall be held and be taken to be *prima facie* evidence of such embezzlement."¹⁶

There can be no doubt that, under the Congressional acts and the state constitutional provisions which have been referred to, not only were valid contracts entered into but the several states were created trustees of the lands involved as well as of the proceeds of such as they should thereafter sell. There can also, we believe, be no question that a state may be a trustee and that

¹⁶ Similar grants were made to and similar constitutional provisions adopted by nearly all of the western states.

"the statement that the crown or a state cannot be a trustee means no more than that the cestui cannot compel performance of the trust by bill in equity. . . . The cestui's proper course is to sue by petition — in England, to the Crown; in this country, to Congress or the Legislature."¹⁷

It is also clear that, though a state may not be sued by its own subjects or by its own agencies, an American state may be sued by its sovereign the United States, that if it assumes the relationship of a trustee it assumes the liabilities of the trust and that it and its officers can be held responsible in the federal courts.

The United States then has created the states of the West trustees of what may be termed charitable trusts, for though the property conveyed and the object of the grants is certain, the *cestuis que trust* are not only the children of the present generation but the children of the generations yet unborn, and the public schools, universities, and other schools were not only not in existence and were undefined at the time of the grant, but in a number of the states, noticeably North Dakota, have never at any time had any corporate entity and their trustees or regents have acted merely as agents of the state.¹⁸

In spite of these facts, however, and in spite of the clear expression of the terms and the conditions of the trust, both in the act of Congress and in the provisions of the constitution under which the grant was accepted and the state was admitted into the Union, there can be no question that there is to-day in the state of North Dakota a determined effort and purpose to violate this trust relationship, and that this effort, if successful there, will be repeated in other land grant states. It is an effort not entirely to repudiate the trust, but to use the funds for purposes which are not authorized and to further the cause of state socialism by loaning and investing the funds in a manner which can never be sanctioned and which would not be tolerated in the case of a personal trustee even under the so-called liberal Massachusetts rule of investment.

¹⁷ Notes to KENNESON'S CASES ON THE LAW OF TRUSTS, 91. "The king shall not be seized to another's use, because he is not compellable to perform the confidence." *Dillon v. Fraine*, Popham, 70, 72; *President and Fellows of Yale College*, 67 Conn. 237, 34 Atl. 1036 (1895); KENNESON'S CASES ON THE LAW OF TRUSTS, 90.

¹⁸ *Board of University and School Lands v. McMillan*, 12 N. D. 280, 96 N. W. 310 (1903).

This purpose has not as yet been fully carried out but has in a measure been checked, at first by the determined efforts of a few hold-over senators in the legislature of 1917 and later by a few conservatives in the ranks of the reformers. Already, however, the former state debt limit of two million dollars has been swept away and the state is authorized to issue bonds to the extent of ten millions of dollars upon the security of "the real or personal property of state owned utilities, enterprises or industries, in amounts not exceeding its value," and the intention is quite clear that the school funds shall be used in the purchase of these bonds. Already, too, authority has been given for the entry of the state into all kinds of commercial enterprises and insurance projects, and above all a state owned bank has been created in which all state moneys are required to be deposited, including the school funds while waiting permanent investment, and which may loan its deposits to practically whomsoever it pleases, and which a recent lawsuit disclosed had deposits in a private state bank a large portion of whose assets were post-dated farmers' checks.

These measures, however, are merely compromises, and the real program was outlined in what is known as House Bill 44 of the legislative session of 1917, which submitted an entirely new state constitution, was vigorously championed by the governor, passed the lower house by a large vote, and was only defeated in the Senate by the vote of eight hold-over senators.

This proposed constitution authorized both the state and the municipalities to engage in any public industrial enterprises that they pleased, entirely removed the state debt limit as to state bonds which were issued on the strength of these industries, and what is still more significant amended section 162 of the original constitution so as no longer to authorize the investment of the school funds in United States bonds, but in state bonds and on real estate security only. It also repealed or omitted section 165 of the original constitution which guaranteed the proper investment of the school funds and made it the duty of the legislature to make their unlawful investment or wrongful withholding from investment or diversion a criminal offense, and thus paved the way for the practice of depositing large sums of the money in the state bank or its branches to be by them loaned as they saw fit and, as far as the trust fund was concerned, secured only by the responsibility of

the state bank. The amendments, in short, made it possible for the whole of the school funds to be loaned or kept by the state for the furtherance not of its political and governmental, but its private industrial purposes.

It is quite apparent that this program involves a serious breach of the trust relationship. All that the original congressional grant provided was that the proceeds of the sale of the school lands should be kept as a permanent fund and should be safely invested, and it is quite clear that such directions to an ordinary trustee would in no case be understood to grant the power to loan to himself. It is true that the constitution which was adopted by the new state and which was accepted by the federal Congress provided that such money could be invested "in bonds of school corporations, within the state, bonds of the United States, bonds of the state of North Dakota, or in first mortgages on farm lands," and that the acceptance of this constitution was an acceptance of the method of investment. There was in the same constitution, however, a state debt limit of two million dollars, and it is quite apparent that the bonds contemplated were the bonds which are usually issued by states, in the performance of their educational, charitable, and governmental functions, and that it was never contemplated that the state, any more than any other trustee, should invest the whole fund in its own securities or loan the whole amount to itself, and especially after it had raised the debt limit and entered into general business and loaned its credit to all kinds of industrial enterprises. Much less was it contemplated that the real security should not be the obligation of the state, but the property of industrial institutions, nine out of ten of which must fail for the simple reason that politics and business are poor bed-fellows and that the success of every industrial undertaking depends upon business management. When, too, United States government bonds and real estate mortgages and school bonds were all included, they were included for a purpose. It was never intended that the state should use the money to set itself up in business or to loan all of the money to itself.

It was never intended that the state should create a state bank, in which all the state moneys should be required to be deposited, including the school funds while waiting permanent investment, and that these funds should be placed in such a position that they

could be loaned out on short loans to needy state industries, nor that a practice, recently held illegal by the attorney general but now sought to be legalized by statute, of turning all of the taxes and funds into a general fund for general expenses, and the keeping of the accounts separate as a matter of bookkeeping merely, should jeopardize any of the funds, or prevent the educational or other institutions from having them always kept subject to their drafts.

"Trustees cannot use trust moneys in their business, nor embark it in any trade or speculation; nor can they disguise the employment of the money in their business, under the pretense of a loan to one of themselves, nor to a partnership of which they are members."¹⁹

A trustee, even though he be a sovereign state, cannot loan to himself or personally profit by the funds that he holds.

It is perfectly clear that if any of these things are attempted the United States may interfere in the premises and that it will not be compelled to wait until the fund is wasted or dissipated and then sue an already bankrupt state for damages. Fortunately the trust funds are now intact; either the land is undisposed of or the fund has so far been preserved. Certainly the state could be enjoined from dissipating the property. Certainly even a sovereign state which violates its trust may be removed as a trustee or, if the matter be merely considered contractual, the contract may be held broken and a return of the lands and moneys demanded.

In such a case the proper person to act must necessarily be the Attorney General of the United States, and this not merely because the United States has made a contract with the several states which it is entitled to enforce, but because it is a case where the settlor or creator of the trust has a definite interest and perhaps alone can protect the parties interested.

The *cestuis que trust*, even if they were ascertained and the trust was not charitable, could hardly of themselves obtain adequate relief. Being subjects, they could not sue the trustee in its own courts and would be equally precluded by the eleventh amendment from suing in the federal tribunals. No provision even seems to be made for one who seeks to sue not as a citizen of any one state but as a citizen of the United States itself.

¹⁹ PERRY ON TRUSTS, § 464.

If an action were brought by the attorney general as a representative of the *cestuis que trust* the same difficulty would be experienced.

There can be no question, however, that the settlor itself may enforce the contract and the trust obligations. The trust was not for the benefit of the state alone or for that of its children as state citizens, but for the benefit of the United States itself and of its own future citizens.

The foundation for the public land grants was laid in the provision of the Northwest Ordinance that "Religion, morality and knowledge being necessary to good government, and the happiness of mankind, schools and the means of education shall forever be encouraged," and though North Dakota is not a part of that territory and its reformers have omitted the words which have been quoted from their proposed constitution, it is none the less clear that the policy of that ordinance was the cause of the state's enrichment. The West indeed was opened for settlement and the school land grants made, not for the benefit of the states, which for the most part were then not in existence, but that in the organization of the territories and the carving them into states, the nation might be strengthened and its future secured. The children to be educated were the children of the nation itself.

It is also well settled that

"If, after the charity is established and is in process of administration, there is any abuse of the trust or misemployment of the funds, and there are no individuals having the right to come into court and maintain a bill, the attorney-general, representing the sovereign power and the general public, may bring the subject before the court by bill or information, and obtain perfect redress for all abuses,"²⁰

and it is clear that the attorney general in the case before us is the Attorney General of the United States and the court the Supreme Court of the nation.

The rule of state sovereignty which was announced in the case of *Coyle v. Oklahoma*,²¹ where the removal of a state capital was sought to be prevented, does not apply where a trust is concerned, and that the United States can interfere in the latter contingency

²⁰ PERRY ON TRUSTS, § 732.

²¹ 221 U. S. 559, 31 Sup. Ct. Rep. 688 (1911).

was clearly intimated by Mr. Justice White, when in the case of *Ashburner v. California* ²² he said:

"By the act of June 30, 1864, c. 184, the United States granted to the State of California the Yosemite Valley and the Mariposa Big Tree Grove, 'with the stipulation, nevertheless, that the State shall accept this grant upon the express condition that the premises shall be held for public use, resort, and recreation, and shall be inalienable for all time; . . . the premises to be managed by the governor of the State and eight other commissioners, to be appointed by the executive of California, who shall receive no compensation for their services.' 13 Stat. 325. In 1866 the State of California, by an act of the legislature, accepted this grant 'upon the conditions, reservations, and stipulations contained in the act of Congress.' There cannot be a doubt that, in this way, these interesting localities were, by the joint act of the United States and California, devoted to a special public use. The title was transferred to California for the benefit of the public as a place of resort and recreation. Without the consent of Congress the property can never be put to any other use, and the State cannot part with the ownership. It may be called a trust, but only in the sense that all public property held by public corporations for public uses is a trust. It must be kept for the use to which it was by the terms of the grant appropriated. If it shall ever be in any respect diverted from this use the United States may be called on to determine whether proceedings shall be instituted in some appropriate form to enforce the performance of the conditions contained in the act of Congress, or to vacate the grant. So long as the State keeps the property, it must abide by the stipulation, on the faith of which the transfer of title was made."

If the socialistic fervor of the western states is to continue, a close scrutiny of the use and method of investment of the school funds would seem to be very necessary, and it is equally certain that no political or other reasons should, when occasion demands, prevent the national government from asserting its rights and preserving intact to the children of the future the magnificent heritage that is theirs.

If the fact had been generally recognized that these grants were trusts for a definite purpose and not gifts to the several states for their own peculiar benefit, much of the reckless mismanagement and prodigal waste of the past would have been prevented, and states like Wisconsin would to-day possess and enjoy the immense

²² 103 U. S. 575, 577 (1880).

tracts of valuable land which were sold often at prices as low as \$1.50 an acre that real estate dealers might profit and the political speculator might thrive. Perhaps even now sovereign states may be held liable for their mismanagement as trustees.

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THE PROGRESS OF THE LAW, 1918-1919

EQUITY¹

LITTLE that is new is involved in the decisions upon equity during the past year. There are a few interesting applications of settled principles. Also there are occasional instances of what the critical student of equity must pronounce judicial slips. But for the most part a reviewer may do no more than discuss the reasoning by which courts arrived at sound results called for by well-understood doctrines and point out certain tendencies in the administration of equity to which they appear to testify. In one aspect such a condition is gratifying, as indicating that the judicial system is functioning as it should. From another standpoint, however, it cries out for change. After reading upwards of fourteen hundred double-column pages of judicial opinions, carefully sifted from many thousands of pages in the National Reporter System, one is impelled to ask why paper, printer's ink, labor, and shelf-room should be devoted to the perpetuation of what for the largest part is avowedly but repetition of things long familiar and is too often merely elaborate elucidation of the obvious.

I

NATURE OF EQUITY JURISDICTION AND OF EQUITABLE RIGHTS

1. EQUITABLE REMEDIES

A group of cases involving constructive trusts invite consideration of what such a "trust" really is. An express trust is a substantive institution. Constructive trust, on the other hand, is

¹ This is the fourth article in a series written by professors in the Harvard Law School in which it is intended to point out the most notable decisions, books, articles, and statutes, coming under the notice of the author, which affect or explain the law in the topic under discussion. The following articles have appeared: Joseph H. Beale, "The Conflict of Laws," 33 HARV. L. REV. 1; Austin W. Scott, "Civil Procedure," 33 HARV. L. REV. 236; Zechariah Chafee, Jr., "Bills and Notes," 33 HARV. L. REV. 255. The series will be continued in the February number. — ED.

purely a remedial institution. As the chancellor acted *in personam*, one of the most effective remedial expedients at his command was to treat a defendant as if he were a trustee and put pressure upon his person to compel him to act accordingly. Thus constructive trust could be used in a variety of situations, sometimes to provide a remedy better suited to the circumstances of the particular case, where the suit was founded on another theory, as in cases of reformation,² of specific performance,³ of fraudulent conveyance,⁴ and of what the civilian would call exclusion of unworthy heirs,⁵ and sometimes to develop a new field of equitable interposition, as in what we have come to think the typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment. In the latter case, constructive trust appears as what might be called a remedial doctrine, alongside of election, subrogation, contribution, and exoneration. In the cases first put it is rather to be compared to negative decrees where historical prejudice or practical difficulties make courts hesitant to frame decrees affirmatively,⁶ to enforcement of incidental negative covenants in order to bring about performance of affirmative covenants which cannot be coerced directly because of practical obstacles,⁷ and to enforcement of arduous alternative duties at home in the expectation of coercing affirmative action abroad.⁸ In neither case is there the substance of a trust. This is not a matter of mere academic classification. Of the cases decided during the past year, two⁹ clearly recognize that a constructive trust is imposed simply as a remedy — in those cases as a convenient form of specific performance. Other cases where it is used in the same

² *Cole v. Fickett*, 95 Me. 265, 49 Atl. 1066 (1901).

³ Compare the doctrine of the "equitable ownership" of purchaser in a land contract; the Massachusetts doctrine as to when vendor is a "trustee" under the statute allowing real enforcement of decrees as to land held in trust, *Felch v. Hooper*, 119 Mass. 52 (1875); the "trust" in *Parker v. Garrison*, 61 Ill. 250 (1871); and the constructive trust imposed on one who takes subject to a vendor's duty of conveying.

⁴ 1 PERRY, TRUSTS, § 164.

⁵ DIG. XXIV, 9, 9, § 1; NOV. 115, c. 3, § 12, c. 4, § 6; FRENCH CIVIL CODE, art. 727; GERMAN CIVIL CODE, §§ 2339-2344.

⁶ *Lane v. Newdigate*, 10 Ves. 192 (1804); *Hood v. North Eastern R. Co.*, L. R. 8 Eq. 666 (1869).

⁷ *Lord Davey in Yorkshire Miners' Ass'n v. Howden*, [1905] A. C. 256, 269.

⁸ *California Development Co. v. New Liverpool Salt Co.*, 172 Fed. 792 (1909).

⁹ *Trout v. Ogilvie*, 182 Pac. (Cal. App.) 333 (1919); *Signaigo v. Signaigo*, 205 S. W. (Mo.) 23 (1918).

way seem to think of it as something substantive,¹⁰ and in one this confusion discloses serious possibilities, leading the court to decide a question of the statute of limitations, in a suit by a donee in a parol gift who had partly performed, upon the principles applicable to an express trust.¹¹

In *Hausner v. Wickham*¹² a testator was about to devise land to his granddaughter, subject to a life estate in his son, her father. By reason of threats made by the son, and upon the son's agreement to leave the land by will to his daughter, testator devised it to the son. It will be seen that the case is in substance the same as *Cassey v. Fitton*,¹³ and it was properly decided in the same way. But the court treats it as a case of specific performance of a contract and thus becomes involved in the theoretical difficulties which are encountered in *Cassey v. Fitton*. If one bears in mind the purely remedial nature of constructive trust, the results which courts have reached in this sort of case are attained with much less difficulty. They should be compared with the cases where the heir murders the ancestor or the devisee murders the testator.¹⁴ In those cases courts have been willing, on the one hand, to read a judge-made exception into the statute of descents or statute of wills, or, on the other hand, to allow the murderer to retain the fruits of his crime because the latter was not enriched at the expense of those next in succession and there were theoretical difficulties in raising a constructive trust as something substantive.¹⁵ Likewise in such cases as *Cassey v. Fitton* courts have struggled vainly with a contract theory, being deterred by similar theoretical difficulties in raising a constructive trust. But in truth, when put in this way, the choice is between the frying pan and the fire.

¹⁰ *Stewart v. Todd*, 173 N. W. (Ia.) 619 (1919).

¹¹ *Peixouto v. Peixouto*, 181 Pac. (Cal. App.) 830 (1919). This case will be considered more fully in another connection.

¹² 105 Misc. 735, 172 N. Y. Supp. 680 (1918).

¹³ 2 HARGRAVE, JURIDICAL ARGUMENTS, 296; 1 AMES, CASES IN EQUITY JURISDICTION, 145.

¹⁴ *Kuhn v. Kuhn*, 125 Ia. 449, 101 N. W. 151 (1904); *Holdom v. Ancient Order*, 159 Ill. 619, 43 N. E. 772 (1896); *Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 830 (1908); *Perry v. Strawbridge*, 209 Mo. 621, 108 S. W. 60 (1908); *Shellenberger v. Ransom*, 41 Neb. 631, 59 N. W. 935 (1894); *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188 (1889); *Deem v. Milliken*, 53 Ohio St. 668, 44 N. E. 434 (1895); *Carpenter's Estate*, 170 Pa. 203, 32 Atl. 637 (1895).

¹⁵ *Kuhn v. Kuhn*, *supra*; *Wellner v. Eckstein*, *supra*.

One who succeeds by operation of law or by devise, when in equity and good conscience he should be excluded, and hence another should take in his stead, may be made to give up what he ought not to be suffered to hold by the remedial device of a constructive trust. The task is to find a solid theory of why he should not be allowed to take, not one of finding an enrichment at some one's expense who is to be beneficiary of a substantive trust.

A like remedial device, easily confounded with a substantive legal institution, is the imposition of an equitable lien. Recent cases generally perceive the true nature of this lien.¹⁶

2. ENFORCEMENT IN REM

Although legislatures are grinding out a huge grist annually, the power of courts of equity to give real effect to their decrees is still in doubt or undefined or over-narrow in too many jurisdictions.¹⁷ During the past year two courts have had to pass upon the question,¹⁸ and in one case the matter was so doubtful that two out of five judges dissented.¹⁹ When we remember that an excellent model was set up in this country as far back as 1785,²⁰ it is significant of our toleration of archaic legal machinery that such questions should remain open anywhere in the second decade of the twentieth century. This matter deserves to be taken up by bar association committees.

3. FOREIGN DECREES

This mooted question is passed on in *Matson v. Matson*²¹ and is considered in Professor Barbour's paper on "The Extra-Territorial Effect of the Equitable Decree."²² The Iowa court adopts and Professor Barbour urges the view taken in *Mallette v. Scheerer*,²³ in which an Illinois decree awarding alimony out of Wisconsin lands was enforced in Wisconsin, as against the contrary view taken in *Bullock v.*

¹⁶ *Fleming v. Fleming*, 202 Mich. 615, 168 N. W. 457 (1918); *Hodgson v. Martin*, 90 Ore. 105, 175 Pac. 671 (1918).

¹⁷ See HUSTON, THE ENFORCEMENT OF DECREES IN EQUITY, Appendix of Statutes.

¹⁸ *Bush v. Aldrich*, 96 S. E. (S. C.) 922 (1918); *Birch v. Covert*, 99 S. E. (W. Va.) 92 (1919).

¹⁹ *Bush v. Aldrich*, *supra*.

²⁰ LAWS OF MARYLAND, 1785, c. 72, § 14.

²¹ 173 N. W. (Ia.) 127 (1919).

²² 17 MICH. L. REV. 527.

²³ 164 Wis. 415, 160 N. W. 182 (1916).

Bullock,²⁴ *Fall v. Fall*,²⁵ and *Fall v. Eastin*.²⁶ The analogy of enforcement of foreign judgments and of foreign money-decrees on which they chiefly rely does not seem to me in point. Under modern statutes allowing enforcement of money-decrees by execution they are on the same basis as money judgments. But it is to be noted that it is only money judgments that are enforced abroad, and that this "enforcement of the judgment" is a dogmatic fiction. In the Roman law the claim sued on underwent a novation in the "procedural contract" of *litis contestatio*.²⁷ In our law the debt sued on was merged in the judgment. Hence in legal theory the original claim no longer existed, and in order to allow it to be asserted abroad it became necessary to invoke a "quasi-contractual" obligation to pay the judgment.²⁸ But in equity the suit is to compel defendant to do his duty, and that duty is not necessarily merged in the decree, so that if the decree fails of effect, an action may still be brought upon plaintiff's legal right, if he has one. Thus there was never any necessity for proceeding subsequently on a theory of enforcing the decree rather than the original claim. Moreover, in such cases as *Bullock v. Bullock* there is no need of suing on a right created by the decree. The right to alimony exists independently of and anterior to the decree. It may be asserted as such where the land lies,²⁹ and a decree may be had there either awarding the land or money which can be made from the land. If conveyances have been executed with notice in fraud of that claim the ordinary equitable remedy against such conveyances will meet the case.³⁰ On the other hand, if we are to allow

²⁴ 52 N. J. Eq. 561, 30 Atl. 676 (1894).

²⁵ 75 Neb. 104, 106 N. W. 412, 113 N. W. 175 (1905).

²⁶ 215 U. S. 1 (1909).

²⁷ KELLER, DER RÖMISCHE CIVILPROCESS UND DIE ACTIONEN, 5 ed., § 60.

²⁸ "For just as a contract is made by stipulation . . . so there is a contract by judgment; therefore we must not look to the origin of the proceeding, but to the very obligation, as it were, of the judgment." Ulpian in DIG. XV, 1, 3, § 11. Compare KEENER, QUASI CONTRACTS, 16-17.

²⁹ *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942 (1894).

³⁰ *Matson v. Matson*, as the court points out, may be distinguished from *Bullock v. Bullock*, *Fall v. Fall*, and *Fall v. Eastin* in that in the Iowa case the husband was a party to and was served with process in the second suit, which thus becomes in substance one to assert the claim to alimony existing by the laws of Iowa, as well as those of Washington, anterior to and proved by the foreign decree, and to set aside the conveyance in fraud thereof. There seems no good reason why these could not be joined in one proceeding.

a court of equity in New York to create duties to convey New Jersey land, to-day when a duty to convey land, specifically enforceable in equity, in effect, and very generally in theory involves an equitable ownership capable of assertion against the whole world, unless and until cut off by conveyance to a purchaser for value without notice, the result is to allow one state through its courts to create real rights in land in another state — and if it may do so by its courts, why not through its legislature?

4. RESTRAINING ACTIONS IN OTHER JURISDICTIONS

Others have called attention to a recent tendency to exercise more freely the jurisdiction to enjoin legal proceedings abroad.³¹ Examples of this tendency may be seen in *Weaver v. Alabama R. Co.*³² and *Culp v. Butler*,³³ while the older and, as it seems, better view is set forth in *Wells Lumber Co. v. Menominee River Boom Co.*³⁴ Much of the difficulty in such cases arises from the ambiguity of the term "jurisdiction" and from not distinguishing between the rules determining jurisdiction and the principles governing the exercise of jurisdiction. Three questions have to be asked: (1) Has the sovereign jurisdiction through any of his courts — that is, has he the power actually to coerce the person or act upon the *res*? (2) If he has, has his court of equity jurisdiction, — that is, is the plaintiff's right equitable only, or if it is legal, is the legal remedy therefor adequate? (3) If equity has jurisdiction, should that jurisdiction be exercised in the present case? At one time there was a tendency, chiefly in American state courts, to confuse the second and the third and to turn the principles governing exercise of the chancellor's jurisdiction into rules limiting that jurisdiction. Instead of inquiring whether the remedy at law was adequate under the particular facts and whether, if it was not, under the principles governing exercise of equity jurisdiction the case called for equitable relief, many courts sought to dispose of equity cases by referring them to certain abstract categories: Was the contract one calling for continuous performance, was it a building contract, was it a contract for the sale of a chose in action, was it a contract

³¹ 33 HARV. L. REV. 92.

³² 76 So. (Ala.) 364 (1917).

³³ 122 N. E. (Ind. App.) 684 (1919).

³⁴ 168 N. W. (Mich.) 1011 (1918).

for personal service? This unfortunate tendency has spent itself. But a similar confusion of the second and third with the first is appearing. Undoubtedly a state may coerce its citizens not to sue abroad. It does not follow, however, that its courts of equity have jurisdiction to do so in every case, or that they ought to exercise such jurisdiction in every case where it exists. We have to ask: What are the legal rights of the plaintiff in equity, defendant abroad, and are the legal remedies which are open to him adequate to maintain those rights? We have then to ask, is the injustice and hardship upon the plaintiff such as to make it expedient for equity to act, in view of the delicate considerations involved in interference with legal proceedings in other states?

Three types of case may be distinguished in which courts have enjoined litigation in foreign jurisdictions. In one the foreign court had no jurisdiction, but the threatened foreign judgment would embarrass plaintiff in the assertion of his rights, the legal remedy of collateral attack on the judgment when set up against plaintiff involved danger of impairment of the evidence by which its invalidity could be made to appear, and to compel plaintiff to go to the foreign state to defend or attack the threatened judgment directly involved compelling him to litigate abroad with a wrongdoer whom he could reach at home.³⁵ In a second type concurrent litigation between the same parties over the same subject matter was in progress or was threatened. In some of the cases of this type there was simply a vexatious multiplicity of actions.³⁶ Here courts were cautious about interposing.³⁷ In others, one court was not in as good a position to do complete justice as another.³⁸ In still others, the defendant was seeking to obtain an inequitable advantage over other creditors by means of concurrent litigation abroad.³⁹ In a third type there was an attempt of domestic creditors to reach exempt property of a domestic debtor by means of an action

³⁵ *E. g.*, *Kempson v. Kempson*, 58 N. J. Eq. 94, 43 Atl. 97 (1899).

³⁶ *E. g.*, *French v. Hay*, 22 Wall. (U. S.) 250 (1874).

³⁷ "If this court has the power, it must be a very special case which will induce it to break over the rule of comity, and of policy, which forbids the granting of an injunction to stay the proceedings in a suit, which has already been commenced, in a court of competent jurisdiction in a sister state." Walworth, C., in *Burgess v. Smith*, 2 Barb. Ch. (N. Y.) 276, 280 (1847).

³⁸ See what is said on this point in *Harris v. Pullman*, 84 Ill. 20 (1876).

³⁹ *Cole v. Cunningham*, 133 U. S. 107 (1890); *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 606 (1889).

outside of the state.⁴⁰ To these some courts are adding a fourth: Cases where the foreign court has jurisdiction, in which there is no concurrent litigation or vexatious multiplicity of actions, and in which there is no attempt to reach anything which the policy of the local legislation seeks to secure to the plaintiff, but in which a domestic creditor seeks to sue a domestic debtor, as he has full legal power to do, in another state, where the latter has property, because of more favorable procedure or more favorable views as to what is a defense in the latter jurisdiction. In these cases it cannot be said that plaintiff (in equity) has a legal right only to be sued at home, nor may he claim a legal interest in the procedure or substantive law of his domicile. Doctrines of Conflict of Laws may sometimes require the court in the other state to judge the cause by the laws of the jurisdiction where the parties are domiciled. But that is a matter for that court to consider and does not give to the latter jurisdiction any claim to exclusive cognizance of the cause nor to its citizens any legal claim to make their defense solely at their domicile. As between a plaintiff and a defendant, each seeking the tribunal more favorable to him, why should not equity leave the matter to the law? The only consideration which may be urged in such cases is the expense involved in litigating abroad what might well be litigated at home. This expense falls on both alike, and the Michigan court says aptly:

“The only situation which would seem to justify a court of one state in stopping, by its writ of injunction, the prosecution of a case pending in a court of a sister state, would be where the equitable considerations are plain and compelling, and the aggrieved party, through poverty, is utterly unable to present his equities to the foreign court.”⁴¹

Otherwise:

“the only satisfactory doctrine, because the only doctrine compatible with the dignity of the courts of the country and the orderly administration of justice everywhere, would be to hold the court in which the objectionable suit was commenced, and that court only, entitled, at the instance of the aggrieved party to refuse to proceed further with the suit, where it appears the object of the plaintiff was to evade the law of the state of his residence, and, upon view of the facts and the laws of

⁴⁰ *E. g.*, *Snook v. Snetzer*, 25 Ohio St. 516 (1874).

⁴¹ *Wells Lumber Co. v. Menominee River Boom Co.*, 168 N. W. (Mich.) 1011, 1016 (1918).

the state of the residence of the parties applicable thereto, the court is convinced the prosecution of the suit pending before it to judgment or decree would result in giving the plaintiff an unconscionable advantage."⁴²

II

RECOVERY OF SPECIFIC CHATTELS

In *Rawll v. Baker-Vawter Co.*⁴³ an employee had deposited with the employer company two bonds of the employer as security for his performance of the terms of the employment. The bonds were of the par value of \$1,000 each and were part of an issue of \$250,000. They were "not listed upon any exchange or curb market." It appeared that there had been some sales at par within three or four months, and at 80 within a year. There were some two hundred and fifty holders. It was held, two judges dissenting, that a suit in equity would not lie to recover the bonds in specie. The majority rely upon a series of decisions as to specific performance of contracts for the sale of securities.⁴⁴ But it should be noted that in those cases the plaintiff was not an owner whose property was detained wrongfully by a bailee, but a purchaser who claimed a contract right to have the specific securities transferred to him. Is it adequate protection of the rights of an owner of specific securities to say to him, you can't get the securities themselves from the wrongdoer who detains them, but through an action of trover you may obtain what a jury finds them to be worth, on the basis of some recent sales, and endeavor with the money to buy at that price, if you can, from some one of two hundred and fifty holders who may be willing to sell? One may feel also that the language, at least, of some New York cases as to contracts to sell securities

⁴² See *supra*, note 41. Compare *Turner, L. J.*, in *Pennell v. Roy*, 3 DeG., M. & G. 126, 139 (1853): "If we were to maintain this injunction we should, as it seems to me, be assuming a jurisdiction in this Court to prescribe the Courts in which parties should bring their suits, without there being anything to affect the consciences of the parties, upon the simple ground that the suits were such as, in the opinion of this Court, ought not to be maintained, and thus we should be bringing under the decision of this Court the question whether suits in other Courts could be maintained, — a question which it is for those Courts and not for this Court, to decide. To assume such a jurisdiction would, I think, be to exercise a legislative and not merely a judicial power."

⁴³ 176 N. Y. Supp. (Misc.) 189 (1919).

⁴⁴ *Butler v. Wright*, 186 N. Y. 259, 78 N. E. 1002 (1906); *Clements v. Sherwood-Dunn*, 108 App. Div. 327, 95 N. Y. Supp. 766 (1905), 187 N. Y. 521, 79 N. E. 1102 (1907); *Waddle v. Cabana*, 220 N. Y. 18, 114 N. E. 1054 (1917).

is somewhat narrow.⁴⁵ It is interesting to note that in this case the statute of limitations had run against the actions of trover and replevin, which were said to afford an adequate remedy at law, but not against a suit in equity, so that relief was only possible in equity. Could plaintiff claim to be legal owner and invoke the concurrent jurisdiction of equity to maintain that ownership by a more adequate remedy after the legal remedies of trover and replevin were barred? Or must the statute of limitations, in jurisdictions where it applies to suits in equity, have run also upon the concurrent equitable remedy, if any?

III

SPECIFIC PERFORMANCE

I. INSOLVENCY OF VENDOR

In four cases the courts had or took occasion to consider the effect of insolvency of the defendant. In two of them the contract did not entitle the plaintiff to call for a specific *res*, one being a contract for the delivery of so much corn generally,⁴⁶ the other a like general contract for the delivery of so much machine-mined coal.⁴⁷ In the former the court said rightly that insolvency was no basis for relief. In the latter the court refused relief in the absence of showing of insolvency. In two other cases,⁴⁸ in which plaintiff was asserting a claim to a specific *res*, the court said that the remedy of damages against an insolvent would not be adequate. But in both it was equally inadequate as against a solvent defendant. Here again the source of disagreement is in not distinguishing between a ground of jurisdiction and an important circumstance in determining the exercise of jurisdiction. If plaintiff has no right to exact a specific thing, the insolvency of the defendant can not give him greater rights than his contract gives him. But if he has a right to a specific thing, the chancellor may still think, if money damages will enable him to get not the exact thing but something substantially as good, that the extraordinary interposi-

⁴⁵ In *Waddle v. Cabana*, *supra*, the court points out that the two prior cases turn largely on practice and indicates a more liberal view.

⁴⁶ *Union Co-operative Co. v. Adolfson*, 171 N. W. (Neb.) 902 (1919).

⁴⁷ *Consolidated Fuel Co. v. St. Louis R. Co. (C. C. A.)*, 250 Fed. 395 (1918).

⁴⁸ *Crawford v. Williams*, 99 S. E. (Ga.) 378 (1919); *Doty v. Doty*, 171 N. Y. Supp. (Misc.) 852 (1918).

tion of equity is not worth while, and yet, when because of impossibility of collecting a judgment at law that substitute is not available, may hold that transfer of the specific thing should be enforced. If the contract is unilateral and defendant has the consideration, as it were, in his pocket, insolvency of the defendant, in the sense that he is proof against execution, may be a strong ground for exercising jurisdiction where ordinarily it would not be exercised.

2. INSTALLMENT CONTRACTS

*Dells Paper Co. v. Willow Lumber Co.*⁴⁹ is a good case of this type. The contract was for the sale of logs and pulp wood to a paper mill for a period of twenty-six years and had been performed for seven years. Specific performance was granted. In *Davison Chemical Co. v. Baugh Chemical Co.*⁵⁰ the contract called for delivery of sulphuric acid in stated yearly quantities for a period of five years. Specific performance was denied, but the case turns on questions of interpretation and impossibility of performance. The former, and a like decision in New York some years ago,⁵¹ should be compared with the refusal of the Privy Council to follow *Buxton v. Lister*⁵² in an unusually strong case, complicated, however, by questions of continuous performance and practical obstacles in the way of specific enforcement.⁵³ In this matter the American courts have taken a less mechanical and more enlightened view, looking to the circumstances of each particular case to see whether the legal remedy is or is not substantially adequate and not trying to lay down a hard and fast rule that all installment contracts are or are not specifically enforceable simply because they call for performance in the future.

3. CONTRACTS FOR THE SALE OF STOCK

Three of these cases are clear enough. In *Nason v. Barrett*⁵⁴ ownership of the stock would carry with it control of a coal company.

⁴⁹ 173 N. W. (Wis.) 317 (1919).

⁵⁰ 133 Md. 203, 104 Atl. 404 (1918).

⁵¹ *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149, 65 N. E. 967 (1903).

⁵² 3 Atk. 383 (1746).

⁵³ *Dominion Coal Co. v. Dominion Iron & Steel Co.*, [1909] A. C. 293, 311, reversing s. c. 43 N. S. 77, 145 (1908).

⁵⁴ 140 Minn. 366, 168 N. W. 581 (1918).

The purchaser could say I have a right to get a controlling interest in *this* company, not in what someone else may think a venture just as good, and the law gives me no way to get it. In *Cape-Girardeau-Jackson R. Co. v. Light and Development Co.*⁵⁵ the contract was for sale of the stock and bonds of a railroad company as a whole and amounted to sale of the railroad. In *Amsler v. Cavitt*⁵⁶ the number of shares was limited, the stock was not on the market, and purchaser had an interest in the corporation. *Toles v. Duplex Power Co.*⁵⁷ is more doubtful. The contract was for sale of one thousand shares in a manufacturing company of somewhat speculative prospects. Plaintiff alleged that at the time the bill was filed the stock was worth double its par value. The contract called for sale at par. No question was made as to fairness, but the court held the remedy at law adequate, saying:

“He was not attracted to the stock by any desire to become its owner for sentimental reasons. It was with him purely a commercial transaction to which he was moved in a business way by inside information which made the stock attractive as a speculation. We see no reason why the measure of damages for this alleged breach of contract is not as readily ascertainable in an action at law as in chancery.”

It is submitted that this does not meet the case. No doubt a court of law could assess damages here; but would it not in substance deprive plaintiff of the benefit of his contract? The theory on which damages are taken to be an adequate remedy is that the plaintiff may take the money and purchase other stock of the same sort or another speculation just as good. But here he could not get this stock on the general market and if the shares had doubled in value since the contract, he might well believe they would go higher still and might properly insist on the bargain he made. The ultimate outcome of the speculation was so conjectural that the legal remedy would not insure him a substitute substantially as good. The remarks of Jessel, M. R., in *Fothergill v. Rowland*⁵⁸ have done harm in these cases, as in cases of installment contracts, by confusing the question whether a jury is in a position to assess damages at all with the different question whether, however

⁵⁵ 210 S. W. (Mo.) 361 (1919).

⁵⁶ 210 S. W. (Tex. Civ. App.) 766 (1919).

⁵⁷ 202 Mich. 224, 168 N. W. 495, 497, 498 (1918).

⁵⁸ L. R. 17 Eq. 132, 140 (1873).

accurate the legal measure of damage, money damages will secure to the plaintiff what he is legally entitled to or the substantial equivalent thereof.

4. CONTRACTS TO LEND MONEY

*Norwood v. Crowder*⁵⁹ involved a contract to lend plaintiff one thousand dollars upon the security of plaintiff's share in a plantation. The cause turned on the ability of plaintiff to convey a good title, and as defendant made no other objection, a decree for plaintiff was affirmed on the ground that his title was made out. But the court, following the general doctrine, says that such a contract is not specifically enforceable. We may grant that ordinarily the remedy at law would be adequate. A loan could be had elsewhere and the measure of damage would be the increased rate at which plaintiff had to borrow and the loss caused by any delay. But if the borrower has a contract to lend without security or on inadequate or unusual security, or if money is not readily obtainable for the sort of loan to which the contract entitled him, the legal remedy is not adequate. In such a case as *Norwood v. Crowder*, where one may suspect there was some such situation, the real question is as to mutuality of performance. If the lender is required to advance the money, can the court assure him that he will get back his money years hence when it is due? Where this difficulty is out of the way under the peculiar circumstances of the case,⁶⁰ or the contract amounts in substance to a purchase of an issue of securities, the courts do not tell us that the legal remedy is adequate.

5. CONSTRUCTION CONTRACTS

*Strauss v. Estates of Long Beach*⁶¹ was a suit for specific performance of a contract to build a sewer. The circumstances were such that money damages would not enable the plaintiff to get the sewer to which he was entitled because of defendant's control of the *locus*. Hence the case is clear. But it is of interest to note that defendant relied on *Beck v. Allison*,⁶² while the court answered with *Jones v. Parker*.⁶³ That characteristically sensible and

⁵⁹ 99 S. E. (N. C.) 345 (1919).

⁶⁰ *E. g.*, *Caplin v. Penn Life Ins. Co.*, 82 App. Div. 269, 169 N. Y. Supp. 756 (1918).

⁶¹ 176 N. Y. Supp. (App. Div.) 447 (1919).

⁶² 56 N. Y. 366 (1874).

⁶³ 163 Mass. 564, 40 N. E. 1044 (1895).

liberal decision is not the least of the many contributions of Mr. Justice Holmes to our law. A question similar to that in *Jones v. Parker* was involved in *New York R. Co. v. Stoneman*,⁶⁴ where a tenant sued for specific performance of the landlord's covenant that "the demised premises shall be heated by the lessors to a proper warmth for office purposes." A ruling that the bill could not be maintained was reversed.

6. CERTAINTY

One of the stock objections in construction contracts is want of sufficient certainty. As this objection was exceptionally well handled in *Jones v. Parker*, *supra*, it is convenient to bring together at this point all the cases treating of "certainty" in connection with specific performance. *Penney v. Norton*⁶⁵ involved a contract for the sale of land. No time was fixed for payment. But, as the law would construe the contract to require payment within a reasonable time, it would seem that no difficulty as to certainty was encountered. Yet the objection was made and the court met it by saying that tender of the conveyance had made the time of payment certain. In *Wilson v. Beaty*⁶⁶ a contract for the sale of land fixed the purchase price and the date at which it should all become due, but provided for notes for deferred payments, to be paid in five years, without fixing the number or time of execution of the notes. On objection for want of certainty, the court held properly that these provisions were only an option as to the mode of payment for the benefit of the purchaser, and when not availed of did not prevent specific performance. *Feenaughty v. Beall*⁶⁷ was a suit to enjoin breach of a covenant not to engage in competing business. The covenant read: "We further agree that we will not enter directly or indirectly into any organization or individual connection in the same line of business in or about the city of Portland or this territory whereby the interests of Beall & Co. will be in any measure interfered with." This was held too uncertain for specific enforcement because of the indefiniteness of the word "territory," and because of the uncertainty "from the language of

⁶⁴ 123 N. E. (Mass.) 679 (1919).

⁶⁵ 81 So. (Ala.) 666 (1919).

⁶⁶ 211 S. W. (Tex. Civ. App.) 524 (1919).

⁶⁷ 91 Ore. 654, 178 Pac. 600 (1919). Compare *Standard Fashion Co. v. Magrane Houston Co.* (C. C. A.), 251 Fed. 559 (1918).

the writing what the parties considered at the time to be an interference with the interests of Beall & Co."

It is worth while to notice how "certainty" came to play so large a part in the law of specific performance. When the chancellor was struggling to establish his jurisdiction with jealous courts of law eying him narrowly, the dignity of the court had to be maintained and it was jeopardized by any order which the chancellor could not be sure of enforcing. Hence he was chary of decrees for affirmative performance of anything beyond a single act, and when he did decree performance of anything involving details, he felt that execution of the details must be supervised. Thus the notion arose that if a court of equity ordered a thing done it was bound to stand over every item and see it done according to the decree. This idea had two consequences. On the one hand it led to a prejudice against enforcement of construction contracts and contracts for continuous performance, since they called for continued supervision, and since the "court cannot by its ordinary means and instrumentalities carry out the decree" where such continued supervision is required.⁶⁸ It led also to a prejudice against affirmative decrees in any case where more than a single simple act was sought and a preference for negative decrees wherever possible. Though this has died out in England,⁶⁹ it is still strong with us. On the other hand, since the court ought not to make a contract for the parties but only to enforce it as they made it, it led to a doctrine that every detail of performance ought to be fixed by the agreement so that the court could supervise and exact each detail without departing from or adding to the agreement. Accordingly the older cases were too squeamish about absolute certainty in all details. *Jones v. Parker* took a step forward in holding that where there was a contract at law, if there was an objective standard, capable of determination and application by experts, there might be specific performance. The court could very well leave the details to the choice of the defendant where the contract did. But the old notion, intrenched in textbooks and encyclopedias, dies hard.

In *Feenaughty v. Beall*, construing the contract so as to give it effect and validity if we may reasonably do so consistently with

⁶⁸ 4 POMEROY, EQUITY JURISDICTION, 3 ed., § 1402.

⁶⁹ *Jackson v. Normanby Brick Co.*, [1899] 1 Ch. 438.

its terms, may we not fairly interpret "territory" to mean the region tributary to Portland in the usual course of such a business (something which business men can usually fix pretty definitely) and interpret the other clause to mean that defendants shall do nothing which amounts to business competition with covenantees' business? If the courts "ought not to be wiser than the parties" and make their contracts over for them, they ought not to conjure up objections that blind them to what the parties have agreed to and thus defeat fair business transactions.

7. CONTRACTS FOR CONTINUOUS PERFORMANCE

Reference has been made to the prejudice for historical reasons against affirmative decrees in cases calling for more than a single simple act. This is illustrated by *Mobile Electric Co. v. City of Mobile*.⁷⁰ The contract required the defendant to furnish electric light and current for ten years. It was objected that this called for continuous performance. The court said:

"While the bill is in the nature of a bill for specific performance of a contract, it does not call for the continuous performance of same by all the parties thereto running through a series of years; it seeks by the negative means of injunction the enforcement of a public duty by preventing the respondents from shutting off the lights of the citizens who comply with the terms of an existing contract placing upon the respondent the discharge of a public duty."

All this is quite in line with the orthodox way of treating such cases.⁷¹ But the English courts are now decreeing specific performance affirmatively under these circumstances,⁷² and it must be admitted that the supposed practical difficulties sought to be avoided by use of the negative form are more theoretical than real and grow chiefly out of *ex post facto* attempts to put a reason behind a historical prejudice. It is significant that one American court during the past year has avowedly followed the English practice.⁷³

⁷⁰ 79 So. (Ala.) 39 (1918).

⁷¹ *Hood v. North Eastern R. Co.*, L. R. 8 Eq. 666 (1869); *Keith v. National Tel. Co.*, [1894] 2 Ch. 147; *Prospect Park R. Co. v. Coney Island R. Co.*, 144 N. Y. 152, 39 N. E. 17 (1894).

⁷² *Fortescue v. Lostwithiel R. Co.*, [1894] 3 Ch. 621, 640-641.

⁷³ *Brown v. Western R. Co.*, 99 S. E. (W. Va.) 457 (1919).

Two other cases involve interesting points as to the form of the decree. In *Village of Larchmont v. Larchmont Park*⁷⁴ a suit to enforce a contract to maintain a sewage system, the decree provides for plaintiff's doing the work and for charging defendant's land with a lien for the expense. Apparently because it looked too much like real execution and because of jealousy of equity on the part of courts of law, which required the chancellor to proceed cautiously in the direction of enforcement *in rem*, our precedents thus far have been against this eminently common-sense mode of enforcing construction contracts and contracts for continuous performance.⁷⁵ But it exists in other parts of the world and has been urged by English writers.⁷⁶ Also it seems to be authorized by the new Federal Equity Rules.⁷⁷ That it found its way into a decree in the jurisdiction of *Beck v. Allison* may illustrate how the exigencies of judicial administration of justice will sooner or later require resort to modern machinery despite all technical and historical objections. In *City of LaFollette v. LaFollette Water Co.*,⁷⁸ in granting specific performance of a contract to furnish water and light to a municipality Judge Sanford said:

"It should further, in my judgment, be an equitable provision of the decree for specific performance that the plaintiff consent that this cause shall be retained on the docket to the end that if at any time the plaintiff shall fail to perform its part of the contract or advancement in science shall disclose new methods of improving the water, which can be installed at a reasonable expense and which can reasonably be required of the plaintiff in a water works system of the character in question, considering all the surrounding circumstances, or the water should become from any cause dangerous to the health of the inhabitants, the defendant shall have leave to apply to the court in supplemental proceedings for such relief as it may be entitled to receive in the premises as a condition of keeping the decree for specific performance in full force and effect."

This use of a conditional decree is an admirable example of a court of equity at its best.

⁷⁴ 185 App. Div. 330, 173 N. Y. Supp. 32 (1918). Commented on in 32 HARV. L. REV. 730.

⁷⁵ *Rayner v. Stone*, 2 Eden, 128 (1762); *Beck v. Allison*, 56 N. Y. 366 (1874).

⁷⁶ *Clark v. Glasgow Co.*, 1 MacQueen, 668 (1854); FRY, SPECIFIC PERFORMANCE, § 109; Amos, "Specific Performance in French Law," 17 L. QUART. REV. 372, 377.

⁷⁷ Fed. Equity Rules, rule 9.

⁷⁸ (C. C. A.) 252 Fed. 762, 774 (1918). Commented on in 32 HARV. L. REV. 439.

Public interest is often a controlling circumstance in these cases of contracts for continuous performance. This is illustrated by several decisions in 1918-19.⁷⁹ But a salutary warning as to the limitations of this doctrine is to be found in *Driver v. Smith*.⁸⁰

8. CONTRACTS FOR PERSONAL SERVICE: NEGATIVE COVENANTS

In *Whitman v. Whitman*⁸¹ an aged father agreed with his son that the latter should take over certain mortgaged premises and the business which the father conducted thereon and, on payment by the son of the mortgage out of the profits of the business, the father was to convey the property to him. The son was then to give the father a lease for life and the two were to receive their living from the business. The land having been conveyed, the father sued to require the son to provide for his living. The court held that a reconveyance could not be decreed, but that the amount required to support and maintain the plaintiff should be paid to him annually and should be a lien upon the land. While this is not a contract for personal service it comes very near one, and a captious court might have made itself much trouble with "practical obstacles" to relief. The main point was to prevent unjust enrichment of the son at the father's expense and to secure to the father his contract right to his living out of the property conveyed. There is, it is true, danger of making over the contract when a court makes use of a remedial device of this sort.⁸² In such a decree as that in *City of LaFollette v. LaFollette Water Co.*,⁸³ where Judge Sanford made the plaintiff accept certain modifications of the contract as a condition of specific performance, we are on surer ground. If the plaintiff will not consent, he may have his remedy at law on the contract as made. If he desires equitable relief, he may be required to do equity by accepting reasonable modifications

⁷⁹ *Mobile Electric Co. v. City of Mobile*, *supra*; *Village of Larchmont v. Larchmont Park*, 185 App. Div. 339, 173 N. Y. Supp. 32 (1918); *Brown v. Western R. Co.*, *supra*; *Oconto Electric Co. v. City*, 168 Wis. 91, 169 N. W. 293 (1918); *Armour v. Texas R. Co. (C. C. A.)*, 258 Fed. 185 (1919).

⁸⁰ 89 N. J. Eq. 339, 104 Atl. 717 (1918).

⁸¹ 174 N. W. (Mich.) 153 (1919).

⁸² Compare *Title Ins. Co. v. California Development Co.*, 171 Cal. 173, 152 Pac. 542 (1915), where as part of the mortgaged land was in Mexico but the mortgagor was a California corporation, the court ordered the land in California and the stock of the California corporation which would control the property in Mexico to be sold.

⁸³ 252 Fed. 762 (1918).

in view of supervening events which would make performance according to the unmodified terms a hardship.⁸⁴ These cases are significant of a return to the classical conception of the chancellor's powers and the manner of their exercise, and are in welcome contrast to the inflexible mechanical methods of a generation ago, which then seemed to import a decadence of equity. Yet there was some basis for the fear of arbitrary action on the part of the chancellor which led cautious courts to these mechanical methods, and we must be on our guard against a recrudescence of the seventeenth- and eighteenth-century tendency to make contracts over for the parties.⁸⁵ It may be noteworthy in this connection that three courts during the past year found it necessary to lay down emphatically that they had no power or inclination to do more than enforce the contract as the parties made it.⁸⁶

*Tribune Ass'n v. Simonds*⁸⁷ has already been commented on in this REVIEW. It applies the doctrine of *Lumley v. Wagner*⁸⁸ to the case of an editorial writer of unique character, not only by reason of his abilities but because of special knowledge, who had been given special value also through plaintiff's spending some thirty-five thousand dollars in exploiting him. Here the hardship upon plaintiff, if left to a remedy at law, was so great as to justify the court in wrestling mightily with mere practical obstacles to relief. In *Driver v. Smith*⁸⁹ the same court had before it the case of three employees of a manufacturing company who had covenanted to serve for two years and not "to be connected or concerned in any other business or with any other person whatsoever during the said two years of service." Here the negative had no separate significance, and the affirmative was not merely one affording obstacles to enforcement but one that ought not to be enforced specifically. Following *Sternberg v. O'Brien*⁹⁰ an injunc-

⁸⁴ Compare *Curran v. Holyoke Water Power Co.*, 116 Mass. 90 (1874).

⁸⁵ *E. g.*, Lord Thurlow's decree criticized in *Drewe v. Hanson*, 6 Ves. Jr. 675, 678 (1802); Lord Thurlow's view that time could not be made of the essence even by express stipulation, *Williams v. Thompson* (1782), *NEWLAND, CONTRACTS*, 2 ed., 238.

⁸⁶ *Stoddard v. Stoddard*, 124 N. E. 91 (1919); *Fairey v. Strange*, 98 S. E. (S. C.) 135 (1919); *Hermann v. Goddard*, 82 W. Va. 520, 96 S. E. 792 (1918).

⁸⁷ 104 Atl. (N. J. Eq.) 386 (1918), commented on in 32 HARV. L. REV. 176, 17 MICH. L. REV. 97.

⁸⁸ 1 DeG., M. & G. 604 (1852).

⁸⁹ 89 N. J. Eq. 339, 104 Atl. 717 (1918).

⁹⁰ 48 N. J. Eq. 370, 22 Atl. 348 (1891).

tion was denied. *Standard Fashion Co. v. Magrane Houston Co.*⁹¹ was a bill to enjoin breach of a covenant "not to sell or permit to be sold" on its premises other patterns than the plaintiff's. The court does not seem to have been satisfied by the evidence that the negative covenant had any separate significance, nor that any great hardship on the plaintiff would result from leaving it to an action at law. On the other hand, the practical difficulties involved seem more theoretical than real, and the case does not appear very different in principle from *Butterick Co. v. Fisher*,⁹² which the court observes it is not bound to follow. The covenant was held too uncertain to be enforced and a question of its validity under the Clayton Act was also involved. Under such circumstances it is to be regretted that the court felt called on to throw doubt upon the power of equity to coerce affirmative action by means of enforcement of negative covenants and to quote the *dictum* of Mr. Justice Holmes in *Javierre v. Central Allagracia*⁹³ in this connection.

Much of the difficulty in such cases grows out of confusing situations where a court ought not to enforce a covenant directly or indirectly and those where there is no reason why it should not be enforced if it may be, but there are practical considerations in the way of direct enforcement. Where the covenant calls for "service of a confining nature and under the direction of the employer as to details,"⁹⁴ there is more than a practical obstacle. The court ought not to exact performance even if it could. In other cases the interference with privacy or personal liberty may make direct enforcement impossible. In others it may be impossible to coerce directly a course of affirmative action involving individual taste or skill or judgment. In such cases there may be no policy of the law against enforcing the service, so that if the court, without making over the contract, can make use of a negative of separate significance to enforce the contract "in the only manner in which it could be enforced,"⁹⁵ there may be every reason for doing so.

⁹¹ (C. C. A.) 251 Fed. 559 (1918).

⁹² 203 Mass. 122, 89 N. E. 189 (1909).

⁹³ 217 U. S. 502, 508 (1910).

⁹⁴ *Clyatt v. United States*, 197 U. S. 207, 215 (1905).

⁹⁵ *Yorkshire Miners' Ass'n v. Howden*, [1905] A. C. 256, 269. See also *Cincinnati v. Marsans*, 216 Fed. 269 (1914); *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198 (1890); *Great Northern R. Co. v. Telephone Co.*, 27 N. D. 256, 265, 145 N. W. 1062 (1914).

Where breach of the negative involves a damage by itself apart from or over and above breach of the affirmative, it can be no objection to enforcement of that negative that it may tend to enforce an affirmative that ought to be performed. Mutuality of performance is a doctrine of equity for the protection of defendants by insuring to them when performance is exacted of them that they get the counter performance due them. If they obstinately refuse to avail themselves of the opportunity to have all that the contract calls for, by remaining idle when enjoined from breaking the negative covenant, they ought not to be heard to complain. Great hardship upon plaintiff, as, for example, in *Tribune Ass'n v. Simonds*, *supra*, may properly move the court to attach little weight to the possibility that the defendant, by doing nothing, may perform part of the contract with no equivalent.

*Eastman Kodak Co. v. Warren*⁹⁶ involved a covenant not to enter the service of a competitor within two years after termination of the employment. The covenant was not at all necessary for protection of the covenantee, and employees to do the kind of work in question were readily procurable. In substance the case is like *Sternberg v. O'Brien*,⁹⁷ and was so decided. *Roper v. Pryor*⁹⁸ is more doubtful. It does not appear that plaintiff had any interest in enforcement of the negative beyond holding defendant to his promise. In *Clark Paper Co. v. Stenacher*,⁹⁹ on the other hand, if defendant was permitted to break his covenant and enter the service of a competitor, his knowledge of plaintiff's customers and trade methods, and the confidential information he had acquired, involved serious possibilities of injury. Hence the case is like *Salomon v. Hertz*,¹⁰⁰ and was so decided. *Rowe v. Toon*¹⁰¹ was a suit to enjoin breach of a covenant not to compete with a business which defendant had sold to plaintiff. It differs in this respect from *Roper v. Pryor*, *supra*, where defendant had been plaintiff's clerk, and the injunction was rightly granted.

In *White Marble Lime Co. v. Consolidated Lumber Co.*¹⁰² a lumber

⁹⁶ 178 N. Y. Supp. (Misc.) 14 (1919).

⁹⁷ 48 N. J. Eq. 370, 22 Atl. 348 (1891).

⁹⁸ 102 Neb. 709, 169 N. W. 257 (1918).

⁹⁹ 177 N. Y. Supp. (Misc.) 614 (1919).

¹⁰⁰ 40 N. J. Eq. 400, 2 Atl. 379 (1885).

¹⁰¹ 169 N. W. (Ia.) 38 (1918).

¹⁰² 172 N. W. (Mich.) 603 (1919).

company agreed to sell wood slabs to a lime company “so far as the production of their mill may enable them to do so.” Afterwards, finding a higher price could be obtained elsewhere, they contracted to sell the slabs produced at their mill to a chemical company. The case differs from *Donnell v. Bennett*¹⁰³ in that the chemical company and the lime company were not competitors. Hence the implied negative had no separate significance. Because of the limited supply, uncertainty of the market, and necessity of such fuel to plaintiff’s business, the decree enjoined sale to the chemical company, expecting thus to enforce specific performance without requiring the supervision of the court.

(To be continued)

Roscoe Pound.

HARVARD LAW SCHOOL.

¹⁰³ 22 Ch. D. 835 (1883).

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THE ESPIONAGE ACT AND THE LIMITS OF LEGAL TOLERATION.^a—The sharp discussion which has been aroused by the numerous convictions under the Espionage Act of 1917¹ is much clarified by such a preliminary statement of the precise issues involved as that of Hand, J., in the case of *Masses Pub. Co. v. Patten*.² False statement of fact apart, the statute speaks only of crimes and "attempts." Expressions of opinion and exhortations to be punishable must therefore contain the ingredients of an attempt,³ namely: 1. A specific intent to commit the substantive crime; 2. A certain proximity to success. No doubtful question of constitutional law is involved.⁴ The controversy becomes one as to definitions of criminal attempts, and reduces itself primarily to criticism of charges to the jury in the district courts.

Since a trial judge must act unaided in the first instance, it is impracti-

^a An article taking the other view will appear in the February number.—Ed.

¹ Act of June 15, 1917, c. 30, Title I, § 3; 40 U. S. STAT. AT L., 219.

² 244 Fed. 535 (S. D. N. Y., 1917). He says "It must be remembered at the outset . . . that no question arises concerning the war power of Congress. It may be that the fundamental personal rights of the individual must stand in abeyance, even including freedom of the press . . . though that is not the question. Here is presented solely the question of how far Congress . . . has up to the present seen fit to exercise a power which may extend to measures not yet even considered but necessary to the existence of the state as such."

³ The term "attempt" is used to include attempts by words alone, *i. e.*, "incitements."

⁴ It is believed to be unquestioned that punishment for incitement is not prohibited by the First Amendment. See *infra*, note 16.

cable for the upper court subsequently to demand adherence to a single rigid formula or set of words. It is submitted that there is nothing damning *per se* in the use of such expressions as "inferred" or "presumed" intent. All facts must be inferred from the evidence presented. Such a "presumption" is legitimate, provided the jury understand that it is not conclusive,⁵ and is one of fact not law.⁶ Nor is there anything inherently vicious in the use of "natural tendency and reasonably probable effect" in defining the degree of proximity to success necessary to constitute an attempt.⁷ The charge in the Debs case made use of similar expressions.⁸ It was affirmed by a united court, and Justice Holmes in delivering the opinion specifically approved of the charge.⁹

When we turn to convictions under the Espionage Act as amended May 16, 1918,¹⁰ new issues are involved: first, of interpretation; second, of constitutionality. Obviously Congress intended to increase the field of criminal utterances. How has it done so? 1. By adding new substantive offenses. 2. By making the willful expression of certain disloyal utterances criminal *per se*; and thereby apparently abandoning in such cases the requirement of proximity to success, and possibly also of specific intent which are necessary to constitute an attempt. In the main, district courts appear to have insisted upon the necessity of these elements since the amendment as before. But this as a matter of statutory construction seems unwarranted. And at least one notable exception exists. In *United States v. Curran*, Learned Hand, J., recognizes the change made in this respect.¹¹ Nor, it is worth observing, did he seem to doubt the constitutionality of this change, which it was open to him to question. As yet the decisions are not numerous; but there have been a certain number in lower federal courts,¹² and a case has at last come up for review by the Supreme Court.¹³

In that case the defendants were convicted for printing and distributing in New York City two leaflets, in violation of the Espionage Act, as amended May 16, 1918. The leaflets, after denouncing the government, appealed to Russian workers in America to cease to render assistance in the war, and to rise and prevent the intervention of America against the revolutionary government in Russia. Workers in munition factories were urged to cease the production of "bullets to murder their dearest"; and

⁵ See Wolverton, J., in *United States v. Floyd Ramp*, INTERP. OF WAR STAT. BULL. NO. 66 (D. C. Ore., 1917).

⁶ See Bean, J., in *United States v. Equi*, INTERP. OF WAR STAT. BULL. NO. 172 (D. C. Ore., 1918).

⁷ It is a question of degree, to be determined in each case upon the special facts of that case. See J. H. Beale, Jr., "Criminal Attempts," 16 HARV. L. REV. 491, 501.

⁸ *United States v. Debs*, INTERP. OF WAR STAT. BULL. NO. 155 (D. C. N. D. Ohio, 1918).

⁹ *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. Rep. 252 (1919).

¹⁰ Act of May 16, 1918; U. S. COMP. STAT., 1918, § 10212 c.

¹¹ INTERP. OF WAR STAT. BULL. NO. 140 (Dist. Ct. S. D. N. Y., 1918). "Mr. COTTON: Is not intent necessary in both these? The COURT: On the 3d count the intent to persuade is necessary. The utterance of the words themselves is sufficient in the other two, they being if uttered unloyal words." *Idem*, at p. 6.

¹² The following is a list of reported cases on indictments under the amended Act: INTERP. OF WAR STAT. BULL. NOS. 131, 140, 143, 149, 155, 157, 168, 169, 172, 183, 185, 189, 191, 202.

¹³ *Abrams v. United States*, U. S. Sup. Ct., October Term, 1919, No. 316 (November 10, 1919).

a general strike was advocated as the necessary "reply to the barbarous intervention" in Russia. The fourth count of the indictment charged, in the language of the Act, a conspiracy to advocate curtailment of production of munitions.¹⁴ The defendants claimed that the evidence was insufficient to support the verdict. The Supreme Court affirmed the conviction, Holmes and Brandeis, JJ., dissenting.¹⁵

The case restricts the issue to a narrow field. The facts render unnecessary an inquiry into the requirements of the statute as to the proximity-to-success element.¹⁶ And the offense charged, though not an "attempt," was nevertheless under a clause of the statute which required a specific "intent . . . to cripple or hinder the United States in the prosecution of the war." The question of constitutionality seems therefore essentially the same as in cases of conviction under the original Act.¹⁷ Moreover there appear to have been no exceptions urged to the charge by the court below. The question of law before the Supreme Court was whether there had been sufficient evidence to sustain the verdict, the only doubt being as to the evidence of the necessary intent.

It is urged in the dissenting opinion that manifestly the sole object of the leaflets was to stop American interference in Russia: that any hindrance of the United States in the conduct of the war was an indirect effect of their publication; one not desired for its own sake, not the "proximate motive" of the act; and that therefore the necessary intent to hinder was lacking.

It is true that a wanton and conscious disregard of the probability of hindering would not satisfy the specific intent to hinder, required by the statute. But surely the conscious disregard of the certainty of hindering does so.¹⁸ In other words, "when words are used exactly,"¹⁹ a man intends not only those consequences of his act which he desires for their own sake, but also those which he is conscious must inevitably result from his act, *if the desired consequence is to be achieved*.²⁰ The first physical

¹⁴ The portion of the statute involved reads in part: "Whoever, when the United States is at war, shall willfully . . . advocate any curtailment of production in this country of any thing or things . . . necessary . . . to the prosecution of the war . . . with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, . . . shall be punished," etc. U. S. COMP. STAT., 1918, § 10212 c.

¹⁵ See RECENT CASES, p. 474.

¹⁶ It is admitted in the dissenting opinion that the distribution of the leaflets broadcast in New York would have constituted a sufficiently dangerous proximity to success to satisfy the requirements of an attempt.

¹⁷ The constitutionality of the Act of 1917 has been repeatedly affirmed. *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. Rep. 247 (1919); *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. Rep. 249 (1919); *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. Rep. 252 (1919); *Sugarman v. United States*, 249 U. S. 182, 39 Sup. Ct. Rep. 191 (1919).

¹⁸ To illustrate: William Tell, instead of removing the apple from his son's head, unfortunately kills the youth. Strictly the killing is not intentional. There was a conscious disregard of dangerous possibilities, only. 2. Suppose that the target assigned him had been his son's heart, not the apple. He attains the target, and the son dies. Clearly the killing is intentional. Considerations of motive are of course immaterial. 3. The target is the apple, but it is placed directly over the son's heart. The apple is hit, and incidentally but inevitably the boy killed. Can defendant Tell be heard in logic or justice to plead that the killing was unintentional?

¹⁹ The quotation is from the dissenting opinion in the principal case.

²⁰ If not, one who knocks A down in order to step across his body and strike B,

consequence in the chain of those specifically desired by the defendants would have been a decrease in the production of munitions. Such a result would necessarily, in and of itself, have constituted a hindrance to military operations against Germany.²¹ Of this the defendants, unless insane, must have been aware. Therefore they intended "to hinder the United States in the prosecution of the war." Similarly an intent to kill one's daughter's suitor is unescapably included in an intent "to look upon his body chopped particularly small."²² Since the state of mind necessary to complete the crime may be found without tracing beyond the point indicated the chain of desired consequences, the mental attitude of the defendants toward more distant consequences becomes immaterial.

It is submitted, therefore, that the decision in the principal case is sound.

As already observed, no issue of constitutional law seems involved. Constitutional questions of no mean interest are, however, suggested by it and the other espionage cases. An article in a recent number of this REVIEW deals at length with the relation of the constitutional guaranty of free speech to such war legislation.²³ It is there suggested that the social theory embodied in, and imposed upon us by, the First Amendment²⁴ may be crystallized into a rule of law. Subject to the existing law of Defamation and Fraud, freedom in the expression of opposition to the aims, laws, or structure of our government may be abridged only when such utterances would, by the rules of the common law, constitute attempts or incitements to commit substantive crimes against the government. Like the Constitution itself, the rule should persist in time of war, as in peace. This conclusion is based upon an historical investigation which demonstrates that the amendment was aimed not merely, as conceived by the Blackstonian definition, at prior governmental censorship, but also at such subsequent censorship by prosecutions for seditious libel as was then practiced in England. The amendment is found to be the expression of a broad principle of political faith: that unfettered expression of ideas, because essential to the slow progress toward ultimate truth, is a social interest to be zealously protected from abridgment. And this political tenet, though based on the need to question all things, shall, the amendment ordains, itself remain unquestioned.

intended to strike A, since the desire to reach B is but the motive for striking A. Yet one who reluctantly fires a bullet through his friend A as the only possible way of hitting B, did not intend to shoot A. A distinction so repugnant to common sense discredits a definition of "intent" which entails it. If intent connotes desire, surely the desire includes all consequences essential to the achievement of the desired consequence.

²¹ In an attempt the specific intent required is only to produce some result which if achieved would constitute a substantive crime. See BISHOP, CRIMINAL LAW, 8 ed., § 731. That is, in the present case, though an intent to publish would not be enough, an intent to produce any consequence which would in fact be a hindrance, *i. e.* curtailment in the production of munitions, would be enough. It is worth noting that the statute, therefore, by requiring an actual intent "to hinder," demands even more than the specific intent necessary to constitute an attempt. See J. H. Beale, Jr., "Criminal Attempts," 16 HARV. L. REV. 491, 493.

²² W. S. GILBERT, THE BAB BALLADS: "Alice Brown."

²³ Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932.

²⁴ "Congress shall make no law . . . abridging the freedom of speech or of the press," U. S. CONSTITUTION, AMENDMENT I.

If we grant the inadequacy of the Blackstonian doctrine,²⁵ if we admit and admire the clear exposition of the social theory which underlies the First Amendment, must we therefore subscribe to the rule of constitutional law deduced therefrom?

At the outset it should be noted that the rule presupposes that a "clear and present danger of success" is invariably the measure of that "dangerous proximity to success" necessary to constitute an attempt.²⁶ This seems questionable.²⁷ The degree of proximity required varies from offense to offense, and depends upon the gravity of the crime attempted and the special facts of each case.²⁸ The phrase "dangerous proximity to success" has only acquired meaning in the case of specific offenses by a process of exclusion and inclusion; as the result of a series of cases dealing with attempts to commit a particular crime.²⁹ The want of such blocking out by judicial decision is precisely the troublesome factor in the case of those crimes to which the rule is sought to be applied.³⁰

But whether a clear and present danger of success be a necessary ingredient of all attempts or not, to maintain that the rule marks a sharp line which Congress may not transgress, may not even transgress by virtue of the war power, is, it is believed, untenable.³¹ The First Amendment is an expression of political faith; not a prohibition which can be defined by mere interpretation of the language employed. The policy to which it commits us is one of toleration; of recognition of the "relativity of values." But legal toleration pushed to its ultimate conclusion becomes impotence, self-destruction. We may not believe that the truths we hold are immutable, but for some of them at least we must stand ready to fight. Somewhere we must be willing to put our back against the wall of opinion, or existence becomes impossible. The law must resist its own destruction. Thus, though we may readily conceive that the overthrow of our government by force might well produce a bettered social order, yet the law must punish such action, must thwart the appreciated possibility of the attainment of new and better truths. So too, logically, must it condemn all acts or utterances aimed at such subversion, or tending solely thither. It must do so, not because sure of

²⁵ See Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 651; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 596 *et seq.*

²⁶ Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, 967.

²⁷ In *Masses Pub. Co. v. Patten*, 246 Fed. 24 (C. C. A. 2d C., 1917), the judges of the Circuit Court of Appeals appear to have taken this view. In the case of a conviction under the original Act, and hence necessarily for an "attempt," they substitute "natural and reasonable effect" as a measure of the degree of dangerous proximity to success required.

²⁸ See Holmes, J., in *Commonwealth v. Kennedy*, 170 Mass. 18, 20, 48 N. E. 770.

²⁹ See J. H. Beale, Jr., "Criminal Attempts," 16 HARV. L. REV. 491, 501.

³⁰ This point is commented on at length by the learned author. See Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, 942 *et seq.*

³¹ This the learned author at one point in his argument seems himself to admit. See Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, at 963. If the test proposed punishes agitation at its "boiling point"—yet Congress may go further back and punish at a point which is "hot" though not at one which is "merely warm"—then the test is not one of constitutionality at all. We are faced, unaided, by a question of degrees of heat; and the true constitutional rule is yet to be ascertained.

the eternal rightness of its own doctrines, but because the law must believe that law is better than no law, that its own preservation is better than its own destruction. Now it is true the First Amendment is a binding adjudication that freedom of speech is a thing of great social value.³² But the why and the wherefor thereof must be considered. Freedom of speech is of social value, apart from its gratification of the individual's desire to have his say, because it permits thought to get itself accepted at the bar of public opinion; and, by becoming actuality, to benefit society. This reason ceases to exist when that actuality would be of the sort which we have seen the law must prohibit, irrespective of ultimate merits.

It is conceived, therefore, that the guaranty of the First Amendment extends only so far as the reason behind the guaranty demands; and that it does not inhibit the suppression, whenever reasonably necessary, of utterances whose aims render them a menace to the existence of the state. In the case of such utterances it is for Congress to judge, in the light of existing conditions, whether of war or peace, as to the kind and amount of repression necessary.³³ Unless palpably unreasonable, the decision of Congress should be respected by the courts.³⁴ If we are to deal in realities, it is believed no more specific definition is possible. To limit the state's right of self-protection to the punishing of attempts and incitements is purely arbitrary.³⁵ There is nothing in the policy imposed by the amendment, as construed in the light of the reason underlying that policy, to indicate such an intention.

How far behind the point of actual success it is wise or effective to go in punishing utterances that are beyond the pale of constitutional protection is a question worthy of deep consideration.³⁶ But within the field of its discretion Congress is sole judge of the political expediency of its own acts. Those who have often condemned judicial refusal to give

³² But *that* social interest may be outweighed by others; activities necessary to the preservation of morals or the safety of the state, for instance. See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 445, 456. Compare the Civil War "free speech" case, *Ex parte Vallandigham*, 1 Wall. (U. S.) 243 (1863) and *idem*, 28 Fed. Cas. 874 (1863).

³³ Compare the now settled right of Congress to decide that conscription is a necessary method of raising an army, despite the provisions of the Thirteenth Amendment. *Arver v. United States* (Selective Draft Law Cases), 245 U. S. 366 (1917). Cf. *Ex parte Vallandigham*, *supra*, note 32. See *Martin v. Mott*, 12 Wheat. 19 (1827); *McCulloch v. Maryland*, 4 Wheat. 316 (1819). See also Ambrose Tighe, "The Theory of the Minnesota 'Safety Commission' Act," 3 MINN. L. REV. 1; and C. H. Hough, "Law in War Time—1917," 31 HARV. L. REV. 692.

³⁴ See THAYER, LEGAL ESSAYS, 1-41.

³⁵ It is submitted that the power of Congress to legislate at all upon such matters, *i. e.* apart from the question of express constitutional prohibition, rests upon the right of self-protection. The Constitution recognizes this right by according, in normal times, the power "to make all laws necessary and proper . . ." etc.; by according, in abnormal times, the "war powers." See H. W. Biklé, "The jurisdiction of the United States over Seditious Libel," 41 AM. L. REG. (N. S.) 1.

³⁶ Bad teachings cannot be overcome by force. Neither is repression a cure for grievances. Yet war is a jealous mistress; and the catchword, "during the present emergency," was then no empty phrase; while even to-day one must be blind not to perceive the danger to civilization itself from what Mr. Gilbert Murray has called "the monstrous and debauching power of the organized lie." See an admirable article on this point in Vol. I, No. 30, THE REVIEW, p. 634 (December 6, 1919).

effect to so-called "liberal" legislation, because the refusal seemed to them based upon individual opinions of desirability, should not reverse their position now that the shoe pinches on the other foot.

It may be objected that the line of reasoning suggested reduces the First Amendment to a nullity. This is untrue. The reason behind the safeguard excludes from its protection only those utterances whose aim or obvious tendency is toward methods of change which the law cannot sanction: only those utterances, that is, whose aim is to subvert the government and the law, either directly, as by revolt; or indirectly, as by assistance to a foreign enemy in time of war. But there remains within the protection of the guaranty unfettered advocacy of any change, provided only it be by lawful means. The most humiliating censure of the administration; bitter and intemperate criticism of a public official to prevent reflection or procure impeachment; attacks upon the form of government itself to induce amendment — as to these the hands of Congress are tied. No conviction that the ultimate objects were fraught with disaster would permit Congressional interference. Yet the English law of Seditious Libel could have found therein food for prosecutions. The line may be indefinite, — all lines are hard to draw, — it is none the less real.³⁷ It differentiates between utterances, in the language of Best, J., according as they would result in "setting the government in motion for the people or setting the people in motion against the government."³⁸ And it must not be forgotten that, in the case of the latter, the power, not the wisdom, of repression is alone under discussion.

Finally there remain in addition those guaranties which have now sufficed to insure the free exchange of ideas in England for over a half-century. Whatever new test of criminality Congress may enact, the final application of that test rests in the hands of the jury. There it may safely be left. Of whatever lapses our "twelve good men and true" may have been guilty on specific occasions, they are too typical a feature of our legal system, are too ingrained in its very structure, to be condemned without mature reflection. They are drawn from the people. Their opinion may be considered representative of public opinion in general. And that public opinion in this matter should rule is in full accord with the spirit of our government. For it must be remembered that the First Amendment means what it was intended to mean at its inception, not what some of us might think it wise that it should mean to-day. And does not history show us that its primary object was to protect the people against the government, the master against his servant, rather

³⁷ The unwillingness of courts to question the constitutionality of the Act is perhaps an indication of tacit acquiescence in the view suggested, since under that view the clauses of the Act which have so far come up for consideration seem clearly constitutional. Note the remarks of Justice Holmes in the Schenck case: "When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right." *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. Rep. 247, 249 (1919). See also the remarks of Hand, J., quoted *supra*, note 2; and his assumption of the constitutionality of the Amended Act in *United States v. Curran*, *supra*, note 11.

³⁸ See *Rex v. Burdett*, 4 B. & Ald. 95, 132 (1820).

than to protect a few of the people against the force of public opinion, the master against his fellow masters?³⁹

There are those to whom all of the foregoing will seem but safeguards of straw; who will feel that to admit that Congress in this matter can be completely circumscribed by no clearly drawn line is to sacrifice all. For them there is perhaps some bitter consolation to be had from the opinion of a famous champion of free speech, Alexander Hamilton: "What is the liberty of the Press? Who can give it any definition that would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and the government."⁴⁰

D. K.

SEPARATE AND DISTINCT PENALTIES FOR WOMEN. — A survey of the statutes establishing reformatories for women in the United States under a system imposing indeterminate sentences for offenses punishable in the case of men with determinate sentences, showed two years ago that the example set by Indiana in 1869 had been followed more or less closely by seventeen other states.¹ In that study it is stated that the constitutionality of these laws had never been seriously questioned. The question has finally been raised, however, in *State v. Heitman*,² and the Act in question has been upheld.

The opinion is interesting because it takes cognizance of some of the newer movements in criminology. "Crime," says the court, "is no longer treated abstractly according to the *a priori* method, and punishment no longer consists of penalties sawed into stock lengths and corded up by the judge's bench for use in passing sentence. . . . The study of crime, not neglecting the social factor, becomes largely the study of individuals." Apparently the court welcomes the tendency toward the individualization of punishment — though it is an individualization in which the court will have but little part beyond passing on its constitutionality. Saleilles, whose work laid the ground plan for the more recent discussions of the subject, divides individualization into three classes: Legislative (the English translation says "Legal"), Executive, and Judicial.³ According to him, the first of these is not individualization at all; it is at best classification in the direction of individualization. Executive individualization, taking place after sentence, represents a method of undoing legislative and judicial blunders. Judicial individualization is the kind he advocates. The statute under consideration, however, is not only limited to legislative and executive individualization, but is antagonistic to that limited discretion of the judge which ordinarily lies between maximum and minimum sentences. The legislature makes the general classification (in this case on the basis of sex), and leaves to the

³⁹ J. R. Long, "The Freedom of the Press," 5 VA. L. REV. 225.

⁴⁰ HAMILTON, THE FEDERALIST, 631, 632. See 16 HARV. L. REV. 55.

¹ See Helen Worthington Rogers and Marion Canby Dodd, "A Digest of Laws Establishing Reformatories for Women in the United States," 8 J. OF CRIMINAL LAW AND CRIMINOLOGY, 518-553.

² 181 Pac. (Kan.) 630 (1919). See RECENT CASES, p. 473.

³ See SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT, 1898 (Eng. tr. 1911).

executive the working out of the details of the indeterminate sentence. In other words, the judiciary is still to consider only the crime; the legislative and executive, the criminal.

The reasons for this roundabout process of introducing a simple idea into our law — the adaptation of penalties to criminals — are not, then, connected with any preconceived notion of the separation of powers under the Constitution.⁴ They rather fly in the face of the alleged principle of the separation of powers, at least if the analysis offered by Saleilles is correct. The real difficulties in the way of this reform are to be found in the political fact of the jealousy on the part of legislatures of judicial power, and the practical limitations of our traditional system of evidence, which precludes from the tribunal (whether judge or jury) the possibility of investigating the criminal by limiting it solely to the investigation of the alleged crime in any particular case. Finally, the ill repute that a series of accidents and incidents attached to the Star Chamber, though it was the "twin sister of Chancery," has prevented the development of criminal equity in the Anglo-American system. For the present we must be satisfied with the rough individualization of the statute book, supplemented by the more or less arbitrary interference of the executive, together with the surreptitious individualization that has long been carried on by the jury, and the leeway between maximum and minimum sentences left to the court.

The question is therefore of some importance: how far can a legislature go in classifying criminals in spite of the Fourteenth Amendment, which provides for equal protection of the laws? It certainly smacks of mechanical jurisprudence to suggest that the woman in this case was deprived of this "equal protection" by being sent to an industrial farm instead of a penitentiary, but such was the main contention of the defendant. To justify the alleged "discrimination" the court might have cited decisions to the effect that discriminations in favor of women in the matter of conditions of employment are not class legislation.⁵ But the court preferred to rest its decision frankly on a social interest in the treatment accorded women criminals. To this extent it takes a wholesome "realistic" view of constitutional law.⁶ It relies more on the statute passed by the seventeen states, and the results achieved in some of these as set forth in the survey referred to above, than on any so-called legal argument.

It is not remarkable that separate treatment for women in the criminal law should follow on the establishment of separate courts for children. True, the way was paved for the Juvenile Court by the notion that children were somehow wards of the Chancellor.⁷ But ancient and medieval law had also made some distinctions in favor of women. Ecclesiastical law was quite ready to open the convent to the erring woman.⁸ Even

⁴ Cf. 24 HARV. L. REV. 236.

⁵ *Muller v. Oregon*, 208 U. S. 412 (1908); *Quong Wong v. Kirkendall*, 223 U. S. 59; *Wenham v. State*, 65 Neb. 394, 91 N. W. 421 (1902).

⁶ As the word is used by Professor Frankfurter in 29 HARV. L. REV. 353.

⁷ Cf. Dean Pound's Introduction to the English translation of Saleilles, p. xii; see Julian W. Mack, "The Juvenile Court," 23 HARV. L. REV. 104.

⁸ See SALEILLES, p. 201; cf. AMUNÁTEGIN, *LOS PRECARSORES DE LA INDEPENDENCIA DE CHILE*, I, 164.

the common law distinguishes between the feminine crime of being a common scold and its masculine counterpart of being a common railer and brawler. Perhaps the motive for the distinction was not so consciously a social interest, but it is hard to believe that the principle involved was not dimly perceived. In the case before us the judge quotes Genesis: "Male and female created He them." Then he adds, "It required no anatomist or physiologist or psychologist or psychiatrist to tell the legislature that women are different from men."

ACTIONABLE INJURIES IN STREET REGULATION. — The right of a state to appropriate private property for the construction of roads and streets is an aspect of the general right of eminent domain. It seems probable that there is a common-law obligation to compensate the private owner;¹ but whether this obligation exists or not is perhaps an academic question, since its enforcement is generally subject to constitutional limitation or statutory regulation.

In England, since 1845, compensation has been allowed by act of Parliament for property "injuriously affected" by the construction of public works.² In the United States, the limitation imposed by the Fifth Amendment³ applies only to the federal government;⁴ but the exercise of the power by the states has been limited by nearly all of the state constitutions,⁵ the typical provision being to the effect that private property may not be taken for public use without just compensation.

The right of a private owner to recover for injuries sustained through street regulation under such a constitutional provision depends upon the construction of the words "property," "taken," and "just compensation." If there has been a physical occupation of property, or a divesting of title, the provision is clearly applicable. And where part only of a tract⁶ is taken, compensation must include not merely the value of that part, but also the damage to the remainder caused by the taking, and by the use for the purpose proposed.⁷ So, where the grade of a new street is to be established above or below the natural surface of the tract, and the remaining land is thereby rendered less valuable, this depreciation is an element of damage.⁸ A recent case in the New York Supreme Court, *In re Skillman Ave.*,⁹ would seem, however, to deny this principle. There,

¹ See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 4; 3 SEDGWICK ON DAMAGES, 9 ed., § 1107.

² LANDS CLAUSES CONSOLIDATION ACT 1845, 8 & 9 VICT., c. 18.

³ "... nor shall private property be taken for public use without just compensation." Art. V, AMENDMENTS, U. S. CONSTITUTION.

⁴ *Barron v. The Mayor, etc. of Baltimore*, 7 Pet. (U. S.) 243 (1833).

⁵ See 1 LEWIS, EMINENT DOMAIN, 3 ed., §§ 9, 15-61.

⁶ "In assessing damages, . . . the inquiry is limited to the tract of land immediately affected. This is held to be so much as belongs to the proprietor whose land is taken, and is continuous with it, and used together for a common purpose." 3 SEDGWICK ON DAMAGES, 9 ed., § 1154.

⁷ "In making appraisals of this kind, the true rule . . . is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, what is it now fairly worth in the market, and what will it be worth after the improvement is made." Harris, J., in *Troy & Boston R. R. v. Lee*, 13 Barb. (N. Y.) 169, 171 (1852).

⁸ *In re Lafayette Ave.*, 147 N. Y. Supp. 839 (1913); *Patton v. Philadelphia*, 175 Pa. St. 88, 34 Atl. 344 (1896).

⁹ 177 N. Y. Supp. 767 (1917). See RECENT CASES, *infra*, p. 476.

part of an unoccupied plot was taken for a street, and the owner claimed compensation for damage to the remainder caused by the use to which the city intended to put the land taken, namely, a public street at a grade several feet below the natural level of the land. The court denied recovery for this damage, saying: "The opening of a new street is a benefit to every foot and parcel of vacant land adjoining it, and, while the benefit may vary, it must be in every case substantial. No vacant land can therefore be held to be damaged by and through the very means and agency which every one concedes, and by law must assume, is a benefit." In a later case, however, *In re Putnam Ave. West*,¹⁰ the same court allowed recovery for similar damage where the proposed street was to be constructed at a grade from twenty-one to twenty-five feet above the natural level of the property. These words of the court sufficiently indicate the error in the first case: "The claim for damages suffered by the taking *in invitum* is one thing, and the assessment for benefit is another. The latter is a matter of taxation, wherein the benefits are to be equitably adjusted between the owners of lands within the area of benefit." The latter case not only represents the sounder view, but accords with the weight of decision.

A more difficult problem is presented by regulation subsequent to the establishment of a street. Abutting proprietors may find their property seriously damaged by either of two causes: first, repair and regrading, or, second, use of the street for purposes other than the normal foot and vehicular traffic. We are concerned here only with the first situation. That the abutter is remediless for damage caused by the regrading of a city's streets, if the work was done pursuant to legal authority and executed with due care, seems to have been the original view.¹¹ The *rationes decidendi* of these cases seem to be, first, that as repair and regrading are incidental to the maintenance of a street, the injury must have been compensated in the original proceeding, and second, that as there is no occupation of additional property, there is no "taking" of "property" within the constitutional provision. The first reason is sound if the alteration was contemplated when the street was established, but if it was not, the possibility of damage in the future by reason of possible change would seem to be purely speculative. It is submitted that the second reason is based upon the erroneous conception that property in the legal sense is the *res*. But property is not so much land and things, as it is the sum of legal rights which the owner enjoys with reference to the *res*.¹² Among these is the sheaf of reciprocal rights which the land-

¹⁰ 177 N. Y. Supp. 768 (1919). See RECENT CASES, *infra*, p. 476.

¹¹ *Callender v. Marsh*, 1 Pick. (Mass.) 418 (1823); *Radcliff's Executors v. Mayor of Brooklyn*, 4 N. Y. 195 (1850); *Smith v. Washington*, 20 How. (U. S.) 135 (1857); *O'Connor v. Pittsburg*, 18 Pa. St. 187 (1851).

¹² "The word 'property' . . . should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such." Shaw, C. J., in *Old Colony & Fall River R. R. Co. v. County of Plymouth*, 14 Gray (Mass.), 155, 161 (1859). "If the land 'in its corporeal substance and entity' is 'property,' still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make property valuable." Smith, J., in *Eaton v. B. C. & M. R. R.*, 51 N. H. 504, 512 (1872).

owner enjoys in association with his neighbors, expressed in the maxim *sic utere tuo ut alienum non laedas*. So, if in raising the grade of a street there is an encroachment of the filling upon the abutting land,¹³ or a backing of water so as to overflow it,¹⁴ or an obstruction to a natural watercourse to the injury of adjoining land,¹⁵ compensation must be made. The right of lateral support is also a part of the abutter's property, and recovery has been allowed when the lowering of the street grade has caused an actual subsidence of part of the adjacent land.¹⁶ In addition to these, new rights are gained with the establishment of the street — easements of access, of light and air.¹⁷ If a street is vacated and closed in front of property, there is a taking of these appurtenant easements for which compensation must be made.¹⁸ It would seem that the raising or lowering of the street grade may have an equivalent effect. But as these rights are considered to be qualified, that is, subject to usual street uses, and as a change of grade is a normal street use, there is no taking of property if these rights are interfered with by regrading.¹⁹ It is evident, however, that an alteration of these easements may cause great damage to abutting property. Recognition of this hardship has led to the enactment of statutes in many jurisdictions giving compensation for all injuries incident to a change of grade.²⁰ Beginning with Illinois in 1870, several states²¹ have revised their constitutions, providing that private property shall not be "taken or damaged" for public use without just compensation. All damage resulting to abutting property by reason of a change of street grade should be within such a provision.²²

THE NATURE OF SALVAGE SERVICE. — Remuneration to those who have saved property from destruction at sea is said to be taken from the Roman law of *negotiorum gestio*, by which one who, without contract, had cared for the business or the property of an absent person was entitled to be compensated for his outlay.¹ But it should be noted that the doctrine of salvage goes beyond the Roman law. In England prior to the seventeenth century the right of a salvor was a precarious one, being almost wholly dependent upon the generosity of the Lord High Admiral or upon that of

¹³ *Vanderlip v. Grand Rapids*, 73 Mich. 522, 41 N. W. 677 (1889); *Hendershot v. Ottumwa*, 46 Ia. 658 (1877); *Broadwell v. City of Kansas*, 75 Mo. 213 (1881).

¹⁴ *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166 (1871); *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 320, 321 (1874).

¹⁵ *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41 (1885).

¹⁶ *Dyer v. St. Paul*, 27 Minn. 457 (1881); *Nichols v. City of Duluth*, 40 Minn. 389, 42 N. W. 84 (1889); *Park v. Seattle*, 5 Wash. 1, 31 Pac. 310 (1892).

¹⁷ *Williams v. Los Angeles*, 150 Cal. 592, 89 Pac. 330 (1907); *Story v. N. Y. St. Ry. Co.*, 90 N. Y. 122 (1882). See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 120.

¹⁸ *Pearsall v. Supervisors*, 74 Mich. 558, 42 N. W. 77 (1889); *Egerer v. N. Y. Cent. and H. R. R. Co.*, 130 N. Y. 108, 29 N. E. 95 (1891); *Heinrich v. St. Louis*, 125 Mo. 424, 28 S. W. 626 (1894).

¹⁹ *McCullough v. Village of Campbellsport*, 123 Wis. 334, 101 N. W. 709 (1904).

²⁰ See 1 LEWIS, EMINENT DOMAIN, 3 ed., §§ 316-335, for collection of statutes.

²¹ See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 346, note 16.

²² *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146 (1892); *Sheehy v. Kansas City Cable Ry. Co.*, 94 Mo. 574, 7 S. W. 579 (1887).

¹ See *The Calypso*, 2 Hagg. Adm. 209, 218 (1828). Also see DIG., III, 5.

the owner of the salvaged property.² But to-day remuneration for salvage is a legal right, governed by a due regard for the benefit received, combined with a just consideration for the public interest in the promotion and safe conduct of marine commerce.³

Salvage in its proper signification applies only to assistance which results in the preservation of a vessel or its lading,⁴ but statutory extension has widened its scope to include the saving of human life from a vessel in distress.⁵ A recent Canadian case illustrates this phase of salvage.⁶ The service is so exclusively maritime in its nature that admiralty has undisputed jurisdiction, but a common-law court has a concurrent jurisdiction to allow recovery in an action *in personam* when the labor has been performed at request.⁷ Salvage may arise upon a contract,⁸ although the majority of cases involve services rendered to an owner of property who has had no contractual relation with the salvor.⁹ The right acquired may be enforced *in rem* against the property saved,¹⁰ or *in personam* against the party for whose benefit the service was performed,¹¹ but both remedies may not be invoked concurrently.¹² In no instance can the recovery for salvage exceed the value of the property saved.

Salvage proceeds upon a theory somewhat analogous to the quasi-contractual right to prevent unjust enrichment, but is distinguishable from the latter in that the salvor is entitled to recover when no request for assistance has been made;¹³ and, secondly, in that a right *in rem* is secured against the property saved. Such a right is distinct from a common-law lien in that the salvor secures a right *in rem* which is not dependent upon the possession of the *res*. The basis for this right, as well as for all maritime liens, would seem to be the urgent need in early

² See SELDEN SOCIETY, 2 SELECT PLEAS IN THE COURT OF ADMIRALTY, Intro. xxxvi.

³ See *Mason v. The Blaireau*, 2 Cranch (U. S.), 239, 265 (1804). Salvage remuneration operates (1) as compensation for labor done, (2) as reward to the particular salvors, and (3) as an inducement for others to render like meritorious services. *The Sarah*, 1 C. Rob. 313, note (1800).

⁴ *The Gas Float Whitton No. 2*, [1897] A. C. 337, and cases collected therein. American cases have allowed salvage for a raft of logs. *Whitmire v. Cobb*, 88 Fed. 91 (1898); *Bywater v. A Raft of Piles*, 42 Fed. 917 (1890). This is contrary to the principles upon which salvage is founded, unless a raft may be included within the category of vessels.

⁵ MERCHANT SHIPPING ACT of 1894, 57 & 58 VICT. c. 60, § 544. Also enacted in Canada. See STAT. OF CANADA 1895. See also 1916 U. S. COMP. STAT. § 7992. When life salvage is allowed it creates a lien upon the ship and cargo saved which has priority over all other salvage claims. *The Fusilier, Br. & Lush*, 341 (1865). Prior to the enactment of such statutes, if passengers and ship were both saved, the owner of the vessel paid a greater amount of salvage than the mere rescue of the ship would entail. *The Bremen*, 111 Fed. 228 (1901). See 19 HARV. L. REV. 310.

⁶ *Cloyquot Sound Canning Co. v. S. S. Princess Adelaide*, 48 Dom. L. R. 478 (1910). See RECENT CASES, p. 480, *infra*.

⁷ *Newman v. Walters*, 3 Bos. & P. 612 (1804).

⁸ *The Kennebec*, 231 Fed. 423 (1916). This case distinguishes a towage service which merely expedites a voyage, from a salvage service which gives relief from distress or danger.

⁹ *The Apache*, 124 Fed. 905 (1903); *The R. R. Rhodes*, 82 Fed. 751 (1897).

¹⁰ *The Sabine*, 101 U. S. 384 (1879).

¹¹ *The Cargo, Ex Port Victor*, 17 T. L. R. 378 (1901).

¹² *The Sabine*, *supra*.

¹³ See *Falcke v. The Scottish Ins. Co.*, 34 Ch. D. 234, 248 (1886).

commercial life for maximum shipping facilities coupled with the animate, mobile character of a ship, which makes a right *in rem* against a vessel comparable to a right *in personam* against an individual.

No right to remuneration for salvage exists unless certain requisites have been fulfilled. The early cases required that there be an actual and immediate peril as a condition precedent to a right of recovery.¹⁴ But to-day, by going more fully into the circumstances surrounding the alleged salvage, the requirement has been relaxed to a reasonable apprehension of impending danger. Likewise, the growth of the policy in our law to preserve property irrespective of the individual interests involved has combined to make a reasonable risk of danger sufficient.¹⁵ *The Andrew Kelly v. The Commodore*¹⁶ shows that the serious crippling of a vessel's navigational powers may satisfy the requirement of peril though the disability was not sufficiently great as to have prevented her from making port. It is the danger of the salvaged property and not that of the salvors which is material in determining whether a salvage service has been performed. Further, it is necessary that the act be voluntary. This excludes services which are performed where the legal duty to supply aid already exists, as in the case of seamen aboard the salvaged vessel,¹⁷ or persons employed for the express purpose of rescue.¹⁸ Thirdly, to constitute a salvage service property must actually have been saved through the efforts of the party claiming reward.¹⁹ However, if such efforts proved unsuccessful in the preservation of property, nevertheless, if they were requested, recovery on the common count may be had in a common-law court or in admiralty as compensation in the nature of salvage.

Once a court has determined that a salvage service has been performed, many considerations pertaining to the work arise in the estimation of damages. The degree of danger of the salvaged property, the risk incurred by the salvors, their labor and skill, the time occupied in performing the service, the value of the property saved and its proportion to the value of the property in danger, all combine to determine the extent of the salvor's right.²⁰ But it is fundamental to note that these are incidents and not requisites of salvage service.

¹⁴ *The Henrietta*, 3 Hagg. Adm. 345, notes (1837); *The Giacomo*, 3 Hagg. Adm. 344 (1836).

¹⁵ *The Urko Mendi*, 216 Fed. 427 (1914); *The Evolution*, 199 Fed. 514 (1912). "It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if services were not rendered." Per Dr. Lushington in *The Charlotte*, 3 W. Rob. 68, 71 (1848).

¹⁶ 48 Dom. L. R. 213 (1919). See RECENT CASES, *infra*, p. 453.

¹⁷ *The C. P. Minch*, 73 Fed. 859 (1896); *The Nebraska*, 75 Fed. 598 (1895). But seamen are entitled to salvage for services rendered after a final abandonment of the ship. *The Aguan*, 48 Fed. 320 (1891); *The Umattila*, 29 Fed. 252 (1886). See 32 HARV. L. REV. 835 as to what constitutes abandonment.

¹⁸ See *The Resolute*, 168 U. S. 437, 441 (1897).

¹⁹ *The Henry Steers, Jr.*, 110 Fed. 578 (1901); *The Tolomeo*, 7 Fed. 497 (1881); *The Huntsville*, Fed. Cas. No. 6, 916 (1860).

²⁰ See *The Blackwall*, 10 Wall. (U. S.) 1, 14 (1869). "Where all the elements are found to exist in a high degree, a large reward is given; where few of them are found, or they are present only in a low degree, the salvage remuneration awarded is comparatively small." KENNEDY, CIVIL SALVAGE, 2 ed., 133.

EFFECT IN EQUITY OF A CONDITIONAL CONTRACT TO MORTGAGE.—In *Connecticut Co. v. New York, N. H. & H. R. R. Co.*,¹ a case recently before the Connecticut Court of Errors, corporation bonds contained a promise that in the event the corporation should thereafter mortgage any property owned by it at the date of the issue of the bonds, the bondholders should share equally in the security with the future mortgagees. The principal questions sent up by the lower court were: (1) whether the corporation could effect a valid mortgage in terms which would prevent the bondholders from sharing in the security; (2) whether the bonds created an equitable lien forthwith on the property owned by the corporation at the date of issue. The first question was answered unanimously in the negative; the second, two of the five judges dissenting, in the affirmative.

It is a well-established doctrine that a contract to mortgage property creates an equitable lien upon the property, provided the money has already been advanced.² Prior to the maturity of the loan damages are so conjectural that the lender would obviously be entitled to only a nominal recovery at law. The cause of action which arises if the debt is not paid at maturity is clearly an inadequate substitute for the security contracted for. Consequently such a promise will be specifically enforced.³ Such an equitable lien like the equitable ownership of land in land contracts is considered a consequence of the right to specific performance.

If the contract be to mortgage property to be acquired in the future, the lien attaches upon the acquisition of the property.⁴ In the principal case, however, the property is already acquired, but the promise to give security is conditional. Hence the inquiry becomes whether there is a lien before the condition is performed. The case of an option to purchase land provides an analogy. In such a case the promise of the landowner is, in substance, to convey the land if the option holder elects to exercise his option. No equitable estate in the land is created forthwith by the option contract, because until the option is exercised there is no vendor-purchaser relation.⁵ Hence there is no right to specific performance, and consequently no equitable interest in the property is trans-

¹ 107 Atl. 646. See RECENT CASES, p. 476, *infra*.

² *Holroyd v. Marshall*, 10 H. L. C. 191 (1862); *Wickes v. Hynson*, 95 Md. 511, 52 Atl. 747 (1902); *Atlantic Trust Co. v. Holdsworth*, 50 App. Div. (N. Y.) 623, 63 N. Y. Supp. 756 (1900); *Carter v. Sapulpa & Interurban Ry.*, 49 Okla. 471, 153 Pac. 853 (1915); *Fitzgerald v. Fitzgerald*, 97 Kan. 408, 155 Pac. 791 (1916); *accord*. *Chase v. Denny*, 130 Mass. 566 (1880), *contra*. See Samuel Williston, "Transfers of Personal Property," 19 HARV. L. REV. 560, note 4. Also for definition of equitable lien, see 3 POMEROY, EQ. JUR., 4 ed., § 1235, cited with approval in *Walker v. Brown*, 165 U. S. 654, 664 (1897), and *Knott v. Mfg. Co.*, 30 W. Va. 790, 795, 5 S. E. 266, 268 (1888).

³ For collection of cases, see Ames, *Cas. Eq. Jur.* p. 61, note 3. And following more recent cases. *King v. Williams*, 66 Ark. 333, 50 S. W. 695 (1899); *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535 (1904). See also FRY, *SPECIFIC PERFORMANCE*, 3d ed., p. 23.

⁴ *Holroyd v. Marshall*, *supra*.

⁵ *Stembridge v. Stembridge*, 87 Ky. 91, 7 S. W. 611 (1888); *Sweezy v. Jones*, 65 Iowa, 272, 21 N. W. 603 (1884). Nor is there an equitable conversion until the option is exercised. *Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159 (1893); *Rockland Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43 (1911); *accord*. *Lawes v. Bennet*, 1 Cox Ch. 167 (1805), *contra*.

ferred. Again, certain illustrations of the doctrine of equitable conversion are helpful in this connection. If, in the case of a contract to convey land the vendor is unable to furnish good title, unless the contrary has been expressed there has been a breach of an implied condition precedent and the purchaser has an election whether he will compel a conveyance. It has been held under such circumstances, as where tested by the death of the vendor before the election, that there is no equitable conversion.⁶ Furthermore the risk of loss, a natural concomitant of ownership, is, prior to the purchaser's election, to go after the property on the vendor.⁷ Similarly it would seem in the Connecticut case that no property right was created by mere contract, and that none could arise until the corporation made a mortgage of some of its property. Until there were such a mortgage it would be impossible to say what property was subject to the lien. Just what or how much could not be determined until the future mortgage was made. Until the performance of this condition precedent, the specification by mortgage of the property, the bondholder is not entitled to specific performance. If the hypothesis that the creation of equitable property rights by contract is to be tested by the right to specific performance be correct, then it is immaterial whether the condition precedent is to be performed by the party claiming the equitable interest in the *res*, as in the option and defective title cases, or by the promisor, as in the principal case.

The judges who dissented on the second question seem to have reached the sounder view. The majority apparently gave the bonds a more sweeping effect than that of English debentures,⁸ which are in the nature of floating mortgages not attaching to specific property until the happening of the event agreed on, *e. g.*, insolvency. To impose a cloud on the title of the corporation *ab initio* is a more serious matter and could hardly have been within the intent of the parties.⁹ As to the first question there can be little doubt that when the mortgage is made, the condition is fulfilled, the property is ascertained, and the contract made specifically enforceable, so that from that instant the bondholders should share

⁶ *Thomas v. Howell*, L. R. 34 Ch. D. 166 (1886); *Lunsford v. Jarrett*, 11 Lea (Tenn.), 192 (1883). See *Cooper v. Jarman*, 3 Eq. 98, 101 (1866).

⁷ *Mackey v. Bowles*, 98 Ga. 730, 25 S. E. 834 (1896).

⁸ For a good description of an English debenture see *Government Stock Co. v. Manila Ry. Co.*, [1897] A. C. 81, 86 (1896); see also SIMONSON, *DEBENTURES AND DEBENTURE STOCK*, 15-26.

⁹ If A contracts to mortgage his horse to B if it rains next Thursday, and B advance the money, before Thursday B will have no property right. But if A before Thursday gives his horse to C, or C purchases it with notice of the agreement, and Thursday is rainy, B should be able to compel a mortgage of the horse from C. Such is the result in the case of an option to buy land. A donee or purchaser with notice from the vendor must convey to the option holder if the latter exercises his option. *Ross v. Parks*, 93 Ala. 153, 8 So. 368 (1890); *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149 (1890); *Horgan v. Russell*, 24 N. D. 490, 140 N. W. 99 (1913); *Faraday Coal & Coke Co. v. Owens*, 26 Ky. L. Rep. 243, 80 S. W. 1171 (1904); *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539 (1903); *City of Birmingham v. Forney*, 173 Ala. 1, 55 So. 618 (1911). No better reason can be assigned for this rule than that it is unconscionable for C thus to prevent performance of a bargain of which he has knowledge. Dean Ames suggested unjust enrichment. See "Specific Performance for and against Strangers to the Contract," 17 HARV. L. REV. 174. In the principal case, however, this situation can not arise, because, if the corporation sells any of its property, they cannot later mortgage it, and as to that property the contingency can never happen.

equally in the security.¹⁰ Only where the mortgagees were purchasers for value of a legal interest without notice of the provision in the bonds should they come ahead of the bondholders.

TITLE TO SEASHORE AND SOIL UNDER NAVIGABLE RIVERS AND STREAMS.—By a rule of international law every independent nation is considered to have territorial property in and jurisdiction over the seas which wash its shores within a limit of three miles from low-water mark on the shore.¹ Moreover, title to the soil of all navigable tidal rivers as far inland as the tide ebbs and flows, and of all estuaries and arms of the sea, vests in the sovereign,² on the ground that such streams partake of the nature of the sea and are branches of it as far as it flows.³ But inlets of the sea and small tidal creeks which are not susceptible of navigation belong to the owners of the lands along their banks.⁴ In England, whatever may be the King's right to-day, it was early recognized that he had the right to make a grant of the soil under tide-waters.⁵ The States are the successors to the rights of the English King in this country, and in the absence of any constitutional inhibition there is no reason why they cannot through their legislatures make similar grants.⁶ In order to pass the soil under such waters, however, express words must be used.⁷

At common law, title to the seashore⁸ on tidewaters was *prima facie* in the King. This was the opinion of Lord Hale⁹ and the modern English cases have accepted his view.¹⁰ The majority of American juris-

¹⁰ The right that the bondholders acquire when the contingency happens would seem to be the equitable ownership of the security title.

¹ *Gann v. The Free Fishers of Whitstable*, 11 H. L. Cas. 192 (1865); *Manchester v. Mass.*, 139 U. S. 240 (1891).

² *Gann v. The Free Fishers of Whitstable*, *supra*; *Townsend v. Brown*, 24 N. J. L. 80 (1853); *Hoboken v. Penn. R. R. Co.*, 124 U. S. 656 (1888).

³ *Royal Fishery of the Banne*, Davies Rep. 149 (1610).

⁴ See *Commonwealth v. Charlestown*, 1 Pick. (Mass.) 180 (1822); *Rowe et al. v. Granite Bridge Corp.*, 21 *Idem.* 344 (1838).

⁵ *The Free Fishers of Whitstable v. Gann*, 11 C. B. (N. S.) 387 (1861). The corporation of New York City received under royal charters title to lands under water along the East and North Rivers to the extent of four hundred feet from the line of low-water mark. *Furman v. New York*, 10 N. Y. 567 (1853).

⁶ *Gould v. The Hudson River R. Co.*, 6 N. Y. 522 (1852); *Langdon v. New York*, 93 N. Y. 129 (1883).

⁷ *Middletown v. Sage*, 8 Conn. 221 (1830); *Wright v. Seymour*, 69 Cal. 122, 10 Pac. 323 (1886).

⁸ The seashore is "that space of land on the border of the sea which is alternately covered and left dry by the rising and falling of the tide; or, in other words, that space of land between high and low water mark." 2 BOUVIER'S LAW DICT. 963. High and low water marks are the limits within which the tide ordinarily ebbs and flows. *Atty.-Genl. v. Chambers*, 4 De G., M. & G. 206 (1854); *Church v. Meeker*, 34 Conn. 421 (1867).

⁹ "The shore . . . doth *prima facie* and of common right belong to the king." HALE, DE JURE MARIS, c. 4.

¹⁰ *Scrutton v. Brown*, 4 B. & C. 485 (1825); *Le Strange v. Rowe*, 4 Fost. & Fin. 1048 (1866); *Pearce v. Bunting*, L. R. 2 Q. B. D. 360 (1896). The King has the right to transfer title to the seashore by grant, subject to the public easements of navigation and fishing. *Atty.-Genl. v. Parmeter*, 10 Price, 378 (1822); *Parker v. Elliott*, 1 U. C. C. P. 470 (1851).

dictions have adopted the English rule, and consequently title to the shore is *prima facie* in the state, and the riparian owners hold only to high-water mark.¹¹ A minority of jurisdictions, however, give the riparian proprietor title as far as the low-water mark.¹² It is submitted that the latter rule is the more desirable. The shore is of little practical value to the sovereign.¹³ The owners of lands along the shore alone are ordinarily in a position to make a valuable use of the shore and to construct improvements on it.¹⁴ Their access to the sea should not be jeopardized by the possible presence in a grant of words open to a construction which would convey the shore to a third party. Lord Hale himself¹⁵ and the English courts since his time have been compelled to acknowledge the weight of these considerations. The result has been that rather

¹¹ Long Beach Land & Water Co. v. Richardson, 70 Cal. 206, 11 Pac. 695 (1886); Hess v. Muir, 65 Md. 586, 6 Atl. 673 (1886); Parker v. The West Coast Packing Co., 17 Ore. 510, 21 Pac. 822 (1889); Boulo v. New Orleans, Mobile & Tex. R. Co., 55 Ala. 480 (1876); Bailey v. Burges *et al.*, 11 R. I. 330 (1876); Simons v. French, 25 Conn. 346 (1856); The N. J. Zinc & Iron Co. v. The Morris Canal & Banking Co., 44 N. J. Eq. 398, 15 Atl. 227 (1888); Roberts v. Baumgarten, 110 N. Y. 380, 18 N. E. 96 (1888); Eisenbach v. Hatfield, 2 Wash. St. 236, 26 Pac. 539 (1891); Galveston City Surf Bathing Co. v. Heidenheimer, 63 Tex. 559 (1885).

Grants made by the United States from public lands on tidewaters in the Territories carry only to high-water mark. The disposition of the soil below that point is left to the states when they are organized and admitted into the Union. Shively v. Bowlby, 152 U. S. 1 (1893). See Hardin v. Jordan, 140 U. S. 371, 381 (1891).

The state, like the King, may grant away its title to the shore. Ward v. Mulford, 32 Cal. 365 (1867); Galveston v. Menard, 23 Tex. 349 (1859). In New Jersey the riparian owners may reclaim the shore by filling it up, and if the state fails to intervene, they thereby acquire title to the land reclaimed. By the acquiescence of the legislature the state is divested of its title and may not thereafter grant the shore to a third party. Gough v. Bell, 22 N. J. L. 441 (1850). By a statute in 1856 the State of Florida divested itself of all title and interest in lands covered by water upon navigable streams, bays, and harbors, as far as the edge of the channel, and vested the same in the riparian proprietors. Geiger *et al.* v. Filor, 8 Fla. 325 (1859). A similar statute in Virginia extended the title of the riparian owners on bays, rivers, creeks, and shores of the sea to the line of low-water mark. McDonald v. Whitehurst, 47 Fed. 757 (1891).

¹² Palmer v. Farrell, 129 Pa. 162, 18 Atl. 761 (1889); The Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435 (1882). In the Colony of Massachusetts an ordinance of 1641 extended the title of the adjoining landowners to low-water mark, where the ebb and flow of the tide did not exceed a hundred rods; otherwise title was given to the flats to the extent of a hundred rods from high-water mark. Though the ordinance was annulled by the vacating of the charter under the authority of which it was made, the usage continued and acquired the force of common law. Storer v. Freeman, 6 Mass. 435 (1810); Tappan v. Boston Water-Power Co., 157 Mass. 24, 31 N. E. 703 (1892). The rule of the Colonial ordinance of 1641, though never extended to Plymouth Colony as a positive law, is nevertheless a settled rule of property in every part of the State of Massachusetts. Barker v. Bates, 13 Pick. (Mass.) 255 (1832); Sale v. Pratt, 19 Pick. (Mass.) 191 (1837). The Colonial ordinance of 1641 is a part of the common law of Maine. Abbott v. Treat, 78 Me. 121, 3 Atl. 44 (1886). In Clement v. Burns, 43 N. H. 609 (1862), it was held that the Massachusetts usage extended to New Hampshire.

¹³ Cf. the doctrine of accretion, and the reasons given for the same in Gifford v. Yarborough, 5 Bing. 163 (1828).

¹⁴ In whomsoever the title to the shore may be, there is no doubt that it is held subject to the public easements of navigation and fishery.

¹⁵ The subject may gain title to the shore by prescription and usage. Taking seaweed from the shore, enclosing it from the sea, and the punishment in the manorial court of purprestures committed on the shore, are all evidence, according to Lord Hale, that the shore belongs to the lord of the manor. *DE JURE MARIS*, c. 6.

loose rules have been adopted with regard to the evidence which will be held sufficient to rebut the presumption of the Crown's title.¹⁶ The principal effect of the presumption is to cast upon the private claimant the burden of proving his adverse title.¹⁷

As to all fresh-water streams and tidal streams above the ebb and flow of the tide, the rule in England is that title to the soil rests in the riparian proprietors. Here again Lord Hale furnished the lead¹⁸ and the English courts settled the law conformably to his view.¹⁹ In the United States there is a great conflict among the authorities. About half the states accept the rule of the English common law;²⁰ the others repudiate it as inapplicable to the rivers of this country, and vest the title to navigable rivers in the state.²¹ Considerable confusion has been

¹⁶ Modern usage is admissible to show that the shore is part of the manor, when the limits of the same are not defined by an ancient grant. *Beaufort v. Swansea*, 3 Exch. 413 (1849). Where an ancient grant of a manor does not expressly convey the shore, but gives the right to wreck of the sea, acts of ownership, or of exclusive enjoyment of the shore by the lord of the manor, such as the exclusive taking of sand, stones, and seaweed, or the letting of such right to tenants, may be admitted to prove that the shore is parcel of the manor. *Calmady v. Rowe*, 6 C. B. 861 (1844); *Healy v. Thorne*, Ir. Rep. 4 C. L. 495 (1870); *Mulholland v. Killen*, Ir. Rep. 9 Eq. 471 (1874).

¹⁷ *Atty.-Genl. v. Richards*, 2 Anstr. 603 (1795).

¹⁸ *Peck v. Lockwood*, 5 Day (Conn.), 22 (1811); *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384 (1847). The public right of fishery extends to the taking of shellfish on the shore when dry. *Proctor v. Wells*, 103 Mass. 216 (1869); *Parker v. The Cutler Milldam Co.*, 20 Me. 353 (1841). Even though it is necessary to dig up the soil. *Peck v. Lockwood*, *supra*; *Weston v. Sampson*, 8 Cush. (Mass.) 347 (1851); *Allen v. Allen*, 19 R. I. 114, 32 Atl. 166 (1895). But no right exists to carry away the soil itself or dead shellfish embedded therein. *Porter v. Shehan*, 7 Gray (Mass.), 435 (1856); *Moore v. Griffin*, 22 Me. 350 (1843). Nor to attach fixtures to the soil of the shore. *Matthews v. Treat*, 75 Me. 594 (1884). If the public have an easement to go upon the flats and disturb the soil for clams, *a fortiori* they may walk along unenclosed flats for the purpose of fishing in the sea. *Packard v. Ryder*, 144 Mass. 440, 11 N. E. 578 (1887). The taking of seaweed on the shore, however, is not included in the public right of fishery. *Gifford v. Brownell*, 2 Allen (Mass.), 535 (1861); *Hill v. Lord*, 48 Me. 83 (1861); *Howe v. Stawell*, 1 Alcock & N. (Ir.) 348 (1833).

¹⁹ *Murphy v. Ryan*, Ir. Rep. 2 C. L. 143 (1868); *Pearce v. Scotcher*, L. R. 9 Q. B. D. 162 (1882); *Duke of Devonshire v. Pattinson*, L. R. 20 Q. B. D. 263 (1887); *Orr Ewing v. Colquhoun*, L. R. 2 A. C. 839 (1877).

²⁰ *Deerfield v. Arms*, 17 Pick. (Mass.) 41 (1835); *Brown v. Chadbourne*, 31 Me. 9 (1849); *The Norway Plains Co. v. Bradley*, 52 N. H. 86 (1872); *Cobb v. Davenport*, 32 N. J. L. 369 (1867); *Gavit v. Chambers*, 3 Ohio, 496 (1828); *The Washington Ice Co. v. Shortall*, 101 Ill. 46 (1881); *Cruikshanks v. Wilmer*, 93 Ky. 19, 18 S. W. 1018 (1892); *Lorman v. Benson*, 8 Mich. 18 (1860); *State ex rel. The Columbia Bridge Co. v. Columbia*, 27 S. C. 137, 3 S. E. 55 (1887); *Jones v. The Water Lot Co.*, 18 Ga. 539 (1855); *The Steamboat Magnolia v. Marshall*, 39 Miss. 109 (1860).

The early decisions in New York were conflicting. Finally in the important case of *The People ex rel. Loomis v. The Canal Appraisers*, 33 N. Y. 461 (1865), the court, after an elaborate review of the decisions in New York and elsewhere, held that the rule of the English common law was not applicable to the rivers of this country, and that the Mohawk River and its bed belonged to the state. But in *Smith v. Rochester*, 92 N. Y. 403 (1883), it was held that the effect of the former decision was limited to the Mohawk and Hudson Rivers, and that as regards the other rivers of the state the rule of the common law was in force in New York. The Mohawk and Hudson Rivers belong to the state for the reason that the settlers in the valleys of these rivers derived their titles from the government of the Netherlands and their grants must be construed according to the rules of the civil law prevailing in the Netherlands, by which the grants did not carry title to the beds of navigable streams.

²¹ *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. (Pa.) 71 (1826); *McManus v. Carmichael*, 3 Iowa, 1 (1856); *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138,

caused in the American law as the result of an unfortunate *dictum*²² by Chancellor Kent to the effect that only tidal waters were considered by the English common law to be navigable. This misinterpretation of the English law, which in truth did not give navigability such an arbitrary meaning but recognized the question to be solely one of fact,²³ gained wide currency in this country as a correct statement of the common-law definition of navigable waters. Since as a matter of physical geography most of the navigable waters of England are tidal, it is easy to see how the terms "tidal" and "navigable" came to be used interchangeably with reference to the streams of that country. But such a definition of navigable waters, when applied to the great rivers of this continent, was obviously defective, and the great majority of American courts, including many jurisdictions which recognized the title of riparian owners to the soil of fresh-water streams, rejected it and held that *navigability in fact* alone determined *navigability in law*.²⁴ The supporters of the English rule as to the ownership of the beds of fresh-water streams urge that it has the advantage of certainty and is easy of application.²⁵ Moreover, they say, it is not material in whom the nominal title to the stream rests so long as the public easements of navigation and fishing are secure.²⁶ On the other hand, it is contended that these great passageways of commerce are so important and the public interest in them so paramount that the state should hold the fee.²⁷ If the question were *res integra* it can hardly be doubted that the law would be settled pretty generally in the United States contrary to the English common-law rule.

On non-navigable streams riparian owners in all jurisdictions hold title *prima facie* to the center of the stream.²⁸

In construing grants the authorities are not uniform as to the disposition of soil under waters. Boundaries described as "by," "on," "to," or "along" a stream will, unless restrictive words are used, convey

4 Pac. 1150 (1884); *Wood v. Fowler*, 26 Kan. 682 (1882); *St. Louis, Iron Mt. & Southern Ry. Co. v. Ramsey*, 53 Ark. 314, 13 S. W. 931 (1890); *Ravenswood v. Flemings*, 22 W. Va. 52 (1883); *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100 (1893); *In re Minnetonka Lake Improvement*, 56 Minn. 513, 58 N. W. 295 (1894); *Collins v. Benbury*, 27 N. C. 118 (1844); *Bullock v. Wilson*, 2 Port. (Ala.) 436 (1835). See *Florida v. The Black River Phosphate Co.*, 27 Fla. 276, 328, 9 So. 205 (1891).

²² "In the case of the Royal Fishery, in the river Banne, it was resolved, that by the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil." *Palmer v. Mulligan*, 3 Cai. (N. Y.) 307, 318 (1805).

²³ *Pierce v. Fauconberg*, 1 Burr. 292 (1757); *Williams v. Wilcox*, 8 Ad. & El. 314, 333 (1838); *Orr Ewing v. Colquhoun*, L. R. 2 A. C. 839 (1877). See HALE, DE JURIS MARIS, c. 3. A stream may be tidal and still not navigable. *Lynn v. Turner*, 1 Cowp. 86 (1774); *The King v. Montague*, 4 B. & C. 598 (1825).

²⁴ *McManus v. Carmichael*, *supra*; *The Daniel Ball*, 10 Wall. (U. S.) 557 (1870); *Fulmer v. Williams*, 122 Pa. 191, 15 Atl. 726 (1888).

²⁵ *Cobb v. Davenport*, 32 N. J. L. 369 (1867).

²⁶ *Smith v. Rochester*, *supra*; *Lorman v. Benson*, *supra*.

²⁷ *Barney v. Keokuk*, 94 U. S. 324, 338 (1876); *Ravenswood v. Flemings*, *supra*. Of the states which limit the title of the riparian owner along navigable streams to the bank, some fix the boundary at the line of high water, others at low water, while still others choose the edge of the water at its ordinary height.

²⁸ *The Barclay R. & Coal Co. v. Ingham*, 36 Pa. St. 194 (1860); *Hubbard v. Bell*, 54 Ill. 110 (1870); *St. Paul & Pac. R. R. Co. v. Schurmeir*, 7 Wall. (U. S.) 272 (1868). See *Welles v. Bailey*, 55 Conn. 292, 316, 10 Atl. 565 (1887).

title toward the center of the stream as far as the grantor owns.²⁹ When the lands conveyed are bounded, not by the water, but by the "shore," "beach," "coast," "bank," or similar designation, the soil under the water is usually excluded.³⁰ But the cases are in conflict as to whether the shore is included in such a grant. Some courts construe the deed as conveying title to the low-water mark if the grantor owns so far,³¹ others exclude the shore and fix the boundary at high-water mark. A recent Canadian case, *Esquimalt & Nanaimo Ry. Co. v. Trent*,³² follows the view which fixes the boundary at high-water mark. The same reasons, however, which support the widely accepted construction under which grants of lands bounded by waters convey title to the center of the stream should apply with equal force in favor of a rule which gives the grantee title to the low-water mark.

CONTROL OF EXECUTIVE OFFICERS BY *MANDAMUS*. — A writ of *mandamus* is one issuing in the name of the sovereign to an inferior tribunal, corporation, board, or person, commanding the performance of an act which the law enjoins as a duty attaching to an office or trust.¹ It is an extraordinary remedy to be resorted to only in the absence of other adequate legal remedy.² It is to be distinguished from the preventive writ of injunction,³ and the reviewing writ of *certiorari*.⁴

The general principles governing the issuance of the writ are well defined, but their application gives rise to considerable difficulty. The writ issues only in the sound discretion of the court,⁵ but this discretion

²⁹ *Paine v. Woods*, 108 Mass. 160 (1871); *Agawam Canal Co. v. Edwards*, 36 Conn. 476 (1870); *Ballance v. Peoria*, 180 Ill. 29, 54 N. E. 428 (1899); *Partridge v. Luce*, 36 Me. 16 (1853). "Without adhering rigidly to such a construction, water gores would be multiplied by thousands along our inland streams, great and small, the intention of the parties would be continually violated, and litigation would become interminable." *Luce v. Carley*, 24 Wend. (N. Y.) 450 (1840).

³⁰ *Starr v. Child*, 20 Wend. (N. Y.) 149 (1838). *Contra*, *Sleeper v. Laconia*, 60 N. H. 201 (1880).

³¹ *Lamb v. Rickets*, 11 Ohio, 311 (1842); *Halsey v. McCormick*, 13 N. Y. 296 (1855); *Murphy v. Copeland*, 58 Iowa, 409, 10 N. W. 786 (1882); *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. 42 (1891).

³² [1919] 3 W. W. R. 356. *More v. Massini*, 37 Cal. 432 (1869); *Galveston City Surf Bathing Co. v. Heidenheimer*, *supra*; *Brown v. Heard*, 85 Me. 294, 27 Atl. 182 (1893); *Litchfield v. Ferguson*, 141 Mass. 97, 6 N. E. 721 (1886). But a consideration of the whole instrument may show that the word "shore" was used in a popular sense, importing the land as far as low-water mark. *Hathaway v. Wilson*, 123 Mass. 359 (1877).

¹ *Cincinnati, etc. Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033 (1900); *Chicago, etc. R. Co. v. Crane*, 113 U. S. 424, 432 (1889). For leading cases on the definition and history of *mandamus*, see *McBride v. Grand Rapids*, 32 Mich. 360 (1875); *State v. Gibson*, 187 Mo. 536, 86 S. W. 177 (1901); *Chumasero v. Potts*, 2 Mont. 242 (1875); *State v. Marks*, 6 Lea (Tenn.), 12 (1880). See also *People v. Steele*, 2 Barb. (N. Y.) 397, 416 (1851). See HIGH, EXTRAORDINARY REMEDIES, § 1; 2 POTTER, CORP., § 634.

² *Duke v. Turner*, 204 U. S. 623, 631 (1906); *In re Rice*, 155 U. S. 396, 403 (1894).

³ *Matter of Rooney*, 26 Misc. 73, 56 N. Y. Supp. 483 (1899); *Feltcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683 (1894).

⁴ *Hayes v. Morgan*, 81 Ill. App. 665 (1898); *Gibbs v. Commissioners*, 19 Pick. (Mass.) 208 (1837); *People v. Barnes*, 114 N. Y. 317, 20 N. E. 609 (1889); *Jones v. Allen*, 13 N. J. L. 97 (1832); *State v. Elliott*, 108 Wis. 163, 84 N. W. 149 (1900).

⁵ *People v. Olsen*, 215 Ill. 620, 74 N. E. 785 (1905); *McCarthy v. Boston St. Comm.*, 188 Mass. 338, 74 N. E. 659 (1905); *Gleistman v. Town of West New York*, 74 N. J. L.

must be judicial,⁶ equitably exercised,⁷ guided by fixed rules.⁸ Accordingly it will be denied where its issue would injuriously affect the public interest,⁹ or the rights of third parties;¹⁰ when it would be nugatory or unavailing,¹¹ create disorder or confusion,¹² or operate inequitably, imposing excessive burdens on the respondent.¹³ The relator, to be successful, must show the good faith of his application,¹⁴ the necessity or propriety of the requested relief,¹⁵ and the lawfulness of the act sought to be enforced.¹⁶ In addition, he must show a clear and complete legal right to the performance of the particular act in question.¹⁷ Therefore, if the right is a disputed one,¹⁸ inchoate,¹⁹ or prospective,²⁰ doubtful,²¹ or incomplete

74, 64 Atl. 1084 (1906); *People v. Lindenthal*, 77 N. Y. App. Div. 515, 78 N. Y. Supp. 997 (1902); *In re Rice*, *supra*; *Rex v. Bristol Dock Co.*, 12 East, 428 (1810).

⁶ *McCarthy v. Boston St. Comm.*, *supra*; *Shepherd v. Oakley*, 181 N. Y. 339, 74 N. E. 227 (1905).

⁷ *State v. U. S. Express Co.*, 95 Minn. 442, 104 N. W. 556 (1905).

⁸ *State v. Holmes*, 3 Neb. Unoff. 183, 91 N. W. 175 (1902); *People v. N. Y. Police Board*, 107 N. Y. 235, 13 N. E. 920 (1887).

⁹ *Effingham v. Hamilton*, 68 Miss. 523, 10 So. 39 (1891) (refusal to order a change of textbooks, to avoid public inconvenience, although a clear right and duty existed); *People v. Brooklyn Bd. of Assessors*, 137 N. Y. 201, 33 N. E. 145 (1893).

¹⁰ *In re Hart*, 159 N. Y. 278, 54 N. E. 44 (1902); *United States v. Edmunds*, 3 Wall. (U. S.) 563 (1865).

¹¹ *People v. Church*, 103 Ill. App. 132 (1902) (refusal of *mandamus* to perfect an appeal which could not be effective); *People v. O'Keefe*, 100 N. Y. 572, 3 N. E. 592 (1885); *Com. v. Phil. County Comm'rs*, 6 Whart. (Pa.) 476 (1841) (refusing to compel filing of an affirmation where such was too late to be of use); *State v. Irwin*, 40 Wash. 413, 82 Pac. 420 (1906); *United States v. Norfolk, etc. R. Co.*, 118 Fed. 554 (1902).

¹² *People v. Olsen*, 215 Ill. 620, 74 N. E. 785 (1905); *Rex v. Palmer*, 8 East, 416 (1806).

¹³ *People v. Blocki*, 203 Ill. 363, 67 N. E. 809 (1903) (refusing writ where the respondent would be subjected to an action for damages); *Roll v. Perrine*, 34 N. J. L. 254 (1870) (*semble*); *Sibley v. Mobile*, 22 Fed. Cas. No. 12,829 (1876); but see *Com. v. Pittsburg*, 209 Pa. St. 333, 58 Atl. 669 (1904).

¹⁴ *W. U. Tel. Co. v. State*, 165 Ind. 492, 76 N. E. 100 (1906) (refusing to order quotations for a bucket shop); *Donahue v. State*, 70 Neb. 72, 96 N. W. 1038 (1903) (refusing writ where relator was actuated by spite); *People v. Adams*, 18 N. Y. Supp. 896 (1892); but see *Moore v. State*, 71 Neb. 522, 99 N. W. 249 (1904).

¹⁵ *Kenneally v. Chicago*, 220 Ill. 485, 77 N. E. 155 (1906); *People v. Richmond County*, 22 How. Pr. (N. Y.) 275 (1861); *N. Y. Life, etc. Ins. Co. v. Wilson*, 8 Pet. (U. S.) 291 (1884); *Rex v. Godolphin*, 8 A. & E. 338 (1838); *Rex v. Chester*, 1 M. & S. 101 (1813).

¹⁶ *Park v. Chandler*, 113 Ga. 647, 39 S. E. 89 (1901).

¹⁷ *Burke v. Edgar*, 67 Cal. 128, 7 Pac. 488 (1885); *McNeill v. Chicago*, 212 Ill. 481, 72 N. E. 450 (1904) (*de facto* policeman unable to compel restoration unless shown to be an officer *de jure* when excluded); *Padavano v. Fagan*, 66 N. J. L. 167, 44 Atl. 998 (1900); *People v. N. Y. Bd. of Police*, 107 N. Y. 235, 13 N. E. 920 (1887); *Comm. v. James*, 214 Pa. St. 319, 67 Atl. 743 (1907); *Ex parte Cutting*, 94 U. S. 14 (1876); *Reg. v. Lewisham Union* (1897), 1 Q. B. 498; *Africans' Union Church v. Sanders*, 1 Houst. (Del.) 100 (1855) (refusing to enforce a spiritual privilege, devoid of legal right, to be installed as a minister). Thus if the statute sustaining the right be unconstitutional, the writ will not issue. *Van Horn v. State*, 46 Neb. 82, 64 N. W. 365 (1895). See also *HIGH, EXTRAORDINARY REMEDIES*, § 431; *State v. Ware*, 13 Ore. 384, 10 Pac. 887 (1886); *State ex rel. v. Janesville R. Co.*, 87 Wis. 79, 57 N. W. 972 (1894).

¹⁸ *State v. Clark*, 55 Atl. (N. J.) 690 (1903); *People v. Fromme*, 30 Misc. 323, 63 N. Y. Supp. 583 (1900). Thus, where the right of the applicant is in litigation, the writ will generally be refused. *Schwartz v. Large*, 47 Kan. 304, 27 Pac. 993 (1891); *Atty. Gen'l v. New Bedford*, 128 Mass. 312 (1879); but cf. *Oroville R. Co. v. Plumas County*, 37 Cal. 354 (1869); *Calveras County v. Brockway*, 30 Cal. 325 (1866).

¹⁹ *Ex parte Harris*, 52 Ala. 87 (1875); *People v. Brooklyn*, 1 Wend. (N. Y.) 318 (1828).

²⁰ *United States v. Root*, 22 App. Cas. (D. C.) 419 (1903).

²¹ *Mobile, etc. R. Co. v. People*, 132 Ill. 559, 24 N. E. 643 (1890); *State v. Williams*,

because of unperformed conditions precedent,²² purely equitable,²³ or impossible to enforce,²⁴ the writ will not issue. Technical rights will not be enforced through such proceedings at the expense of a violation of the spirit of a statute.²⁵ Abstract and moot questions will not be determined, nor will petty controversies be considered.²⁶ Though a performance,²⁷ or a willingness to perform pending the proceedings,²⁸ will bar the writ, a partial, imperfect, or illegal performance will not stay the proceedings.²⁹

The nature of the duty to be enforced is an important element in the determination of the court's action. *Mandamus* is a remedy for official inaction.³⁰ The duty in question must therefore, generally speaking, be an existing one,³¹ resulting from the occupation of an office or trust,³² and clearly enjoined by law.³³ It is immaterial that the court's order requires continuous action³⁴ or enforces a continuing duty.³⁵ More

99 Mo. 291, 12 S. W. 905 (1889); *People v. Brush*, 146 N. Y. 60, 40 N. E. 502 (1895); *United States v. Thoman*, 156 U. S. 353 (1894); *Ex parte Cutting*, *supra*.

²² *Williams v. Smith*, 6 Cal. 91 (1856); *Lochren v. Long*, 6 App. Cas. (D. C.) 486 (1895); *People v. Lyman*, 67 N. Y. App. Div. 446, 73 N. Y. Supp. 987 (1901). Cf. *O'Neill v. Reynolds*, 116 Cal. 264, 48 Pac. 57 (1897), and *People v. Monroe*, 41 Misc. 198, 83 N. Y. Supp. 995 (1903) (where opposite views were taken as to the issuance of a mandate conditional upon the performance of a condition precedent). *Rex v. Jothan*, 3 T. R. 575 (1790).

²³ *Sheerer v. Edgar*, 76 Cal. 569, 18 Pac. 681 (1888); *Burlington, etc. R. Co. v. People*, 20 Colo. App. 181, 77 Pac. 1026 (1904); but see *Tyler v. Houghton*, 25 Cal. 26 (1864) (holding that a writ lies under a statute by one having an equitable interest to contest a land purchase).

²⁴ *State v. Newman*, 91 Mo. 445, 3 S. W. 849 (1887) (*mandamus* to compel certification of election refused where applicant did not possess necessary qualifications for office).

²⁵ *State v. U. S. Express Co.*, 95 Minn. 442, 104 N. W. 556 (1905); *People v. Brooklyn Bd. of Assessors*, 137 N. Y. 201, 33 N. E. 145 (1893); *Matter of Schofield*, 102 N. Y. App. Div. 358, 92 N. Y. Supp. 672 (1905).

²⁶ *State v. Lewis*, 111 La. 693, 35 So. 816 (1904) (grand juror not reinstated after the jury had been discharged); *Hall v. Staunton*, 55 W. Va. 684, 47 S. E. 265 (1904); but see *People v. Republican Party Committee*, 25 N. Y. App. Div. 339, 49 N. Y. Supp. 723 (1898) (here the question was one of public interest).

²⁷ *People v. Chapin*, 104 N. Y. 96, 10 N. E. 141 (1887); *United States v. Kendall*, 26 Fed. Cas. No. 15, 518 (1838).

²⁸ *People v. Dulaney*, 96 Ill. 503 (1880).

²⁹ *State v. Bare*, 60 W. Va. 483, 56 S. E. 390 (1906) (holding that a mere colorable action was no bar to the issuance of the writ).

³⁰ *Atlanta v. Wright*, 119 Ga. 207, 45 S. E. 994 (1903); *Ex parte Crane*, 5 Pet. (U. S.) 190 (1831).

³¹ *Ex parte Rowland*, 104 U. S. 604 (1881). It must exist independently of the writ. *Internat. Const. Co. v. Lamont*, 155 U. S. 303 (1894).

³² *Placard v. State*, 148 Ind. 305, 47 N. E. 623 (1897); *Com. v. Walton*, 3 Pa. Dist. 391 (1894); *State v. Howard County Ct.*, 39 Mo. 375 (1867) (refusing to enforce a simple common-law right between individuals). *Chicago, etc. R. Co. v. Crane*, 113 U. S. 424 (1881).

³³ *Maxwell v. San Francisco*, 139 Cal. 229, 72 Pac. 996 (1903); *Case v. Sullivan*, 222 Ill. 57, 78 N. E. 37 (1906); *Bacon v. Cumberland County*, 69 N. J. L. 195, 54 Atl. 234 (1903); *Chase v. Saratoga County*, 33 Barb. (N. Y.) 603 (1861); *Internat. Const. Co. v. Lamont*, *supra*; *Reeside v. Walker*, 11 How. (U. S.) 272 (1850).

³⁴ *Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855 (1902); *People v. N. Y., etc. R. Co.*, 28 Hun (N. Y.), 543 (1883) (requiring a railroad to exercise its duties as a carrier); *Atty. Genl. v. Boston*, 123 Mass. 640 (1877) (city compelled to continue to collect ferry tolls).

³⁵ *State v. A. C. L. R. Co.*, 48 Fla. 114, 37 So. 652 (1904).

specifically, the distinction between ministerial and discretionary duties must be noted. It is undisputed that a *mandamus* should issue only where the act to be ordered is merely ministerial, with regard to the performance of which neither judgment nor discretion is left in the officer.³⁶ Accordingly, though the court may compel the exercise of discretion, it may not control the mode thereof.³⁷ Thus, the problem in *mandamus* proceedings is to determine whether the relator seeks to obtain the performance of an undisputed duty, or to dictate the conditions precedent which shall give rise to this obligation to act, thereby controlling the exercise of the officer's discretion. If the latter is his objective, he will inevitably fail. The judgment and discretion reposed in an officer as a part of his official functions are to be exercised by him only and not by the relator through the court.³⁸

The line of demarcation between ministerial duties and those involving the exercise of discretion, at best a vague one, is perhaps most perceptible in *mandamus* proceedings brought against executive officers of the government. That such proceedings are maintainable is clear, the official character of a party not exempting him from the writ, provided, of course, that the duty is merely ministerial.³⁹ A ministerial act may be regarded as one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own opinion concerning the propriety of the act to be performed.⁴⁰ Discretion may be defined, when applied to public officials, as the power or right conferred upon them by law of acting officially, under certain circumstances, solely according to the dictates of their judgment and conscience.⁴¹

The application of these principles to cases where the duty sought to be

³⁶ *In re Morse*, 18 Pick. (Mass.) 443 (1836); *People v. Land Comm'rs*, 149 N. Y. 26, 43 N. E. 418 (1896); *Marbury v. Madison*, 1 Cranch (U. S.), 137 (1803); *Reg. v. Met. Police Dist.*, 4 B. & S. 593 (1863).

³⁷ *People v. Westchester County*, 12 Barb. (N. Y.) 446 (1851); *Gaines v. Thompson*, 7 Wall. (U. S.) 347 (1868); but see under statute, *State v. Clausen*, 44 Wash. 437, 87 Pac. 498 (1906).

³⁸ *Gaines v. Thompson*, *supra*; *Decatur v. Paulding*, 14 Pet. (U. S.) 497 (1840); *United States v. Guthrie*, 17 How. (U. S.) 284 (1854).

³⁹ The authorities are divided as to the power of the courts to control the chief executive of the state government. See 6 L. R. A. (N. S.) 750; 32 L. R. A. (N. S.) 355; 12 HARV. L. REV. 208. But all are agreed that such immunity does not extend to the heads of executive departments. *Pacheco v. Beck*, 52 Cal. 3 (1877); *Bonner v. State*, 7 Ga. 473 (1849). Such a proceeding against a state officer is not a suit against the state within the meaning of the Eleventh Amendment. *Bd. of Liquidation v. McComb*, 92 U. S. 531 (1875); *Internat. Postal Supply Co. v. Bruce*, 194 U. S. 601, 616 (1903). See 20 HARV. L. REV. 245. However, a claim which cannot be enforced against the United States cannot be enforced circuitously by a *mandamus* proceeding against one of its officers. *Reeside v. Walker*, 11 How. (U. S.) 272, 290 (1850). It has been said that *mandamus* would not issue against the President. *Mississippi v. Johnson*, 4 Wall. (U. S.) 475, 499 (1866). But it will issue against the heads of executive departments of the United States. *Marbury v. Madison*, 1 Cranch (U. S.), 137 (1803); *Kendall v. United States*, 12 Pet. (U. S.) 524 (1838); *Boynton v. Blaine*, 139 U. S. 306 (1890). See 23 HARV. L. REV. 633.

⁴⁰ *Ex parte Batesville*, etc. R. Co., 39 Ark. 82, 85 (1882); *Amer. Cas. Ins. Co. v. Fyler*, 60 Conn. 448, 22 Atl. 494 (1891). For other definitions, see *Sullivan v. Shanklin*, 63 Cal. 247 (1883); *Henkel v. Millard*, 97 Md. 24, 54 Atl. 657 (1903); *Mississippi v. Johnson*, *supra*.

⁴¹ *State v. Hultz*, 106 Mo. 41, 16 S. W. 940 (1891). See *Rio Grande County v. Lewis*, 28 Colo. 378, 65 Pac. 51 (1901).

enforced involves the determination of questions of fact is not always easy. It is clear that an act may be ministerial, though the existence of the obligation to act depends upon the determination of a question of fact;⁴² but where the duty requires an examination of evidence and a decision on questions of law and fact, it may be safely classified as discretionary.⁴³ The recent Supreme Court case of *United States ex rel. v. Lane et al.*⁴⁴ affords an illustration of the importance of this distinction. The duty of a public land officer to issue a land patent depends upon the performance of certain conditions precedent with respect to that land by the petitioner.⁴⁵ Clearly, when no doubt exists as to the fact of such performance, the execution and delivery of the patent, if arbitrarily withheld, may be enforced by *mandamus*.⁴⁶ The above case, however, states the well-settled rule that the granting of a patent where hearing, proof, and decision are required,⁴⁷ and the exercise of judgment and discretion necessary,⁴⁸ is not to be subjected to supervision by *mandamus*.⁴⁹ It is not surprising, therefore, that no case has been found in which, under such circumstances, the writ will be granted to compel the issuance of a patent by the land department.

Most of the duties of an executive officer are not merely ministerial. In the administration of the various and important concerns of his office the head of an executive department of the government is continually required to exercise judgment and discretion. He must so act in expounding the laws of Congress under which he is from time to time required to proceed in his duties.⁵⁰ The courts will not, therefore, interfere with these officers in the exercise of their ordinary official duties, even when these necessitate an interpretation of the law, inasmuch as the court has no appellate power for that purpose.⁵¹ The deference due a

⁴² *Flournoy v. Jeffersonville*, 17 Ind. 169 (1861); *Marcum v. Ballot Comm'rs*, 42 W. Va. 263, 26 S. E. 281 (1896).

⁴³ *Cook County v. People*, 78 Ill. App. 586 (1898); *United States v. Edmunds*, 5 Wall. (U. S.) 563 (1866).

⁴⁴ U. S. Sup. Ct., October Term, 1919, No. 36.

⁴⁵ 33 STAT. AT L. 525 (1904).

⁴⁶ *United States v. Hitchcock*, 19 App. Cas. (D. C.) 333 (1902); *State ex rel. v. Nichols*, 42 La. Ann. 223, 7 So. 738 (1890). But discretionary acts will be reviewed and controlled if the discretion has been abused. *State ex rel. Moody v. Barnes*, 25 Fla. 208, 5 So. 722 (1899); *People v. Van Cleave*, 183 Ill. 330, 55 N. E. 608 (1899) (arbitrary action); *Zanone v. Mound City*, 103 Ill. 552 (1882); *State Bd. v. People*, 123 Ill. 227 (1887) (due to personal motive); *Baird v. Bd. of Supervisors*, 138 N. Y. 95, 33 N. E. 827 (1893) (refusal to give proper hearing); *United States v. Schurz*, 102 U. S. 378 (1880) (discretion wrongfully based on ground not within official discretion). See 7 L. R. A. (N. S.) 525.

⁴⁷ *Johnson v. Towsley*, 13 Wall. (U. S.) 72 (1871); *United States v. Comm'rs*, 5 Wall. (U. S.) 563 (1866); *Castro v. Hendricks*, 23 How. (U. S.) 438 (1859).

⁴⁸ *West v. Hitchcock*, 205 U. S. 580 (1906); *In re Emblen*, 161 U. S. 52, 56 (1895); *Carrick v. Lamar*, 116 U. S. 423 (1885).

⁴⁹ *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316 (1902); *Bockfinger v. Foster*, 190 U. S. 116 (1902); *Johnson v. Towsley*, *supra*; *Litchfield v. Register*, 9 Wall. (U. S.) 575 (1869); *Cox v. United States*, 9 Wall. (U. S.) 298 (1869); *Gaines v. Thompson*, 7 Wall. (U. S.) 347 (1868); *Castro v. Hendricks*, *supra*; *The Secretary v. McGarrahan*, 9 How. (U. S.) 298 (1850). But of course, after a patent has been regularly made out and recorded, its delivery may be compelled. *United States v. Schurz*, *supra*.

⁵⁰ *Decatur v. Paulding*, 14 Pet. (U. S.) 497, 515 (1840).

⁵¹ *Riverside Oil Co. v. Hitchcock*, *supra*; *Roberts v. United States*, 176 U. S. 221 (1899). But performance of a duty imposed by statute will be compelled, though the officer must construe the statute to determine the nature of the duty. *Roberts v. United*

coördinate department of the government leads the courts to resolve every reasonable doubt in favor of freedom of executive action and to require a clear case before they will proceed to control it.

ERRONEOUS DESCRIPTION OF LAND IN A WILL. — When a testator intends to devise a plot of land and in his will inadvertently gives it the wrong township, range, or lot number, can the lot the testator intended pass under the will? For example, if the testator owns only lot number 32 in a certain township and it plainly appears from extrinsic evidence that it was that lot that he intended to devise, but in the will the lot is designated number 31, can lot number 32 pass?¹ Courts have not jurisdiction to correct mistakes in wills by reformation.² So if the result is to be attained it must be by construing the words in the will so as to apply to the property the testator intended to give.³

It is always possible under the maxim *Falsa demonstratio non nocet* for a court to disregard portions of a description shown to be erroneous, and to apply the remaining true portion.⁴ In the cases where it is known that the testator intended to devise a piece of land other than that designated in the will, the problem of construction becomes one of the sufficiency of the description after disregarding the erroneous lot numbering. This is true no matter what theory of interpretation is adopted. The orthodox view is that expounded by Vice-Chancellor Wigram,⁵ that the object of interpretation is never "what the testator meant" but "what is the meaning of his words;" or, as Mr. Kales puts it, the subject matter of interpretation is always the legal act contained in the writing.⁶ Clearly this leaves the question one of the sufficiency of the words. But this is no less the case if the theory of Professor Hawkins is followed, that the sole object of interpretation is to determine the intention of the writer, for Professor Hawkins admits that in interpreting a legal document there is

States, *supra*; United States v. Black, 128 U. S. 40, 48 (1888). Also, the court has power to grant relief to an individual aggrieved by a decision based upon a statute inapplicable to the facts in question. *American School, etc. v. McAnnulty*, 187 U. S. 94 (1902); *Burfenning v. Chicago, St. Paul, etc. R. Co.*, 163 U. S. 321 (1896).

¹ The problem has been presented by several recent cases. *Stevenson v. Stevenson*, 285 Ill. 486, 121 N. E. 202 (1918); *Perkins v. O'Donald*, 82 So. 401 (Fla., 1919); *Wilmes v. Tiernay*, 174 N. W. 271 (Ia., 1919). See RECENT CASES, *infra*, p. 486.

² *Newburgh v. Newburgh*, 5 Mad. 364 (1820). The English courts have gone far in striking out words inserted by mistake. *Morrell v. Morrell*, 7 P. D. 68 (1882); *Goods of Boehm*, [1891] P. 247. But they will not substitute one word for another. *Goods of Schott*, [1901] P. 190, overruling *Goods of Bushell*, 13 P. D. 7 (1887). But cf. *Estate of King*, 53 IRISH LAW TIMES, 60 (1919), where, on facts nearly identical with those of *Goods of Bushell*, the same result was reached by interpretation.

³ The problem, of course, is not at all the same as that which would be presented if it were shown that the testator used "thirty-one" as a symbol or code number for "thirty-two." See *Doe, C. J.*, in *Tilton v. American Bible Society*, 60 N. H. 377, 383, "A person known to a testator as A. B. and to all others as C. D. may take a legacy given to A. B." But see *Holmes*, "The Theory of Legal interpretation," 12 HARV. L. REV. 417, 419. And see 21 HARV. L. REV. 434.

⁴ See WIGMORE, EVIDENCE, § 2476.

⁵ See WIGAM, EXTRINSIC EVIDENCE IN THE INTERPRETATION OF WILLS, Introductory Observations, plac. 9 (2 American ed., 53).

⁶ See Kales, "Considerations Preliminary to the Practice of the Art of Interpreting Writings," 28 YALE L. JOUR. 33, 34.

an additional inquiry after having discovered the writer's intention — to wit, has the intention been so expressed as to give it legal validity.⁷

If the court of construction after disregarding the erroneous lot numbering still finds in the will such attributes ascribed to the lot as "belonging to me" and "together with the improvements thereon," and these attributes fit only the lot the testator intended to devise, it seems plain that there is a sufficient expression of the testator's intent and that the lot should pass in spite of the erroneous numbering.⁸ Yet in a recent Florida case,⁹ although the will in dispute contained expressions which would seem to be equivalent to the testator's saying that he devised property belonging to himself, the court held the property not sufficiently identified. Either these expressions were not called to the attention of the court or the court did not think them worthy of consideration, for no mention is made of them in the opinion.

If the will contains no express statement that the testator is devising his own property, it is more difficult to say that the will sufficiently expresses the testator's intent. In the much-cited case of *Kurtz v. Hibner*,¹⁰ where the land was described only by township, range, and lot, and an element of this description was wrong, the Illinois court held that the land would not pass, and in the recent case of *Stevenson v. Stevenson*¹¹ it has affirmed its position. This latter case contained a strong dissenting opinion and has resulted in considerable controversy and a proposal for legislative action.¹² The only question in such a case is, did the court avail itself of all the descriptive matter in the will? We have seen that a court should look beyond the mere section numbering of the property and that an important descriptive element is any expression in the will that the property belonged to the testator.¹³ Mr. Kales, writing *a propos* of the later Illinois decision, says, "I for one would not quarrel with the court if it found regularly and *prima facie* in a will, a devise

⁷ See Hawkins, "On the Principles of Legal Interpretation," 2 JURID. SOC. PAPERS, 298, reprinted in THAYER, PRELIM. TREAT., Appendix C.

⁸ *Patch v. White*, 117 U. S. 210 (1886). The court found the land described as belonging to the testator, in the introductory word of the will: "And touching worldly estate, wherewith it has pleased Almighty God to bless me in this life, I give devise and dispose of the same in the following manner and form. . . ."

⁹ *Perkins v. O'Donald*, 82 So. 401 (1919). The introductory words were similar to those in *Patch v. White*, *supra*. The testatrix ". . . recites that being desirous of settling her worldly affairs and directing how the estates with which it has pleased God to bless her shall be disposed of after her death, she made, published and declared the document to be her last will, . . ." It will be noticed, however, that this is not a direct statement that the testatrix hereby gives the estates which she owns, as in *Patch v. White*. But it is submitted that it is sufficient indication of testatrix's intention to give property that she owned.

¹⁰ 55 Ill. 514 (1870).

¹¹ 285 Ill. 486, 121 N. E. 202 (1918). In this case the testator devised "the southeast quarter of the southwest quarter of section five; also the south half of the east half of the southeast quarter of section eight . . . all in township seven, north of the base line and range six west of the fourth principal meridian situated in the county of Hancock in the State of Illinois." The testator owned no land in township seven, range six, but the section and quarter section numbering correctly described land owned by the testator in township six, range seven.

¹² See 2 ILL. L. BULL. 175, 286, 293. The legislation proposed was to give courts of equity jurisdiction to "correct such mistake and give effect to the actual intent of the testator." 2 ILL. L. BULL. 178.

¹³ *Patch v. White*, *supra*.

of land 'belonging to me,' though the words 'belonging to me' were not explicitly used."¹⁴ But is it necessary to make this an assumption? Does it not follow from the use in the will of the words "give," "devise," or "bequeath"? It is true that it is now possible to devise after-acquired property, yet the fact remains that in the majority of cases the testator "devises" property he owns. The court having found, from evidence *dehors* the will, an intent to devise property owned by the testator, it would seem that the word "devise" should be a sufficient expression of that intent to give it legal validity. It is possible, although not evident from the report, that a recent Iowa case was decided on some such theory.¹⁵ From the report it does not appear that there was any designation of the property as "belonging to me," or any description beyond that of township and section, yet the court allowed the property the testator intended to pass under the will.

If the court cannot find expressly or impliedly in the will any words which describe the land as belonging to the testator, it seems that the devise must fail. Giving the correct section, when township and range are wrong, does not alone seem a sufficient expression of the testator's intent to give a specific lot of land.¹⁶ But it is dangerous to dogmatize on a problem of construction, and the solution of such a problem must always depend largely on the facts of the particular case.

RECENT CASES

ADMIRALTY — TORTS — LIMITATION OF LIABILITY. — A tug with a car float in tow collided with a steamship. Both the steamship and the tug were negligent. The owner of the tug and car float seeks to limit his liability to the value of the tug. *Held*, that he may do so. *The Begona II*, 259 Fed. 219 (Dist. Ct. D. Md.).

Federal legislation limits the liability of a shipowner to the value of his interest for any damage caused by a collision occurring without his privity or knowledge. See REV. STAT., § 4283. The maritime law, however, had previously limited liability in the same way for the same reason that influenced Congress, — encouragement of shipping. See *Norwich & New York Transportation Co. v. Wright*, 13 Wall. (U. S.) 104, 116. See also HUGHES, ADMIRALTY, 302, 303. The courts apportion the damages for a collision equally among all the ships responsible therefor, regardless of ownership. *The Manhattan*, 181 Fed. 229; *The Eugene F. Moran*, 212 U. S. 466. The rule is the same if some of the vessels are in the tow of others. *The Eugene F. Moran*, *supra*. But the second circuit has properly held that the negligence of the towing vessel should not be imputed to the tow. *The Transfer No. 21*, 248 Fed. 459. See also *Sturgis v. Boyer*, 24 How. (U. S.) 110. But the sixth and ninth circuits have reached an opposite conclusion on the ground that by being engaged in a common enterprise the two vessels are to be treated as one. *The Thompson Towing & Wrecking Ass'n v. McGregor*, 207 Fed. 209; *Shipowners' & Merchants' Tugboat Co. v. Hammond Lumber Co.*, 218 Fed. 161. The fourth circuit, however, has held that a barge in tow is a separate vessel to such an extent that it must comply

¹⁴ 2 ILL. L. BULL. 290.

¹⁵ *Wilmes v. Tiernay*, 174 N. W. 271 (1919).

¹⁶ *Cf. Nussey v. Jeffery*, [1914] 1 Ch. 375, "their daughter" held a sufficient expression of testator's intent to give to one particular one of five daughters, identified by extrinsic evidence.

with a statute requiring every ship to accept a pilot's services. *The Carrie L. Tyler*, 106 Fed. 422. It is to be hoped that the doctrine of the second circuit, adopted by the principal case, will ultimately prevail. A doctrine of imputed negligence is as much out of place in admiralty as it is in the common law.

ANIMALS — DAMAGE TO PERSONS AND CHATTELS BY ANIMALS — HORSE STRAYING ON THE HIGHWAY. — The plaintiff's automobile was damaged in a collision with the defendant's horse which was at large in the highway adjoining the defendant's land. The defendant owned to the center of the road. It was not shown that the defendant knowingly permitted his horse to be there, or that he had knowledge of any quality in the horse that would make such a collision especially probable. The lower court granted a nonsuit. *Held*, that this was not error. *Dyer v. Mudgett*, 107 Atl. 831 (Me.).

Where a local statute or ordinance forbids the presence of stray animals in the highway, the case would turn on whether the statute was intended merely to prevent trespasses, or to protect travelers as well. *Marsh v. Koons*, 78 Ohio St. 68, 84 N. E. 599. *Cf. Decker v. McSorley*, 111 Wis. 91, 86 N. W. 554. In the absence of such statutes, some jurisdictions hold that it is not wrongful for the animal to be on the highway, and thus reach the result of the principal case. *Holden v. Shattuck*, 34 Vt. 336; *Brady v. Straub*, 177 Ky. 468, 197 S. W. 938; *Higgins v. Searle*, 25 T. L. R. 301. But in other states the contrary view is held. *Leonard v. Doherty*, 174 Mass. 565, 55 N. E. 461; *Barnes v. Chapin*, 4 All. (Mass.) 444; *Baldwin v. Ensign*, 49 Conn. 113. It would seem possible to subject an animal straying in the highway to the same rules as an animal trespassing on private land. See 32 HARV. L. REV. 420. But since the courts do not proceed on this theory the defendant's ownership of part or all of the highway becomes immaterial. In other cases the courts have not considered the presence of the animal in the highway, and have excused the owner from liability on the basis of the unforeseeable nature of the accident. *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630; *Maloney v. Bishop & Bridges*, 105 N. W. 407 (Iowa); *Heath's Garage v. Hodges*, 32 T. L. R. 134. It is to be noted that the doctrine of scienter does not properly belong in these cases. *Scienter* has to do with the probability of an animal acting contrary to the normal nature of his kind; whereas in these cases it is a question of the probability of any animal of a certain kind acting in the way that the defendant's animal actually did. See *Klenberg v. Russell*, 125 Ind. 531, 25 N. E. 596; *Earl v. Van Alstine*, *supra*.

BANKRUPTCY — DISCHARGE — BURDEN OF PROOF IN ATTACKING DISCHARGE. — The defendant had sold an automobile to the plaintiff, making certain express representations concerning it, and agreeing that if it did not fulfill these representations he would refund the money. The plaintiff had returned it, and upon refusal by the defendant to refund the money had obtained a judgment for the same, the jury finding the above facts to be true. The defendant then became bankrupt and the plaintiff proved the judgment and received dividends. Having received his discharge in bankruptcy, the defendant now sought to have the judgment discharged. The plaintiff opposed on the ground that it had been based on a liability for obtaining property by false pretenses and hence was not discharged under Section 17a (2) of the Bankruptcy Act. *Held*, that the judgment be discharged. *Guindon v. Brusky*, 43 Am. B. R. 263 (Minn.).

A discharge in bankruptcy releases the bankrupt from all provable debts except those specified in Section 17 of the Bankruptcy Act. *Bluthenthal v. Jones*, 208 U. S. 64. The discharge does not automatically relieve the bankrupt, however, and its effect upon a particular debt is to be determined by the court in which an action thereon arises. *In re Weisberg*, 253 Fed. 833; *In re Lockwood*, 240 Fed. 161. The burden of establishing is on the creditor, who

seeks to bring his claim within one of the exceptions. *Bluthenthal v. Jones*, *supra*; *In re Miller*, 212 Fed. 920. Where the debt is a judgment, the court will look behind that in order to see upon what the judgment is based. *Bullis v. O'Beirne*, 195 U. S. 606; *Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55, affirmed in 177 U. S. 177. However, in determining this question, only the records of the case are available and admissible. *Bullis v. O'Beirne*, *supra*; *Burnham v. Pidcock*, 58 App. Div. 273, 68 N. Y. Supp. 1007. A claim on an express warranty is essentially a claim arising out of a contract. *Frederic L. Grant Shoe Co. v. Laird Co.*, 212 U. S. 445. Where it is doubtful whether it was based on contract or on fraud, the creditor has not sustained his burden of proving the claim to be within the excepted class and hence it is discharged. *Cooke v. Plaisted*, 181 Mass. 82, 62 N. E. 1054; *Hallagan v. Dowell*, 179 Iowa, 172, 161 N. W. 177. This seems to be the situation in the principal case.

BANKRUPTCY — FRAUDULENT CONVEYANCES — RIGHTS OF SUBSEQUENT CREDITORS WHEN NO FRAUD AS TO THEM. — A trustee in bankruptcy, proceeding under § 70 e of the Bankruptcy Act of 1898, had imposed a charge on certain property, fraudulently conveyed only as to existing creditors. The amount of the charge had been paid to the trustee, and the only existing creditor petitioned that the whole amount be paid over to him. The petition was denied. *Held*, that the judgment be reversed. *American Trust & Savings Bank v. Duncan*, 43 Am. B. R. 7 (Circ. Ct. App.).

A trustee in bankruptcy, suing under § 70 e of the Bankruptcy Act of 1898, to set aside a conveyance, fraudulent only as to existing creditors, did not in his bill give the names of the existing creditors. The conveyance was set aside. *Held*, that the decree be sustained. *Riggs v. Price*, 43 Am. B. R. 413 (Mo.).

The right of subsequent creditors to set aside conveyances is variously made to depend upon fraud as to them and fraud as to existing creditors. *Harlan v. Maglaughlin*, 90 Pa. 293; *Ebbitt v. Dunham*, 25 Misc. 232, 55 N. Y. Supp. 78. But where the subsequent creditor cannot set aside the conveyance, he should not participate in the proceeds in case one with a better right does set it aside. *Lee v. Hollister*, 5 Fed. 752. See *Gardner v. Kleinke*, 46 N. J. Eq. 90, 94, 18 Atl. 457, 459. However, the rights of subsequent creditors, when the debtor becomes bankrupt, have been in effect increased by the Bankruptcy Act. The trustee, it would seem, acts for the benefit of all the creditors and not for the benefit of a particular creditor. See *In re Rodgers*, 125 Fed. 169, 180. Thus, where a creditor holds a note, in which the bankrupt has waived certain exemptions for the benefit of the creditor, the trustee will not act for that creditor on the waiver of exemption. *Lockwood v. Exchange Bank*, 190 U. S. 294. Again, § 67 f of the Bankruptcy Act, which avoids all liens obtained through legal proceedings within four months prior to the petition unless the court orders the lien preserved for the benefit of the estate, is interpreted as meaning that when the lien has been so preserved, the distribution of the proceeds is not confined to the existing creditors. *First National Bank v. Staake*, 202 U. S. 141; *Globe Bank, etc. v. Martin*, 236 U. S. 288. See 28 HARV. L. REV. 703. Section 70 e provides that the trustee may set aside a conveyance which any creditor might have avoided. Neither § 67 f nor § 70 e prescribes a distribution of proceeds which come into the trustee's hands as a result of his succeeding to the creditor's rights, but it would seem that the trustee is acting for the benefit of all the creditors, as well under § 70 e as under § 67 f. If *American Trust & Savings Bank v. Duncan* is sound, it must follow that existing creditors alone will benefit from a charge imposed through their rights by the trustee, while they will have to share with subsequent creditors in case they have themselves secured a lien, within four months prior to bankruptcy, through legal proceedings. Nothing further than the statement of this result seems necessary to point out the undesirability of the decision.

CHARITIES AND TRUSTS FOR CHARITABLE USES — WHAT CONSTITUTES CHARITIES — BEQUEST FOR MASSES. — The testator in his will bequeathed sums of money to religious bodies for the celebration of masses. *Held*, that such gifts are not illegal. *Bourne v. Keane*, [1919] A. C. 815 (House of Lords).

The validity of a bequest for masses is sustained or denied in different jurisdictions on varying grounds. One view, maintained by an increasing number of courts, holds that such a gift establishes a valid charitable trust. *Schouler, Petitioner*, 134 Mass. 426; *Gilmore v. Lee*, 237 Ill. 433, 86 N. E. 568; *Webster v. Sughrow*, 69 N. H. 380, 45 Atl. 139. The celebration of masses is publicly conducted and therefore the benefit conferred is not confined solely to that received by the testator. Some courts uphold the gift as a private trust which may not extend beyond the period of perpetuities. *Re Zeagman*, 37 Ont. L. Rep. 536. See *Kehoe v. Wilson*, 7 L. R. Ir. 10, 16. New York and other states hold that a private trust is attempted which fails, however, under the doctrine of *Morice v. Bishop of Durham*, for lack of a definite beneficiary. *Holland v. Alcock*, 108 N. Y. 312, 15 N. E. 302; *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 18 So. 394. But see *In re Eppig's Estate*, 63 Misc. 613, 118 N. Y. Supp. 683. Still a fourth view regards the bequest, if made to a specific priest, as a gift, conditioned upon the requested services being performed. *Sherman v. Baker*, 20 R. I. 449, 40 Atl. 11; *Harrison v. Brophy*, 59 Kan. 1, 51 Pac. 883. In England, however, on the basis of an early statute these trusts were held illegal as a superstitious use. *Adam's & Lamberg's Case*, 4 Coke, 104 b. See 1 EDW. VI, c. 14. See also DUKE, CHARITABLE USES, 126. And they were so held even after the passage of Catholic relief acts. *West v. Shuttleworth*, 2 Myl. & K. 684; *Heath v. Chapman*, 2 Drew. 413. In the principal case, however, the House of Lords overrules a long line of decisions and holds that a bequest for masses is not illegal, though it is left undecided whether it is charitable or not. This decision, coupled with a late case, in which the House of Lords sustained a trust to promote atheism, indicates an increasingly liberal attitude of the English judiciary towards free religious belief. See *Bowman v. Secular Society*, [1917] A. C. 406; 31 HARV. L. REV. 289.

CHARITIES AND TRUSTS FOR CHARITABLE USES — WHAT CONSTITUTE CHARITIES — BEQUEST FOR THE BENEFIT OF "DESERVING" MEMBERS OF A SPECIFIED RELIGIOUS CREED UPON MARRIAGE. — A testator directed his trustees to invest £2000 in their names in certain securities, and "once in every three years from my decease select at their absolute discretion a deserving Jewish girl, giving the preference to relations of mine, and to pay to such selected girl on her marriage the income from the securities." A summons raised the question whether such a bequest is charitable. *Held*, that it is. *In re Cohen*, 36 T. L. R. 16.

The court in the principal case supported the bequest on the ground that it tended to encourage marriage among Jews, and that it was for the benefit of the Jewish religion. The statute 43 Elizabeth, c. 4, is generally considered as broadly defining what purposes are charitable. See *Morice v. Bishop of Durham*, 9 Ves. 399, 405. See also 29 HARV. L. REV. 793. A gift for the encouragement of marriage, even among members of a particular race or creed, is not found within the terms of that statute, and, it would seem, is not embraced within the spirit of it. It is difficult to support the bequest as a gift for a religious purpose, since the benefit to the Jewish religion from the trust is too remote. Cf. *Laverty v. Laverty*, [1907] 1 I. R. 9. See also *Hester v. Hester*, 2 Ired. Eq. (N. C.) 330, 340. Religious purposes are charitable only when they tend directly or indirectly toward the instruction or edification of the public. *Cocks v. Manners*, L. R. 12 Eq. 574. See TUDOR, CHARITABLE TRUSTS, 3 ed., 9. But the decision might be supported on the ground that there is a trust for the relief of poverty. Though the term "deserving" does not necessarily mean "poor," it might well

be construed to refer solely to needy girls. The money is to be paid over upon marriage when presumably the girl's need for financial aid is greatest. A bequest "to the widows and orphans of Linfield" has been held charitable as a relief of poverty. *Atty.-Gen'l v. Comber*, 2 Sm. & St. 93. See also *Powell v. Atty.-Gen'l*, 3 Mer. 48; *Thompson v. Corby*, 27 Beav. 649. Likewise one for "deserving literary men who have not been very successful." *Thompson v. Thompson*, 1 Coll. 395. Yet all those bequests were in terms equally applicable to poor or rich. But compare *In re Sutton*, 28 Ch. D. 464; *Nichols v. Allen*, 130 Mass. 211.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — RIGHT OF WOMEN TO SAME CRIMINAL PENALTIES AS ARE IMPOSED ON MEN. — The defendant woman was convicted of keeping a liquor nuisance and committed to the state farm for women for an indeterminate period with a six months' maximum under a state statute. A man convicted of the same offense would have received a definite sentence with a six months' maximum. Defendant appeals from the penalty on the ground that the statute differentiating women violated the Fourteenth Amendment, guaranteeing equal protection of the laws. *Held*, that the statute is constitutional. *State v. Heitman*, 181 Pac. 630. (Kan.).

For a discussion of this case, see NOTES, p. 449.

CONSTITUTIONAL LAW — WORKMEN'S COMPENSATION ACTS — LIABILITY WITHOUT FAULT — FACIAL DISFIGUREMENT. — The plaintiff sustained, in the course of a hazardous employment, accidental injuries which resulted in serious facial disfigurement. He sued his employer under a New York statute providing for compensation by the employer for such disfigurement. (WORKMEN'S COMPENSATION LAW, § 15, subd. 13.) *Held*, that the plaintiff may recover. *New York Central R. R. Co. v. Bianc*, U. S. Sup. Ct., October Term, 1919, No. 374.

It is now well settled that employers may be stripped, by legislation, of common-law defenses, such as contributory negligence or assumption of risk, in suits by employees for injuries arising in the course of employment. *New York Central R. R. Co. v. White*, 243 U. S. 188; *Mountain Timber Co. v. Washington*, 243 U. S. 219. Furthermore, the employer may be made liable for accidental injuries in a hazardous industry, though morally not culpable. *Arizona Employers' Liability Cases*, 250 U. S. 400. See 33 HARV. L. REV. 86. Such changes of the common law are not arbitrary, since they merely shift the burden of human wastage to the industry which is responsible for it. See Eugene Wambaugh, "Workmen's Compensation Acts," 25 HARV. L. REV. 129. The amount of compensation may be determined with or without a jury, by prescribed scale or by jury estimate of actual loss. *New York Central R. R. Co. v. White*, *supra*; *Arizona Employers' Liability Cases*, *supra*. Usually the legislation takes as the basis for compensation the impairment of earning power. Disfigurement, especially of face, may well cause a loss of earning power, irrespective of its effect upon the mere capacity for work. *Ball v. Hunt & Sons, Ltd.*, [1912] A. C. 496. But even though a statute allows compensation for pain and disfigurement, in addition to that for loss of earning power, it is not unreasonable. *Arizona Employers' Liability Cases*, *supra*. Even at common law, where pain and suffering accompany physical injury from without, they may be considered as an element of damages. *U. S. Express Co. v. Wahl*, 168 Fed. 848; *Coombs v. King*, 107 Me. 376, 78 Atl. 468; *Patterson v. Blatti*, 133 Minn. 23, 157 N. W. 717. Accordingly, the principal case seems clearly correct in upholding the reasonableness of a statute allowing compensation for disfigurement alone, where caused by a hazard of the industry.

CORPORATIONS — DIRECTORS AND OTHER OFFICERS — LIABILITY OF PRESIDENT TO CORPORATION FOR SECRET PROFITS. — The defendant, the president of a corporation, in consideration of a bonus, secretly agreed with A to release

certain territorial rights of the corporation to A, and to procure and transfer to him a majority of the stock of the corporation. The defendant forced the release of the right and acquired and transferred all of the stock except a small block held by the plaintiff, who now brings a bill in equity to compel the defendant to account to the corporation for the bonus. *Held*, that the defendant must disgorge. *Keeley et al. v. Black et al.*, 107 Atl. 825 (N. J. Eq.).

When an officer of a corporation uses the corporate machinery for his own secret advantage, he may be compelled to account to the corporation for any profit he derives from the transaction, since there is a fiduciary relation between him and the corporation. *McClure v. Law*, 161 N. Y. 78, 55 N. E. 388; *Goodbody v. Delaney*, 82 N. J. Eq. 140, 91 Atl. 724. The principal case gives a moment's pause, however, since it is clear that when the officer accounts to the corporation this will enure largely to the benefit of A, who does not seem particularly deserving. If no one of the old stockholders remained, so that accounting to the corporation would benefit only undeserving persons, equity would look beyond the corporate form to see who were the ultimate beneficiaries, and would refuse relief. *Home Fire Insurance Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024. But equity will not fail to do justice to an innocent petitioner merely because there is an incidental benefit to one wrongdoer at the expense of another. See *New Sombbrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. D. 73, 114. See also 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., § 294. This is the situation in the principal case. The *dictum* that the defendant might also be liable to the former stockholders who had parted with their shares, in an action of deceit, seems correct if there was actual misrepresentation. But New Jersey does not recognize any duty on the part of an officer to make a full disclosure when buying stock from a stockholder. *Crowell v. Jackson*, 53 N. J. L. 656, 23 Atl. 426. See 4 FLETCHER, CYCLOPÆDIA OF CORPORATIONS, § 2564.

CRIMINAL LAW — STATUTORY OFFENCES — VIOLATION OF ESPIONAGE ACT OF 1918 — WHAT CONSTITUTES SPECIFIC INTENT. — The defendants were convicted for publishing two leaflets in violation of the Espionage Act, as amended in 1918. The leaflets appealed to Russian workers in America to rise and prevent the intervention of America against the Revolutionary government in Russia. Workers in munition factories were urged to cease production; and a general strike was advocated. The statute required an "intent to hinder the United States in the prosecution of the war." The defendants claimed that the leaflets showed only an intent to stop American interference in Russia, and that therefore the evidence was insufficient to support the verdict. *Held*, that the conviction be affirmed. *Abrams v. United States*, U. S. Sup. Ct., October Term, 1919, No. 316.

For a discussion of the principles involved in this case, see NOTES, p. 442, *supra*.

DAMAGES — MEASURE OF DAMAGES — CONVERSION OF STOCK. — The defendant stock-broker was held to have converted the stock of the plaintiff's intestate by a wrongful sale. (*In re Berberich's Estate*, 257 Pa. 181, 101 Atl. 461.) A second adjudication for the purpose of determining the amount of damages to be paid by the defendant was required. *Held*, that the damages should be the highest market price of the stock between the conversion and the trial. *In re Berberich's Estate*, 107 Atl. 813 (Pa.).

Generally in an action for conversion the measure of recovery is the value of the property at the time of the conversion, with legal interest from that time. *Hunt v. Boston*, 183 Mass. 303, 67 N. E. 244; *Hayden v. Barlett*, 35 Me. 203. See 2 SEDGWICK, DAMAGES, 9 ed., § 943. Some courts apply the same rule of damages to a conversion of marketable securities. *Continental Mining Co.*

v. *Bliley*, 23 Colo. 160, 46 Pac. 633; *Franklin Bank v. Harris*, 77 Md. 423, 26 Atl. 523. It is clear, however, that the application of the general rule affords inadequate compensation to the owner of the stock. See *Barber v. Ellingwood*, 137 N. Y. App. Div. 704, 713, 122 N. Y. Supp. 369, 378; *Dimock v. U. S. Nat. Bank*, 55 N. J. L. 296, 304, 25 Atl. 926, 928. In an endeavor to reach a more equitable result, the New York courts have laid down a special rule of damages for the conversion of stock; viz., the highest price reached during a reasonable time in which the plaintiff might have replaced his stock after learning of the conversion. *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. 79; *Baker v. Drake*, 53 N. Y. 211. See 19 COL. L. REV. 379. But the plaintiff may at his option rely on the general rule. *McIntyre v. Whitney*, 139 N. Y. App. Div. 557, 124 N. Y. Supp. 234, aff'd 201 N. Y. 526, 94 N. E. 1096. See 24 HARV. L. REV. 62. This so-called New York rule is favored by many jurisdictions. *Galigher v. Jones*, 129 U. S. 193; *Dimock v. U. S. Nat. Bank*, *supra*; *Citizens Ry. Co. v. Robbins*, 144 Ind. 671, 42 N. E. 916. By allowing the plaintiff to recover the highest price of the stock between the conversion and the trial, the Pennsylvania court in the principal case more than compensates the owner of the securities, and in effect penalizes the converter in a civil action in which exemplary damages are not an element. The rule has been justly criticized. See *Baker v. Drake*, *supra*, 217; *Pinkerton v. Manchester Railroad*, 42 N. H. 424, 461.

DAMAGES — MEASURE OF DAMAGES — RECOVERY FOR BREACH OF WARRANTY. — A corporation sold a tractor to the defendant with warranties that it would do general farm work. In an action by the plaintiff, to whom the corporation had assigned the contract, the buyer sought to set off, *inter alia*, the loss of profits from land due to the absence of a crop which he could have sown if the tractor had been as warranted. *Held*, that such damages may be set off. *Mager v. Baird Co.*, [1919] 3 W. W. R. 428.

Damages for a breach which occurs prior to an assignment, provided that it is a breach of the contract assigned or is directly connected with it, may be set off against the assignee. *Newfoundland v. Newfoundland Ry. Co.*, 13 App. Cas. 199. Loss of profits within the contemplation of the parties when the contract was made may be recovered. *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670; *Passinger v. Thornburn*, 34 N. Y. 634. When a warranty has reference to the specific purpose for which an article was sold, such purpose is thereby shown to be within the contemplation of the parties, and a recovery may therefore be had for a loss that is a proximate result of the breach. *Beeman v. Banta*, 118 N. Y. 538, 23 N. E. 887; *Walker v. France*, 112 Pa. St. 203, 5 Atl. 208. The law has gone far in awarding consequential damages for a breach of a warranty, and, to that end, in considering losses to be proximate results of the breach. *Cf. Buckbee v. Hohenedal Co.*, 224 Fed. 14. See 29 HARV. L. REV. 221. See also WILLISTON, SALES, § 615. But even when it might well be said that the loss is proximate, recovery will be denied if the computation of damages is so conjectural as to be speculative. Thus it has been held that a loss of profits due to a defect in a warranted race-horse, where the profits depended on other conditions than those warranted, is both too remote and speculative. *Connoble v. Clark*, 38 Mo. App. 476. And so in the case of a warranted machine. *New York Co. v. Fraser*, 130 U. S. 611. The instant case is an extreme application of the doctrine of consequential damages to a loss that should more properly be considered remote and speculative.

DESCENT AND DISTRIBUTION — FORFEITURE OF ESTATE — CONSTITUTIONALITY OF STATUTE DENYING DOWER TO SLAYER OF HUSBAND. — A Kansas statute provides that a person convicted of killing another from whom he would inherit property shall be denied all right to such property, and that it

shall descend or be distributed as if the person so convicted were dead. The statute is attacked as unconstitutional in a case wherein a wife has been convicted of manslaughter for killing her husband. *Held*, that the statute is constitutional. *Hamblin v. Marchant*, 180 Pac. 811 (Kan.).

Prior to this statute Kansas allowed the criminal to profit by his own crime by taking the inheritance. *McAllister v. Fair*, 72 Kan. 533, 84 Pac. 112. This result the statute here aimed to preclude. The statutory disqualification might conceivably attach either upon conviction or at the instant of killing. The legislature has no power to interfere with dower which has become vested. *Bottomf v. Lewis*, 121 Iowa, 27, 95 N. W. 262. Consequently, to say that the disqualification it created takes effect only upon conviction and, therefore, following the vesting of the estate, would nullify the statute. Further, the statute has expressly directed descent to others than the guilty person. The alternative construction — that the disqualification attaches at the moment of killing — makes the very act which would cause the dower to become vested in the actor work as a bar to its vesting. Acquittal is thus a condition subsequent to the disqualification and conviction a condition precedent to the successful assertion of rights by others who claim under the statute. By this construction, which was the one taken in the principal case, the sole interest affected by the statute is that represented by the wife's statutory dower before her husband's death. This interest is not vested and may be altered at will by the legislature. *Griswold v. McGee*, 102 Minn. 114, 112 N. W. 1020, and 113 N. W. 382. See *Randall v. Kreiger*, 90 U. S. (23 Wall.) 137, 148. Analogous reasoning has been employed to reach at common law the object aimed at by the Kansas statute. *Perry v. Strawbridge*, 209 Mo. 621, 108 S. W. 641; *Box v. Lanier*, 112 Tenn. 393, 79 S. W. 1042.

EMINENT DOMAIN—WHEN IS PROPERTY TAKEN?—STREET CONSTRUCTION AND RE-GRADING. — Part of a vacant tract was taken for a street, and the owner claimed compensation for damages to the remainder caused by the use to which the city intended to put the land taken, viz., a public street at a level several feet below the natural level of his land. *Held*, that this is not a proper element of damages. *In re Skillman Ave. in City of New York*, 177 N. Y. Supp. 767.

Part of a tract was taken, and the new street was to be constructed from twenty-one to twenty-five feet above the natural level of the land. The owner claimed that compensation should be made for the resulting depreciation in value of the remainder. *Held*, that this is a proper element of damage. *In re Putnam Ave. West in City of New York*, 177 N. Y. Supp. 768.

For a discussion of these cases, see NOTES, p. 451, *supra*.

EQUITABLE LIENS — EFFECT OF PROMISE THAT BONDHOLDERS SHALL SHARE IN SECURITY OF FUTURE MORTGAGES. — The plaintiff corporation issued bonds in which it promised that, if it thereafter mortgaged any of the property owned by it at the date of issue, the bondholders should share equally with the future mortgagees in the security. The lower court sent up these questions: (1) Did the bonds create an equitable lien on the corporation property at the date of issue? (2) Could the corporation effect a mortgage which would exclude the bondholders from sharing in the security? *Held*, that the first question be answered in the affirmative, the second in the negative. *Connecticut Co. v. New York, N. H. & H. R. R. Co.*, 107 Atl. 646 (Conn.).

For a discussion of the principles involved in this case, see NOTES, p. 456, *supra*.

EQUITY — BILLS OF PEACE — BILL TO ENJOIN NUMEROUS SUITS IN A JUSTICE'S COURT AND TRY AS ONE IN EQUITY. — The defendant, assignee of 648 claims against the plaintiff for excess freight charges, brought that many

separate actions against the plaintiff in a justice's court. The court costs alone would have exceeded the total amount claimed; and under procedural rules in that state the actions could not have been consolidated in a justice's court. The plaintiff corporation in a bill in equity asked for an injunction against the separate prosecution of these actions, and for their trial as one in this suit. It alleged the facts set forth above, a conspiracy between the defendant and the justice to defraud the plaintiff, and that the plaintiff had a meritorious defense to the several actions in the alleged unconstitutionality of the statute giving rise to the claims. The lower court sustained a demurrer. On appeal, *held*, that the demurrer should have been overruled. *Atchison, T. & S. F. Ry. Co. v. Smith*, 183 Pac. 824 (Cal. App.).

It is well settled that equity has jurisdiction to prevent a multiplicity of suits. See 1 POMEROY, EQ. JURIS., 4 ed., § 267. The only uncertainty is as to the extent of such jurisdiction. Where equitable relief is asked, equity in order to prevent numerous actions between the same parties and about the same subject matter, will generally act. *Goodson v. Richardson*, L. R. 9 Ch. 221; *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, 51 N. E. 301; *Bank of Kentucky v. Stone*, 88 Fed. 383. But where the actions are between the same party on the one hand, and many parties on the other hand, there is a division of authority. Some courts have refused to order the actions to be tried in one equity suit unless there is a privity or community of interest between the many parties other than that all their cases involve similar questions of law and fact. *Tribette v. Ill. Cent. R. Co.*, 70 Miss. 182, 12 So. 32; *Cumberland Tel. & Tel. Co. v. Williamson*, 101 Miss. 1, 57 So. 559; *Ill. Steel Co. v. Schroeder*, 133 Wis. 561, 113 N. W. 51. But the weight of authority undoubtedly is that the community of interest need extend only to a similarity of law and fact. *Mayor of York v. Pilkington*, 1 Atkyns, 282; *Ill. Cent. R. Co. v. Baker*, 155 Ky. 512, 159 S. W. 1169. See 1 POMEROY, EQ. JURIS., 4 ed., § 269. On principle, equity should interfere only if the legal procedure is substantially inadequate to permit a proper defense and if, upon a balance of all interests concerned, justice will be promoted. See *Hale v. Allinson*, 188 U. S. 56, 77. See also R. V. Fletcher, "Jurisdiction of Equity Relating to a Multiplicity of Suits," 24 YALE L. JOUR. 642-648; 21 HARV. L. REV. 208. The principal case is clearly right, since the actions are between two parties only, the law and facts in all the several actions are similar, damages are liquidated, and the legal procedure is grossly inadequate.

FEDERAL COURTS — JURISDICTION BASED ON AMOUNT IN CONTROVERSY — REASONABLENESS AND GOOD FAITH OF CLAIM. — An action for the death of a girl three and a half years old was brought by her father in a federal court. A verdict of \$900 was set aside as excessive. At the second trial the judge at the close of the plaintiff's evidence entered a compulsory nonsuit on the ground that the controversy did not substantially involve the sum of \$3000. *Held*, that the motion to take off the nonsuit be dismissed. *Novitsky et al. v. Rozner*, 259 Fed. 913 (Dist. Ct., W. D., Pa.).

The federal district courts have original jurisdiction of suits between citizens of different states where the matter in controversy exceeds the sum of \$3000. Such courts are required to dismiss a suit whenever, at any stage of the proceedings, it appears substantially not to involve a dispute within the jurisdiction of the court. See 36 STAT. AT L., 1091, 1098; U. S. JUD. CODE, 24, 37. The purpose of the statute is to prevent the clogging of important tribunals with small causes. See *Davis v. Mills*, 99 Fed. 39, 40. It has been broadly stated that the amount claimed by the plaintiff in good faith determines the jurisdiction. *Schunk v. Moline, etc. Co.*, 147 U. S. 500. See *Leroy v. Hartwick*, 229 Fed. 857, 858. And, of course, the mere fact that a verdict for less than \$3000 has been rendered will not affect the jurisdiction. *Armstrong et al. v. Walters*, 223 Fed.

451. But if the plaintiff's complaint discloses to a legal certainty that he cannot recover the necessary amount the cause must be dismissed. *Royal Insurance Co. v. Stoddard*, 201 Fed. 915. The courts have thus, with respect to the pleadings, required that a plaintiff's belief that the jurisdictional amount is in controversy be not only *bona fide* but reasonable. But the rule has not been uniformly applied where the plaintiff's evidence discloses that he cannot recover \$3000. As the objective standard will best accomplish the purpose of the statute it should be applied in this case too. It has in fact been applied. *Horsted v. Merkley et al.*, 59 Fed. 502. See *Maxwell v. A. T. & S. F. R. Co.*, 34 Fed. 286. *Contra*, *Lewis v. Klepner*, 176 Fed. 343. The principal case wisely adopts the rule that the good faith must be reasonable. But the court must be careful to distinguish between its own opinion and the possible opinion of a reasonable man. *Evans et al. v. Lehigh, etc. Co.*, 205 Fed. 637.

INTOXICATING LIQUORS — CERTIORARI — LICENSE TO SELL LIQUOR GRANTED DURING NATIONAL PROHIBITION SET ASIDE AT SUIT OF PRIVATE CITIZEN. — On June 30, 1919, the Board of Commissioners of Jersey City issued a license for the sale of spirituous liquors from its date to July 1, 1920, "subject to the provisions of the laws regulating the sale of intoxicating liquors and the granting of licenses therefor." A private citizen of Jersey City prosecuted a writ of *certiorari* against the commissioners to set aside the license as violative of the federal Wartime Prohibition Act and the prohibition amendment to the Federal Constitution. (40 STAT. AT L. 1045; U. S. CONST. AM. ART. XVIII.) *Held*, that it be set aside. *Wilson v. Commissioners of Jersey City*, 107 Atl. 797 (N. J.).

It is a general rule that a court will not review the proceedings of another tribunal by a writ of *certiorari* unless the prosecutor can show that he will suffer a special injury beyond that sustained in common with the public. *Davis v. Hampshire County*, 153 Mass. 218, 26 N. E. 848; *District Board of Education v. Gilleland*, 191 Mich. 276, 157 N. W. 609. This rule is recognized in New Jersey. *Tallon v. Hoboken*, 60 N. J. L. 212, 37 Atl. 895. See *Ford v. Bayonne*, 87 N. J. L. 298, 299, 93 Atl. 591, 592. But its decisions as to what constitutes such special interest are conflicting. See *Specht v. Central Pass. Ry. Co.*, 68 Atl. (N. J.) 785, 788. But some jurisdictions, while conceding the general rule above, allow any private citizen regardless of special interest to sue out the writ to enforce a duty owing to the public. *Collins v. Davis*, 57 Iowa, 256, 10 N. W. 643; *State v. Ravalli County*, 21 Mont. 469, 54 Pac. 939. This doctrine was applied in the case upon which the court in the principal case relied: *Ferry v. Williams*, 41 N. J. L. 332. In regard to the substantive point of the principal case, the decision also seems correct. State statutes are suspended when Congress, in the exercise of powers granted to it, legislates upon the same subject matter, provided Congress intended its legislation to cover the whole field of that subject matter. *Gulf, etc. Ry. Co. v. Hefley*, 158 U. S. 98; *Southern Ry. Co. v. Reid*, 222 U. S. 424. See Samuel Williston, "The Effect of a National Bankruptcy Law upon State Laws," 22 HARV. L. REV. 547. See also 29 HARV. L. REV. 439. Thus it would seem that the right of the commissioners in the principal case to grant licenses for the sale of spirituous liquors was suspended while the Wartime Prohibition Act was in force.

MANDAMUS — PERSONS AND ACTS SUBJECT TO MANDAMUS — CONTROL OF EXECUTIVE OFFICERS BY THE WRIT. — A statute provided "that any person or association of persons qualified to make entry under the coal land laws of the United States who shall have opened or improved a coal mine or coal mines . . . may locate the land upon which such mine or mines are situated" (33 STAT. AT L. 525). The petitioner claimed to have fulfilled the requirements of the statute and therefore to be entitled to a patent. Upon refusal of the Secretary of the Interior to issue one, he brings *mandamus* proceedings to compel such action.

Held, that the writ be refused. *U. S. ex rel. Alaska Smokeless Coal Co. v. Lane, Sec. of the Interior*. U. S. Sup. Ct., October Term, 1919, No. 36.

For a discussion of this case, see NOTES, p. 462, *supra*.

SALES — AFTER-ACQUIRED PROPERTY — FUTURE CROPS — RETENTION OF POSSESSION BY VENDOR. — The defendant sold the plaintiff all the beans to be planted and raised that year on the defendant's land. It was expressly stated that title was to pass at once. After the beans were harvested, the defendant mortgaged the crop and transferred possession to the mortgagee. The buyer sued the seller and the mortgagee for the beans. *Held*, that title had passed to the plaintiff subject to the mortgagee's lien. *Hamilton v. Klinke*, 183 Pac. 675 (Cal.).

The court's decision was based upon the doctrine of potential possession. "In certain cases a seller may transfer title to goods which he does not then own," on the theory that he is already potential owner. *Grantham v. Hawley*, Hob. 132; *Briggs v. United States*, 143 U. S. 346. See WILLISTON ON SALES, §§ 133-137. In practice this doctrine has been limited to crops and the young of animals. By the application of this doctrine, when such property comes into existence title passes to the buyer free from any defects arising since the bargain. *Grantham v. Hawley, supra*. Because of its great hardship upon innocent third parties, arbitrary limitations of the doctrine have been laid down in several states. *Shaw v. Gilmore*, 81 Me. 396, 17 Atl. 314. See 1913 MINN. GEN. STAT., § 6080. In England and in some states, except as applied to mortgages, it has been abolished. See SALE OF GOODS ACT, 56 & 57 VICT., c. 71, § 5 (3). See also UNIFORM SALES ACT, § 5 (3). In those states where the doctrine is still upheld, through the intervention of another rule, a prior purchaser's title is defeated by a sale and delivery by the seller to a subsequent purchaser. See WILLISTON'S CASES ON SALES, 3 ed., 384, note. See also Samuel Williston, "Transfers of After-Acquired Personal Property," 19 HARV. L. REV. 569, 570. The principal case illustrates this safeguard against the hardships of the doctrine.

SALES — RISK OF LOSS — TIME OF PASSING OF TITLE — C. I. F. CONTRACTS. — The seller in Halifax contracted to sell to the buyer in Philadelphia goods c. i. f. Philadelphia. The quoted price included the cost, insurance, and freight. The goods were destroyed in transit by a submarine. *Held*, that the loss falls on the buyer. *Smith Co. v. Marano*, 76 Leg. Int. 768.

Unless a contrary intention appears, if the contract requires the seller to deliver at a distance, or to pay the freight, the property does not pass until the goods have been delivered to the buyer. See UNIFORM SALES ACT, § 19, subd. 5. But a c. i. f. contract does not come within this section. See WILLISTON ON SALES, 408. While it might well be considered the same as a contract f. o. b. destination, it is treated more like a sale f. o. b. point of origin. See *Mee v. McNider*, 109 N. Y. 500, 503. This doctrine must rest on the theory that the obligation of a c. i. f. contract is met by the delivery to the buyer of the bill of lading, invoice, and policy of insurance. *Horst Co. v. Biddell Bros.*, [1911] 1 K. B. 214, aff'd [1912] A. C. 18. See *Karburg & Co. v. Blythe, Green, Jourdain & Co.*, [1915] 2 K. B. 379, 388. It is not clear from the cases whether the property in the goods passes at the time of the delivery of the goods to the carrier or at the time of the delivery of the documents to the buyer. See *Mee v. McNider, supra*; *Karburg & Co. v. Blythe & Co.*, [1916] 1 K. B. 495, 514; *Groom v. Barbour*, [1915] 1 K. B. 316, 324. But it is unnecessary to decide this point, because it is clear that the risk throughout is on the buyer. *Manbre Saccharine Co. v. Corn Products Co.*, [1919] 1 K. B. 198. Therefore, if the seller has followed his authority as to the insurance, and the goods are destroyed in transit by the public enemy, the seller is not thereby precluded from making a valid tender of

the documents, although he knows at the time that the goods are not in existence; and the buyer is not relieved from the liability to pay the price, although the insurance does not cover war risk and he has no recovery for the loss. *In re Weis & Co. v. Credit Colonial et Commercial (Antwerp)*, [1916] 1 K. B. 346.

SALVAGE — WHAT CONSTITUTES SALVAGE SERVICE. — The plaintiff schooner transferred passengers and baggage from the defendant ship which had run aground. The list of the ship and the number of passengers aboard her created a reasonable apprehension of danger although the rescue could have been accomplished without the aid of the schooner. *Held*, that the service constituted salvage. *Clayoquot Sound Canning Co. v. S. S. Princess Adelaide*, 48 Dom. L. R. 478.

The defendant tug had her rudder carried away in a heavy gale. In response to distress signals the plaintiff trawler made fast and brought the tug safely into port. *Held*, that the service constituted salvage. *The Andrew Kelly v. The Commodore*, 48 Dom. L. R. 213.

For a discussion of these cases, see NOTES, p. 453, *supra*.

SPECIFIC PERFORMANCE — INADEQUACY OF CONSIDERATION AS A DEFENSE — CONTRACT TO DEVISE IN CONSIDERATION OF PERSONAL SERVICES. — The petitioner and his uncle had contracted that, in consideration of personal services to be performed by the petitioner during the uncle's lifetime, the latter would make a will and leave his entire property to the petitioner. The bill alleged complete performance by the petitioner, the uncle's death without having made a will, and prayed specific performance of the agreement. The defendant filed a demurrer, on the ground that the petition did not specify the value of the estate, or the value and extent of the services alleged to be the supporting consideration of the contract. A Georgia statute provides that "mere inadequacy of price . . . may justify a court in refusing to decree a specific performance." (1910 GA. CIV. CODE, § 4637.) *Held*, that the demurrer be sustained. *Potts v. Mathis*, 100 S. E. 110 (Ga.).

A valid contract to devise realty in consideration of personal services will be specifically enforced against the heir or devisee where the promisee has fully performed. *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Burdine v. Burdine's Ex'r*, 98 Va. 515, 36 S. E. 992; *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218. See 30 HARV. L. REV. 192. See also 28 HARV. L. REV. 241-245. Although the remedy by specific performance lies within the discretion of the court, a mere inequality of price and value will not be reason for denying it. *Seymour v. Delancy*, 3 Cow. (N. Y.) 445; *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938; *Harrison v. Town*, 17 Mo. 237. See 15 HARV. L. REV. 318 and 741; 27 HARV. L. REV. 288. But if the inadequacy of the consideration is so gross as to constitute great hardship, or is coupled with sharp practice or unfairness, equity will not decree specific performance. *Cox v. Burgess*, 29 Ky. L. Rep. 972, 96 S. W. 577; *Marks v. Gales*, 154 Fed. 481; *Grizzle v. Sutherland*, 88 Va. 584, 14 S. E. 332. The fairness of a contract to devise in consideration of personal services should be determined with reference to the breadth of the undertaking to serve, and should not be deemed unfair merely because the contract has turned out to be advantageous to one of the parties. *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582; *Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 351; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415. Statutes in some jurisdictions provide that specific performance "cannot" be given in case the consideration be inadequate. See 1915 CAL. CIV. CODE, § 3391; 1907 MONT. REV. CIV. CODE, § 4417; 1913 SO. DAK. REV. CIV. CODE, § 2345. It has been intimated that such a statute makes inadequacy of consideration a ground for refusing specific performance apart from circumstances of hardship or unfairness. *Morrill v. Everson*, 77 Cal. 114,

19 Pac. 190. The proper interpretation seems to be, however, that the usual equity rule is declared. See *Phelan v. Neary*, 22 S. Dak. 265, 117 N. W. 142; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *White v. Sage*, 149 Cal. 613, 87 Pac. 193. This interpretation would seem clear when the statute, as in the principal case, provides that mere inadequacy of price "may justify" a court in refusing to decree specific performance. It has been held that a statute such as those cited above places the burden upon the plaintiff of alleging facts in his declaration which affirmatively show adequacy of consideration. *White v. Sage*, *supra*. But it seems more reasonable to hold that inadequacy of consideration is a matter of defense. *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123. In the principal case there are no circumstances alleged which give rise to an inference of hardship or unfairness. It would seem, therefore, that the demurrer should have been overruled.

TAXATION — LOCAL ASSESSMENT FOR "STOCK LAW FENCES" — DIVERSION TO GENERAL FUND. — A statute authorized a county to sell its "stock law fences," now no longer necessary, and directed that the proceeds, as well as the surplus of the stock law fund, should be returned to the general fund of the county. When the fences were built, assessments had been imposed upon landowners in that portion of the county where the fences were located. These landowners seek to have the proceeds of the sale and the surplus distributed among themselves alone, attacking the statute as unconstitutional. *Held*, that the statute is constitutional. *Parker v. Board of Commissioners of Johnston County*, 100 S. E. 244 (N. C.).

The taxes with the proceeds of which the fences had been built were in the nature of local assessments. *Cain v. Commissioners of Davie County*, 86 N. C. 8. Such assessments are not taxes within the equality and uniformity provisions of the state constitutions. *Arnold v. Mayor, etc. of Knoxville*, 115 Tenn. 195, 90 S. W. 469; *City of Auburn v. Paul*, 84 Me. 212, 24 Atl. 817; *City of St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713. But assessments must be apportioned according to benefits; and by the weight of authority constitutional provisions which forbid the taking of property without due process of law make such apportionment mandatory. *White v. City of Tacoma*, 109 Fed. 32; *Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102. See *Stuart v. Palmer*, 74 N. Y. 183, 189. See 1 PAGE AND JONES, *TAXATION BY ASSESSMENT*, § 118. If the money has been collected by assessment, but not expended, and the improvement abandoned, the persons assessed have a right to a refund. *McConnville v. City of St. Paul*, 75 Minn. 383, 77 N. W. 993. See *Bradford v. City of Chicago*, 25 Ill. 411, 416. And a similar right exists where there is a surplus. See *City of Chicago v. McCormick*, 124 Ill. App. 639, 640; *Cleveland v. Tripp*, 13 R. I. 50, 64. But if the proceeds have been used for the designated purpose, the person complaining cannot recover, even though the expected benefit has not accrued to him. *Germania Bank v. City of St. Paul*, 79 Minn. 29. The principal case seems doubtful, unless the decision can be rested upon the ground that, in view of the small amount involved, distribution among the property owners would be inexpedient and would yield almost nothing. It has been held that the constitutional requirement that taxes shall be uniform applies to their levy, and not to their distribution after they have been raised. *Kerr v. Perry School*, 162 Ind. 310, 70 N. E. 246; *Holton v. Mecklenburg County Com'rs*, 93 N. C. 430.

TAXATION — PARTICULAR FORMS OF TAXATION — TRANSFER TAX — TRANSFER TO TAKE EFFECT AT DEATH. — An uncle, retiring from a partnership in which he and his nephew were the only members, gave up to his nephew a debt which the partnership owed him, upon the nephew's promise to leave the money in the business and pay him two per cent on the amount until his death.

A statute provided that transfers of decedent's property made in contemplation of death or intended to take effect in possession or enjoyment at or after such death should be subject to transfer tax. (1914 N. J. P. L. 267.) *Held*, that the transfer was not subject to the tax. *Wolf et al. v. Comptroller of Treasury of N. J.*, 105 Atl. 871 (N. J.).

A gift *inter vivos* not made in contemplation of death is not taxable. *Matter of Spaulding*, 49 App. Div. 541, aff'd 163 N. Y. 607, 57 N. E. 1124. But a transfer reserving a life estate to the grantor is taxable as intended to take effect at death. *In re Keeney's Estate*, 194 N. Y. 281, 87 N. E. 428; *Carler v. Bugbee*, 91 N. J. L. 438, 103 Atl. 818. Such a transfer for consideration is not taxable. *Blair v. Herold*, 150 Fed. 199. But a transfer in return for a promise to pay interest no greater than the income of the property transferred is not supported by consideration. *In re Estate of Reynold's*, 169 Cal. 600, 147 Pac. 268. In substance, the grantor is reserving for himself a life income and the enjoyment of the grantee is postponed until the grantor's death. This is precisely the situation the statute was designed to cover. See 28 HARV. L. REV. 437. To reason as the court did in the principal case that the transfer was a gift and the nephew's promise an independent undertaking involves the difficulty of a waiver of a debt and a promise without consideration, and overlooks the fact that the agreements were in exchange for each other. Nevertheless, where the interest rate is low, it might well be held that the grantee's enjoyment begins presently as to all but the part necessary to earn the required income. *People v. Kelley*, 218 Ill. 509, 75 N. E. 1038. The case might be supported upon the narrow ground that the promise to leave the money in the business imposed a risk which would render the nephew's undertaking adequate consideration.

TENANCY IN COMMON — LEASE BY COTENANT — RIGHT OF A COTENANT TO ASSIGN HIS RIGHTS TO THE USE OF A SPECIFIC PART OF PREMISES. — In a prior suit by the present plaintiff against the present defendant, a lease made to the defendant by several of the plaintiff's cotenants to which the plaintiff did not assent was declared void. The lessors were not made parties to that suit. The plaintiff now brings ejectment against the defendant, who admits the lease is void against the plaintiff, but claims that, under it, he is entitled to the same rights in the particular premises that his lessors had. *Held*, that ejectment cannot be maintained. *Pastine v. Altman*, 107 Atl. 803 (Conn.).

Attempts by one cotenant or by any number less than all the cotenants to dispose of the interests of the other cotenants are void as to them. *Waring v. Crow*, 11 Cal. 366; *Murley v. Ennis*, 2 Colo. 300. A lease by one cotenant dealing with all or with a definite portion of the land held in common is not binding on the cotenants who do not join in making it and do not accept its benefits. *Mussey v. Holt*, 24 N. H. 248; *Southern Inv. Co. v. Postal Telegraph Cable Co.*, 156 N. C. 259, 72 S. E. 361. Under such a lease the lessee can claim no exclusive rights, because his lessor had no right to demand that the particular part leased should be set off to him in case of partition. *Dorn v. Dunham*, 24 Tex. 366; *Marks v. Wakeman*, 107 Ill. 251. But a cotenant's ownership includes the privilege of exercising the right of the remaining cotenants to occupy and use the premises. See *Gage v. Gage*, 66 N. H. 282, 291, 29 Atl. 543, 547. See also *Rising v. Stannard*, 17 Mass. 282, 284. And a cotenant may authorize another to do whatever he himself might lawfully do with respect to the common premises. *Buchanan v. Jenks*, 38 R. I. 443, 96 Atl. 307; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505. Accordingly some courts have given practical effect to leases by one or a part of the cotenants by considering them as licenses to use the specified premises, subject to the same conditions of cotenancy under which the lessor himself might have used them. *Stark v. Barret*, 15 Cal. 361; *Rising v. Stannard*, *supra*. This seems to be the rationale of the principal case.

TRUSTS — CREATION AND VALIDITY — ANNUITY CONDITIONED UPON CONTINUED SEPARATION FROM HUSBAND. — The testator by his will directed trustees to pay an annuity to A, his mistress, provided and so long as she should not return to live with her present husband and should not remarry. A was living apart from her husband at the time of the execution of the will and the death of the testator. *Held*, that the trust be carried out according to its terms. *Sparks v. Southall*, 54 L. J. 362.

Conditions in testamentary dispositions in limited restraint of marriage are not void as contrary to public policy. *Jenner v. Turner*, 16 Ch. D. 188; *Reuff v. Coleman*, 30 W. Va. 171, 3 S. E. 597. A testator who leaves a fund in trust for a legatee "during such period as she shall remain unmarried" is understood not to be aiming at a restraint of marriage, but rather to providing for the support of the legatee until such time as she shall be married. *Jones v. Jones*, 1 Q. B. D. 279; *Trenlon Trust Co. v. Armstrong*, 70 N. J. Eq. 572, 62 Atl. 456. But a bequest to a married woman living with her husband, to take effect upon her separation from him (by his death or otherwise), may well be frowned upon as tending to disturb the harmony of the marital relation. *In re Moore*, 39 Ch. D. 116; *Conrad v. Long*, 33 Mich. 78. Yet even such bequests have been held valid when it is clear that the testator's sole motive was to provide for the legatee in case she should be left alone. *Thayer v. Spear*, 58 Vt. 327, 2 Atl. 161; *Coe v. Hill*, 201 Mass. 15, 86 N. E. 949. In the principal case, the woman was not living with her husband at the time of the execution of the will nor at the testator's death, and, in such a situation, courts will generally impute to the testator an intention primarily to provide the legatee with maintenance until some spouse should undertake that duty. *In re Charleton*, 55 Sol. J. 330; *Dusbiber v. Melville*, 178 Mich. 601, 146 N. W. 208. The further fact in the principal case that the beneficiary was the testator's mistress is not, in the absence of statute, sufficient to make the bequest void as against public policy. *Sunderland v. Hood*, 13 Mo. App. 232. See PAGE, WILLS, § 24.

TRUSTS — CREATION AND VALIDITY — *CESTUI QUE TRUST* AS TRUSTEE OF A SPENDTHRIFT TRUST. — The testatrix devised the residue of her property to her executor, impressed with a spendthrift trust, the income to be paid to her husband for his life and then to her two children. The husband was named as sole executor. Although no misconduct on the part of the executor was shown, it was sought to declare the trust invalid. *Held*, that the trust was valid. *In re Fox's Estate*, 107 Atl. 863 (Pa.).

Spendthrift trusts under which the creator deprives himself of all power over the principal have always been valid in Pennsylvania. *Rife v. Geyer*, 59 Pa. St. 393; *Shankland's Appeal*, 47 Pa. St. 113. Where, however, the sole trustee is also *cestui que trust* for life, it has been said that during his life there is a merger of the legal and equitable estates. See *Wills v. Cooper*, 1 Dutch. (N. J.) 137, 164; *Rose v. Hatch*, 125 N. Y. 427, 431, 26 N. E. 467, 468. But where one of several trustees is also *cestui que trust* for life, it is clear there is no merger. *Story v. Palmer*, 46 N. J. Eq. 1, 18 Atl. 363. See *Robertson v. de Brulatour*, 111 App. Div. 882, 902, 98 N. Y. Supp. 15, 28. Likewise there is no merger where one of several *cestuis que trust* is himself sole trustee. *Woodward v. James*, 115 N. Y. 346, 22 N. E. 150. A merger, then, results only where all legal and equitable rights under the trust are settled upon one person, so that no one can question his disposition of the property. Where, as in the principal case, equitable remainders are created which limit the trustee-*cestui's* power of disposition, there is, by the weight of authority, no merger during his life. *Nellis v. Rickard*, 133 Cal. 617, 66 Pac. 32; *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. 8. See *Spengler v. Kuhn*, 212 Ill. 186, 193, 72 N. E. 214, 217. In view of the prevalence of spendthrift trusts in those states where they are valid, there would seem to be no reason for holding that because a man is *cestui que*

trust under such a trust he is thereby to be considered too untrustworthy to act as trustee, nor has such a view been taken. *Cf. Nichols v. Eaton*, 91 U. S. 716.

TRUSTS — CREATION AND VALIDITY — MERITORIOUS CONSIDERATION FOR EXECUTORY PROMISE. — The testator executed an instrument, referred to by the court as a deed of trust, wherein he promised, for himself and his executors, to pay to the plaintiff, his wife, from whom he was living apart, a fixed annuity during her lifetime. As security for the performance of his promise he conveyed certain property in trust for her. This property proved insufficient for the maintenance of the annuity, but the testator supplied the deficit while he lived. The plaintiff sought to have the trust fund increased from the estate to an amount large enough to support the annuity. *Held*, that the estate is liable. *In re Hoffman's Estate*, 177 N. Y. Supp. 905 (Surr. Ct.).

The weight of American authority is that meritorious consideration is enough to turn an imperfect gift into a valid declaration of trust. See SCOTT, CASES ON TRUSTS, 151. But the law is fairly well settled that such consideration is not sufficient to support an executory promise. *Matter of James*, 146 N. Y. 78, 40 N. E. 876; *Landon v. Hutton*, 50 N. J. Eq. 500, 25 Atl. 953. *Contra*, *Crawford's Appeal*, 61 Pa. St. 52. Nor does the creation of a trust for the security of the promise seem to afford any reason for changing the rule when the security proves insufficient. Equity has gone far in turning an imperfect gift into a contract when substantial consideration has been given in form only. *Ferry v. Stephens*, 66 N. Y. 321. See Roscoe Pound, "Consideration in Equity," 13 ILL. L. REV. 667, 671. But here no consideration is mentioned. It would seem that the case could not be supported except on the theory that the testator declared a trust of all his property to pay the annuity. Such a trust, while possible, could be established only by strong evidence of intent. *Hickok v. Bunting*, 67 App. Div. 560, 73 N. Y. Supp. 967. It might be urged that the payment of the deficit by the testator during his life was such evidence; but this was nothing more than the performance of his promise. The creation of the trust fund is inconsistent with an intent to hold the rest of the property in trust. And the fact that the testator made no attempt to treat the remaining property as a trust *res* would seem to be conclusive. *Ambrosius v. Ambrosius*, 239 Fed. 473.

TRUSTS — INFANT TRUSTEE — COMPELLING EXECUTION OF TRUST. — A named her minor son, B, as beneficiary of her life insurance policy, upon trust, however, to pay her funeral expenses and to keep the excess. A died while B was still an infant and B made arrangements with an undertaker to conduct the funeral. B now seeks to avoid the payment of the undertaker's bill. *Held*, that the bill must be paid. *Amodei's Estate*, 76 Leg. Int. 733.

An infant may be a trustee. *Jevon v. Bush*, 1 Vern. 342. See 1 PERRY, TRUSTS, § 54. But because of his common-law disabilities, an infant is not liable *ex contractu*. See POLLOCK, CONTRACTS, Williston's ed., 59. The principal case must therefore go on some other ground than that the claimant is a creditor. It would not be doing violence to the intention of the settlor to say that the trust was for the benefit of any undertaker chosen by the trustee and that when chosen he would be the *cestui que trust*. See 18 HARV. L. REV. 529. Or it could be said that the personal representative of the settlor was the *cestui*, since, were it not for the trust, he would be liable for the reasonable funeral expenses of the deceased. *Patterson v. Patterson*, 59 N. Y. 574. In either case there would be the difficulty of compelling the infant to carry out the trust. It has been held that if an infant trustee makes a conveyance which he would have been bound to make upon coming of age, he cannot later disaffirm it. *Anon. v. Handcock*, 17 Ves. 383; *Elliott v. Horn*, 10 Ala. 348; *Starr v. Wright*,

20 Ohio St. 97. And a *cestui que trust* of a chose in action held in trust by an infant has been allowed to compel the obligor to pay directly to him. *Levin v. Ritz*, 17 N. Y. Misc. 737, 41 N. Y. Supp. 405. The principal case goes but a step beyond these cases. Nor is it objectionable, since under modern practice the same result could be obtained by removing the infant and appointing a new trustee.

VENDOR AND PURCHASER — REMEDIES OF VENDOR — EQUITABLE LIEN OF UNPAID VENDOR. — The plaintiff sold and conveyed land to the defendant, receiving a promissory note in part payment. He indorsed the note to a bank as collateral security for advances. Upon failure to pay the note when due, the bank sued the defendant as maker and the plaintiff as indorser and got judgment against each, which judgment remains unsatisfied. The plaintiff then filed the present bill praying a declaration that he has a lien upon the land conveyed and is entitled to maintain a *caveat* against the land until payment of the amount due on the note, and also for foreclosure and sale of the land. The bank was not made a party to the bill. *Held*, that the plaintiff is entitled to maintain a *caveat* against the land, but not to foreclose. *Denny v. Nozick*, 48 D. L. R. 310.

Despite apparent inconsistency with the policy of recording statutes and theoretical objections, there are still a limited number of jurisdictions where an unpaid vendor of land has an equitable lien on the land for the purchase price. *Mackreth v. Symmons*, 15 Ves. 329; *Wilson v. Plutus Mining Co.*, 174 Fed. 317. *Contra*, *Ahrend v. Odiorne*, 118 Mass. 261; *Kauffault v. Bower*, 7 S. & R. (Pa.) 64. See 2 JONES ON LIENS, § 1063. Jurisdictions allowing such a lien are in hopeless confusion in regard to who may enforce it. See 2 JONES ON LIENS, §§ 1092 *et seq.* Some consider it personal to the vendor, and neither allow the lien to follow the debt in equity nor permit him expressly to assign it. *Keith v. Horner*, 32 Ill. 524; *Hecht v. Spears*, 27 Ark. 229. Some permit assignment as collateral security for the vendor's debt but not otherwise. *Carlton v. Buckner*, 28 Ark. 66. Other jurisdictions allow assignment freely. *Sloan v. Campbell*, 71 Mo. 387; *Nichols v. Glover*, 41 Ind. 24. In such jurisdictions, payment to the transferee by the vendor as surety of course enables the latter to enforce the lien by subrogation. *Mathews v. Aiken*, 1 N. Y. 595; *Riggs v. Chapman*, 46 S. W. 692 (Ky.). However, even in jurisdictions restricting assignment, if the vendor is later compelled to pay as indorser, his lien revives. *Cotton v. McGehee*, 54 Miss. 510; *Hallock v. Smith*, 3 Barb. (N. Y.) 267. In any jurisdiction, therefore, which permits the lien at all, the grantor could enforce the lien after payment. Before payment, however, since the bank was not a party in the principal case, it seems clear that the vendor should not be granted foreclosure and sale on a theory of exoneration. But the decree as granted amounts to no more than maintaining the *status quo* until the debt should be paid, and as such would seem to be properly granted. See *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

WILLS — CONSTRUCTION — CONDITIONAL WILLS. — Before starting on a journey, the testator made a will providing, "in case of any serious accident, . . . I direct . . ." and therein left all his property to his aunt. The testator returned home safely. *Held*, that the will was not conditional. *In re Tinsley's Will*, 174 N. W. 4 (Iowa).

The validity of a will may depend upon the fulfillment of a condition. *Davis v. Davis*, 107 Miss. 245, 65 So. 241; *In the Goods of Porter*, L. R. 2 P. & D. 21. If the condition is plainly stated it will be enforced, whether precedent or subsequent in form. See 28 HARV. L. REV. 336. A recent New York decision to the contrary seems insupportable. *In re Steiner's Will*, 152 N. Y. Supp. 725. But if the words of the condition are not mandatory, the condition will not be

enforced unless the particular form of the will evidently depended upon the condition. *Davis v. Davis*, *supra*. Courts do not favor conditional wills and will seize upon such circumstances as the permanence and naturalness of the bequests or the general inaccuracy of the testator's language to construe away a condition. *Eaton v. Brown*, 193 U. S. 411. And in case of doubt courts prefer to construe the statement of contingency as expressing only the occasion for making the will at that particular time. *Forquer's Estate*, 216 Pa. 331, 66 Atl. 93; *In the Goods of Dobson*, L. R. 1 P. & D. 88. In accordance with these principles, the decision in the principal case seems to be a correct interpretation of the testator's intention.

WILLS — CONSTRUCTION — ERRONEOUS DESCRIPTION OF LAND. — A testator directed his executors to sell the northeast quarter of the northeast quarter of section 3, township 92, range 44. The testator never owned the northeast quarter of the northeast quarter but owned the northwest quarter of the northwest quarter of the designated section, township, and range. The executor before discovering the error in the will contracted to convey the northwest quarter of the northwest quarter to the plaintiff, who now seeks specific performance. *Held*, that a decree will issue. *Wilmes v. Tiernay*, 174 N. W. 271 (Iowa).

For a discussion of this case, see NOTES, p. 467, *supra*.

BOOK REVIEWS

THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED. By Joseph Doddridge Brannan. Third Edition. Cincinnati: The W. H. Anderson Company. 1919. pp. iii, 622.

This very handy reference volume comes to us in a third edition, brought down to date. What that signifies in a general way is indicated by the 622 pages of this edition as compared with the 250 pages of the first edition published in 1908. At that time thirty-four states and territories had adopted the Act, which to-day is in force in all of continental United States except Georgia, but including Alaska, besides Hawaii and the Philippine Islands. Apparently the only portions of our territory outside of Georgia in which it is not now effective are Porto Rico, the Canal Zone, Guam, and the Virgin Islands. This wider currency of the law, together with the lapse of time in all jurisdictions — the first edition was published eleven years ago — has of course vastly increased the number of adjudications. A rough calculation shows approximately 2360 entries in the table of cases as against about 600 in the first edition. All of these that are of sufficient significance to justify it are stated in substance and commented on where needful. A useful feature, too often overlooked in books of this sort, is a statement in the preface of the precise point in the various Reports to which the author has carried his researches.

The greatly increased size of the volume when compared with its humble beginnings is not due entirely, however, to the increase in adjudications reviewed. It is largely accounted for by the use of larger type and liberal spacing. Typographically the body of the book is excellent, — it is good to look upon, — though the somewhat crowded title-page can scarcely be said to be a work of art.

The volume contains, besides the law itself and all the adjudications upon it, section by section, all the useful auxiliary apparatus contained in the earlier editions, such as cross-references to the Bills of Exchange Act and tables of

corresponding sections with their numbering in the various state statutes and compilations. In future editions, when still more space will be required for the ever increasing adjudications, nearly a hundred and fifty pages can be saved by omitting the controversy over its adoption waged by Ames, Brewster, and McKeehan. This matter, excellent though it is, is of diminishing importance now, is abundantly accessible elsewhere, and would seem not to be strictly germane to the purpose of the book, which is, we suppose, to keep the profession up to date as to the status of this important statute before the courts. The author states in his preface that it is only "after much consideration and consultation with others" that he decided to retain these articles. It seems to the reviewer that it would not have been a serious mistake to omit them. Nowadays Punch's advice to those about to marry is equally applicable to those about to insert any unnecessary matter in a law book.

A table of the states in which variations or additions have been engrafted on the law shows instructively what difficulties in the way of pride of opinion confront the uniformitarians in law reform. Of fifty-two jurisdictions in which the law has been adopted, thirty-five have made some variations or engrafted some additions on the law as proposed. Not many of them, however, reach the bad preëminence of Illinois and Wisconsin with their thirty-one and twenty-five changes respectively, though Kentucky, North Carolina, and South Dakota each has more than ten. But many more have only one or two, and those not important, so that the efforts at uniformity have been crowned with at least a large measure of success.

In a word, this book, now brought down to date, will be found very useful; and that is all it aims to be.

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LEAGUE OF NATIONS: ITS PRINCIPLES EXAMINED. Volume II. By Theodore Marburg. New York: The Macmillan Company. 1919. pp. 149.

A SOCIETY OF STATES: SOVEREIGNTY, INDEPENDENCE, AND EQUALITY IN A LEAGUE OF NATIONS. By W. T. S. Stallybrass. New York: E. P. Dutton and Company. 1919. pp. xviii, 243.

Dissatisfaction with the treaty of peace, the unrestrained garrulity of the United States Senate, and the acuteness of labor problems have resulted in disillusionment and indifference with respect to the League of Nations. Yet the League, in President Wilson's phrase, must be made "a vehicle of life"; only through it can the world achieve a solution of the difficult problems that the Peace Conference failed to deal with, and only the unsatisfactory security which it grants will permit the cost of armaments to be reduced so that the world may avoid bankruptcy and, by measures of social amelioration, prevent great revolutions. If the recent conflict sowed so many seeds of industrial revolt, the present order will be completely unable to survive another great war.

These truths have as yet been inadequately realized in the United States. There has been practically no real discussion of the proposal, no great debate as to its feasibility, advisability, and the inconvenience that it would cause. Few have realized the importance of the third great decision that the United States was called upon to make: *The Covenant*, by President Lowell, the Tafts, and Mr. Wickersham, was published and was a worthy successor to *The Federalist*, but it was late and only served to show what was necessary. For no great, new ideal — especially if it be unsanctioned by historical experience and mean a sacrifice of national or personal liberty of action — can be put into practice unless its advantages and difficulties are fully understood. The urgency was not so immediate and the course proposed more radical than

when the American Constitution was adopted, and public opinion required a much more prolonged and thorough instruction.

Of general appeals for the support of the League idea there were many, and these books had their place. But they should have been followed by a debate, and there was nothing resembling this. Instead, there were simply *ex parte* arguments, admirable as a preliminary, but giving nothing but a groundwork. Mr. Marburg's little volume belongs in this class. He examines the basic principles of a League. Old practices must be given up; the license to make war must be surrendered; sovereignty must be modified; there must be a will higher than that of the nation. But all this is possible if we have altruism in international relations, and the innovations which the League would require are not too great a price to pay for peace. It is an eloquent and able statement, written by a man versed in international law, with diplomatic experience, and feeling deeply the urgency of the problem. But it did not make many converts, I fancy; it did not answer many of the objections raised in the Senate and elsewhere. In itself it was well worth writing, but the difficulty is that Mr. Wilson did not take the American people into his confidence and that other writers did not begin a more intelligent, a more restrained, and a more helpful debate than that which followed in the United States Senate.

England did have such a discussion. The British Labor Party; a pamphlet series devoted to specific points rather than to the general idea; very well-informed debates in the House of Lords and the House of Commons; constant and intelligent advocacy by several able journals, and a well-organized propaganda by various organizations, served to prepare the English mind. Mr. Stallybrass' volume has a prominent place in this educational campaign. The Vice-Principal of Brasenose College and a barrister-at-law, he has given us an excellent discussion of sovereignty and a League of Nations. This is perhaps the most difficult problem in connection with world organization, for even if the sceptic does not rest his case upon a narrow definition of sovereignty, his concern about restrictions upon national action, possibly inconvenient obligations, ability to withdraw from the League, power to refuse to accept mandates, and exclusion of certain problems, is attributable to this conflict of international organization and national independence.

Some writers would solve the problem by a new conception of sovereignty.¹ Mr. Stallybrass, however, shows that sovereignty is an ideal that cannot be approximated in international relations: it has constantly been limited in the past by administrative organization and treaties of various kinds. Additional limitations upon it would involve a question of degree, not of principle. Mr. Stallybrass lists all the authorities and goes into history for his illustrations; his argument, which commands cordial agreement, should dispose of the problem. The sacrifices required by the League Covenant are more than compensated for by the security which it gives.

The value of books such as these lies in the future even more than in the past. Mr. Wilson said of the League that a living thing had been born; it must be nourished and clothed that the world may be saved, and this is possible only if there is a complete understanding of the international problem. The action of the United States Senate is not all-important, for the test will come in the future: whatever America's reservations or the inadequacies of the League, it can be made to work, and can be improved if its members so desire. But this boon will come only when public opinion demands it, and to the accomplishment of this high purpose these two books contribute worthy and much-needed aid.

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¹ See Professor Chafee's review of Laski, *AUTHORITY IN THE MODERN STATE*, 32 HARV. L. REV. 979.

JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION. Edited by James Brown Scott. Carnegie Endowment for International Peace. New York: Oxford University Press. 1918.

This collection of the decisions of the United States Supreme Court rendered in controversies between the states is published in the faith that "layman as well as practitioner" will be convinced "that what forty-eight states of the American Union can do, a like number of states forming the society of nations can also do." If Mr. Scott means that states forming the society of nations may conceivably form a federal union in the courts whereof their controversies may be judicially determined, the parallel is undoubtedly apt, but so improbable of practical application that its exposition borders on the realm of imaginative literature. If the suggestion is that the success of the Supreme Court in deciding interstate cases is a compelling argument for the feasibility of any such international tribunal as has been seriously projected or seriously considered, the logical necessity is not so clearly seen. A description of the Supreme Court as "in its origin and in fact an international tribunal created by the states" certainly fails somewhat of completeness. Even granting that the constitution is a pact between the states, an assumption in which Mr. Scott seems to dissent from the position taken by Marshall and reaffirmed by Story,¹ it does not follow that the Supreme Court was created as an international court, or that it now is primarily an international court. The records of the Convention would seem to show that the jurisdiction over controversies between the states was one of the last provisions added to Article III.² And the most casual glimpse of the Supreme Court Reports would suggest that the primary function of the court is not the settlement of difficulties between the states. The court is, first and foremost, the highest organ of the judicial power under the federal government. It was created to hear cases arising under the laws and constitution of the United States, and cases which could not be equitably determined in the state courts on account of the character of the parties. And under this general grant of jurisdiction it properly hears controversies between the states.

The seeming misconception upon which the present collection of cases rests is worth noting, because the fundamental differences between the Supreme Court and a possible international tribunal are involved in the distinction. It is precisely because the Supreme Court is a federal court and not an international court that it has been successful in the decision of cases between the states. For one thing, the Supreme Court is an integral part of the judicial system of each of the states, and submission to its awards and to its interpretation of the law is the natural order in the courts of the states. Again, the officers, executive and judicial, of the states are citizens of the United States, and as such amenable to its judicial processes.³ And finally, in the all-important matter of sanction, the fact that the court sits as a federal court is vital. Whatever be the proper resolution of the much-discussed question whether or not the Supreme Court may enforce obedience to its awards on the part of the states,⁴ there is a sanction behind its decisions so compelling that no state ever has permanently disobeyed its commands, or probably ever will. For the state

¹ *McCulloch v. Maryland*, 4 Wheat. 316; *Martin v. Hunter's Lessees*, 1 Wheat. 304.

² The grant to the Supreme Court of jurisdiction over controversies between the states does not appear in the New Jersey plan nor in the Virginia plan; it is realized only in part in the report of the Committee on Detail rendered August 6; it is incorporated in the constitution in its present form in the report of the Committee on Style of September 12. FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION, 132, 133, 186, 600.

³ *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, 100 U. S. 371.

⁴ 31 HARV. L. REV. 210, 1158.

which should defy the Supreme Court would strike, not at an artificial bond between independent states, but at the essential structure of its own constitution and polity. Briefly, then, the interstate decisions of the Supreme Court of the United States are conclusive of one thing only in this connection, — that a federal union is practicable.

But though these decisions do not go so far toward the international solution as Mr. Scott would press them, they do at least offer much and valuable material for the student of world tribunals. Even here, however, a preliminary distinction must be made. So far interstate decisions have been limited to historically justiciable questions, the most common being questions of boundary, contract, and nuisance. Indeed the court has frequently intimated that it has no jurisdiction unless the question is justiciable in the sense suggested.⁵ It is clear, then, that no light can be had here on the difficult international problem of the solution of controversies in which judgment would entail the enforcement of a political act by the sovereign of one of the states. But within the limits thus marked out these cases are clearly of great importance, not only in the fields of constitutional law but also in the new infinities of international experimentation. And the collection now presented should prove convenient for those who have occasion to consult the record of cases between the states. The first volume, with its collection of standard cases on the nature of the jurisdiction of the federal courts, the origin of the Union, the state of the law before the Eleventh Amendment, etc., seems hardly to compensate for the tremendous increase in bulk necessitated by the inclusion. But the second volume would be a convenient addition to the library of any constitutional or international lawyer.

ARCHIBALD MACLEISH.

THE STORY OF MY LIFE. By the Right Hon. Sir Edward Clarke, K. C. New York: E. P. Dutton and Company. 1919. pp. 439.

Lawyer-like, Mr. Clarke has used the words of his title in their most exact sense. His autobiography is not a rumination, but a chronicle. To the general reader the book, save for an occasional passage which may change the angle of a sidelight upon a familiar incident, will, for the most part, be uninteresting; the student of politics and government will find more meat in it; to the lawyer it offers a sketch of the setting in which the English barrister moves. But whoever reads the book cannot fail to be impressed by the comprehensiveness and vigor of the activities of which it tells.

A poor boy who slept behind the counter of his father's jewelry shop, a clerk in the East India House, a junior in the London Sessions, counsel for Captain O'Shea and Dr. Jameson, M.P., K.C., Solicitor-General and Privy Councillor — certainly a man whose life has covered as much ground as this is entitled to the "full contentment" in which he writes his closing chapter. Mr. Clarke's remarkable energy has taken him into the varied fields of law, journalism, literature, politics, and even shorthand; and in two of these fields he has attained an eminence which enables him to give accounts of famous trials that formal reporters could never offer, and to show prime ministers without their grease-paint. It is in his adventures as a disciple of Disraeli that the story comes nearest dramatic significance. When Mr. Clarke stands against his party in favoring compromise with the United States on the Venezuela question, and when he is forced out of his seat in Parliament because of his manly opposition to the Boer War, the respect which must be accorded to merited achievement turns into warm admiration and sympathy, and his re-election — this time to the long-desired position of a representative of the city of London — is felt as a climax to a tale as well as to a career.

⁵ *South Dakota v. North Carolina*, 192 U. S. 286.

Some of the book makes dry reading. Yet there are compensations. Commenting on the historic divorce suit in which Parnell was co-respondent and in which Mr. Clarke was counsel for the plaintiff, Mr. Clarke said to David Plunket, "I knew I was throwing a bombshell into the Irish camp, but I did not know it would do quite so much mischief." "Ah," said Plunket, "you didn't know that when it burst they would pick up the pieces and cut each other's throats with them." Cynicism speaks for the first time when the author finds an epigram in the remark that certain facts will soon pass into history and so be forgotten. And it is not unpleasant to know that the attainment of the first rung of the ladder of success which Mr. Clarke climbed so steadily may have been due to his belief that Hamlet had seduced Ophelia.

There is a pleasant flavor in the book, remindful of the fact — often forgotten, so vigorous does its author still seem to be — that he was born while Lincoln was an obscure Illinois attorney. His story will not rank with the great autobiographies of literature, and his part in the making of history was too unobtrusive, his career too devoid of gestures, for his book to take a place with the memoirs of more prominent men of his time. But it is such men as he, sober, industrious, capable, high-principled, giving themselves freely and yet living richly, such lives as the one of which he writes, that help to give his profession its dignity.

OUTLINE OF A COURSE ON THE HISTORY AND SYSTEM OF THE COMMON LAW. By Roscoe Pound. (Cambridge. 1919.)

In the spring of 1919, Dean Pound delivered ten lectures on the common law to the students of the Trade Union College; and it was a characteristic generosity which led him to reprint their outline for the benefit of a wider audience. Their value consists less in any theoretic novelties they unfold than in the clue they afford to the general lines upon which Dean Pound's legal thinking proceeds. Like all he writes, these pages make positions which, in the past, were the object of furious contention seem the most reasonable in the world. The reader's special attention should be drawn to the four "jural postulates" which appear on page 40 of *The Outline*. They represent a summary of the philosophic bases from which all juristic thinking must start. It is evident that much labor has gone into their making; and they make us all the more eager for that long-expected volume in which Dean Pound is to summarize for us the immense edifice which has earned him the respect of all who care for legal science.

H. J. L.

EXECUTORS' ACCOUNTS. By Charles Howard Widdifield. Toronto: The Carswell Company. 1919. pp. lv, 531.

Judge Widdifield is doing for Ontario what we hope may be done for many of our American jurisdictions, — writing special books on the administration of estates. In 1916 he published his "Executors' Accounts," and the present volume is one of a second edition. In 1917 he wrote "Surrogate Court Practice and Procedure." His new edition of "Executors' Accounts" is nearly double the size of the first, and he has cited cases from all over the common-law world. The book covers the important topics on accounts, but seems to us to deal too briefly with the modern subject of succession duties. Furthermore, we should have liked to have more of a discussion of the best practice on the form of entering the items of the account. How should a pew, a cemetery lot, a copyright, a wasting investment, be inventoried or entered on the

account? Such puzzling questions of practice, which are at the fingers' ends of such an expert as Judge Widdifield, might well find place in a book for young practitioners. And we also regret that he has not had space for more of his own views and theories of probate law. In general, however, the work is thorough and well done, and this second edition is a book which an American lawyer will do well to have on his shelves.

BOOKS RECEIVED

ARGUMENTS AND SPEECHES OF WILLIAM MAXWELL EVARTS. By Sherman Evarts. New York: The Macmillan Company.

TITLE TO REAL PROPERTY. By George W. Thompson. Indianapolis: The Bobbs-Merrill Company.

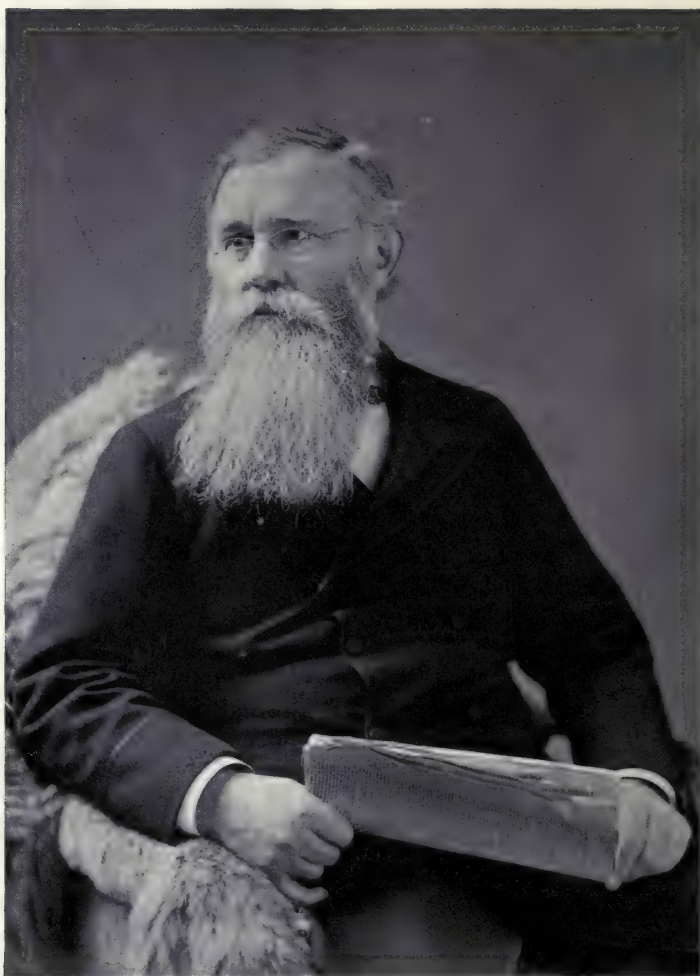
INTERNATIONAL LAW. By Sir Frederick Smith. Fifth edition, revised and enlarged by Coleman Phillipson. New York: E. P. Dutton Company.

BRITISH LABOR CONDITIONS AND LEGISLATION DURING THE WAR. By M. B. Hammond. Carnegie Endowment for International Peace. New York: Oxford University Press.

LAW AND THE FAMILY. By Robert Grant. New York: Charles Scribner's Sons.

POLICEMAN AND PUBLIC. By Arthur Woods. New Haven: Yale University Press.

A LAWYER'S STUDY OF THE BIBLE. By Everett P. Wheeler. New York: Fleming H. Revell Co.



DEAN C. C. LANGDELL

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THE REBIRTH OF THE HARVARD LAW SCHOOL

THE writer has been asked many times to give his recollections of the occurrences with which he was familiar during the early years of Professor Langdell's services to the Harvard Law School. He has hesitated to do this. But so urgent have been the requests, based in great measure upon the fact that those who were in the School during that eventful time are rapidly passing away, that he has reluctantly yielded. He is conscious that what he has written does not adequately portray the situation and events. He realizes that it is more or less fragmentary. But he has endeavored to give some accurate description of those days. It has seemed best to omit the names of teachers and students, even of those who were prominent. The single exception in the case of Professor Ames is necessary, in order that a salient characteristic of Professor Langdell's work may best be illustrated. If any feel that what is said is too eulogistic of Professor Langdell, the writer is sure that the survivors of those who were connected with the School in 1870-72 will not share that feeling. He is confident that there will be no difference of opinion concerning President Eliot's responsibility.

It is a striking fact that the Harvard Law School for almost fifty years, nearly one half of the period of its existence, has followed uninterruptedly the method of instruction originated by Professor Langdell in 1870, a method radically different from any

previously in use, and that this method has been pursued for many years by most American law schools.

Before that time the School had a wide and favorable reputation at home and abroad, and a history of which its graduates and friends were proud. It had had the services of eminent lecturers and professors who, in addition to instructing the students, had written legal treatises which were recognized as authorities. Among its graduates were men who had achieved the highest distinction on the bench and at the bar. Yet for some time before 1870 there was a growing dissatisfaction with the condition of the School and a feeling that the way in which it was being conducted was susceptible of improvement. Some requirements, while of apparent value, were not enforced. The laxity of study among many of the students and the ease with which the degree of LL.B. was obtained alike by the deserving and the undeserving were disquieting. Before the fall of 1870 the degree was given on the recommendation of the faculty to students who had studied three terms in the School, or who had studied two terms in the School and had been admitted to the bar after one year's study of law before coming to the School. Sufficient pains were not taken to ascertain whether they had in fact studied. The statement of the applicant, that he had studied and attended lectures, practically sufficed to gain the degree, a statement which, as can readily be understood, was freely given and accepted. While the greater part of the students were studious and a considerable portion were graduates of colleges, there were many of slight previous training who were attracted by the Harvard degree. Some entered a higher educational institution for the first time. Entrance to the School was free—*i. e.*, without requirement as to previous study—to all and at all times of the school year. It occurred occasionally that some of those who had attended a term, having learned of undergraduate happenings, felt it their privilege, if not their duty, to haze a newcomer. It is difficult for the graduates and members of the last forty-five years to realize this. In the lecture room the courses were not stimulating to many. Although the greater number worked faithfully and profited by their work, yet many preferred a course of ease. There was no examination for the degree.

In 1869-70 the faculty consisted of the president of the university and three professors of law, who were the teaching force.

There were three classes,—senior, middle, and junior. The method of instruction had been for years by lectures.

The authorities of the University examined carefully into the condition of the School, and a thorough reorganization resulted. The office of dean was created. Examinations for the degree were prescribed. In the spring of 1870 Mr. Langdell was appointed professor and made dean. These changes were fundamental in their effects on the future of the School. It has become a tradition that President Eliot was led to appoint Langdell professor by his remembrance of hearing, while a junior in college, Langdell in his room in Divinity Hall talk law in a way which indicated genius. Undoubtedly this caused him to think of Langdell. But it should be said that before the appointment was made much time was spent and great pains were taken to obtain the fullest information about Langdell's work after he left the School and practiced law. Eminent professors, judges, and lawyers were conferred with. While opinions differed, as a result of the inquiry the School fortunately acquired the services of this rare man.

In the fall of 1870 the Law School was located on Harvard Square in Dane Hall, which was in the southwesterly corner of the yard of Harvard College to the west of Wadsworth House. The building was of brick and contained a lecture room in the second story, a library room in the first, and private rooms used by the regular professors. The entrance was up a few steps to a porch and thence to the main hallway. Then, as before, no entrance examination or particular course of previous study was required for admission. The only requirements were, first, age nineteen years or over, and secondly, good moral character. Students could enter at any time of the year. As before, the School was open to all at all times of the year. The liberality as to entrance was, of course, attractive. Of the students who were enrolled in the fall of 1870 more than one half held no degree from any institution of learning. Yet there were many well-educated men. The School offered a complete course of legal education, except in matters of mere local law and practice, for those intending to practice at the bar of any state of the United States. There were seven required and eleven elective studies. Instruction was given, first, in recitations; secondly, by lectures and expositions; thirdly, by moot courts; fourthly, by cases assigned to students for written and oral opinions; fifthly,

by drawing pleadings at common law and in equity. The first was new to the School. It originated with Professor Langdell, and meant an entire change in the method of instruction. The faculty, as before, consisted of the president of the university and three professors. The dean was the head of this department. This was an important and valuable innovation. The professors and four lecturers constituted the teaching force. There were no distinct classes. The courses and lectures were open to all. Access to the shelves of the library was free and unobstructed. As some of the professors and lecturers used published treatises in books as the bases of their lectures, students were allowed to take such textbooks from the building for the purpose of study. There was a large number of copies of these books in the library for such use.

The experience of one who entered the School in 1870 is interesting in this connection. He was an entire stranger to the University and to the students of the School. As he passed up the steps to enter the building there were three or four young men, evidently students, standing on the porch, who looked at him critically. He inquired the way to the office of the dean, where one presented himself for admission to the School. This work was among the manifold duties of the dean at this time. There was no secretary. One of the young men addressed him as "Freshie" and gave complicated and bewildering directions which his companions approved; and suggestions of future hospitality on his part toward them were made to him. He went into the building and was then directed by some one to the office. Professor Landgell asked many questions in addition to the routine inquiries. Some of them are interesting in view of the requirements for entrance made years after. They related to previous training and education; and it was evident he thought that a person who had not received a sound preparatory training might find the courses very difficult. For such he suggested hard outside work to supply, in a measure, the deficiency. When this reception was mentioned afterwards to students and graduates, most of them expressed much surprise, inasmuch as the prospectus stated that no previous study was required; and further, they said that since it was highly desirable that the numbers and the income should be increased it was a serious mistake to discourage men from entering. They reasoned that if one attended the lectures he should acquire enough legal knowledge to fit him for the legal

profession, that too much learning was in the way, that work in the School was more important than prior training, that the prospects of the School would be injured. A few, however, agreed with Langdell. This was the first indication of his attitude in this respect of which the writer has heard. Whether this is the true policy is, although seemingly, not yet really settled. It is questioned by many — not a large number, it must be admitted. On the one hand, it is urged that the School would be swamped by the vast number who, judging from past experience, would come with the mistaken belief that they could continue the course of studies successfully and who would overwhelm the School with their numbers and throw confusion into it; that the accommodations in space are insufficient, and that they would seriously and disastrously interfere with, and most likely destroy, the carrying on of its work. On the other hand, it was and still is urged that an educational institution cannot properly deny the right of those who, although they do not have a preliminary training, have been, as has been shown in former years, and are, able to pursue the course equally successfully with those who have had prior educational advantages. It would have been a misfortune if Simon Newcomb had been denied admission to the scientific school because he held no college degree. However this may be, Langdell favored the requirement of a degree for admission to the Law School.

Again, in the fall of 1870 a new and drastic change was made with reference to the degree in law. Announcement was made that while students not candidates for the degree could avail themselves of the advantages of the School in whatever measure and to whatever extent they might see fit, it would no longer be given as the result of practically mere attendance. The applicant for the degree was required to pass satisfactorily thorough and searching examinations in all the required subjects and in at least seven of the elective courses, after having been in the School at least one year. Graduates and warm friends of the School were greatly alarmed by this requirement. They said that there was no need of it; that success in passing examinations would not bring success in actual practice of the law, and that, after all, to prepare for the actual work of the law was the reason that young men attended; that it was unnecessary to take such steps to ascertain whether there had been serious study in each case; that the statement of the

student always had been and should be sufficient, and that such a step would inevitably injure the School by decreasing the attendance and consequently the income. It is hardly necessary to say that most of the students were opposed to this radical change. A small number favored it.

As we have before stated, the method of instruction had been for years by lectures. In the year 1870-71 this was generally the case. Some of the professors and lecturers literally lectured, that is, read from textbooks or prepared notes, pausing occasionally to make some explanation, and infrequently to answer questions asked by courageous students. A few of the lecturers gave out in advance the subject of the particular lecture, and talked not only to, but once in a great while with, the learners.

This fall (1870) Langdell practically began his long service in the School. There was great curiosity as to what he would do. It was generally believed that his was to be a new method. But no one had any conception what it would be until the students were given, in advance of the lecture, sheets which contained reprints of cases, the headnotes omitted, selected from various reports. As he followed Lord Coke's *melius petere fontes quam sectari rivulos* the first selections were taken from old reports. The sheets for the civil procedure course contained early forms of pleading, in Latin. The latter excited many forcible comments. Some asked why they were not given extracts from ancient tablets. On the appearance of the cases and forms the proposed system was condemned in advance by practically all.

There was but one lecture room. The lecturer occupied a slightly raised small platform at one side of the room, a desk in his front. The students' seats, comfortable, cushioned settees, were arranged in a semicircular manner, rising from front to rear. There were no conveniences for taking notes save a few small square tables which flanked the lecturer's desk on either side. The janitor enjoyed the privilege of letting these tables. Although thus condemned in advance, Landgell's first lecture excited keen interest. The subject was Contracts. While it was a beginner's course, most of those who had been over the subject during the preceding year felt drawn to the lecture. The attendance was unusually large. It filled the room. Langdell began. A short and vivid account has been given by Mr. Batchelder of the way in which Langdell began, — by

questioning students about the case of *Payne v. Cave*.¹ After the preliminary inquiries as to the facts, arguments, and opinions had been made, further questions were put to draw out the views of the students as to the arguments and opinions. At first it was almost impossible to get much expression; for it was evident that very few had studied the case critically, and had had no thought of forming any judgment of their own. And so as question after question was put, all presupposing a careful examination into the various aspects of the case, the answerers for the most part said that they were not prepared. The new men generally had not studied law at all. It seemed to them the height of presumption to have, and much more to express, an opinion. It was to learn rules of law that they had come to the School. When they had accomplished this they might have some right to state their views. They thought it absurd to undertake to give their thoughts about a subject of which they knew nothing. Those were courageous indeed who ventured to participate. Langdell asked more and more questions. As it now comes to the memory of one who was present, there was a series of admirable, analytical inquiries. At the time, the general judgment of the students was that it was a childish performance; for nearly all, if not all, failed to see at the beginning that the method was to analyze the case closely and to extract the essential elements, and in this way to grasp the real legal principles involved. But the hour passed with amazing rapidity. When it ended there was a great deal of comment by those who had been present. Interest had plainly been excited, but principally in the method of teaching. By far the greater number openly condemned the new way. They said there was no instruction or imparting of rules, that really nothing had been learned. Older students said they theretofore had received something, even though in a preliminary way, from professors and lecturers, but here was an entire absence of anything but a seeking of expressions of opinion from youths who were ignorant of what they talked about; that no rule or suggestion of any rule of law had been hinted at; that certainly it was no way to learn law, for the law was not in the idle talk of these young boys; that the performance was foolish; that Langdell acted as if he did not know any law; that it would be more profitable to attend other lectures where something could be learned. Yet

¹ 3 T. R. 148 (1789).

there were a few who felt a quickening of their zeal, who were certain that they had received an impulse, who insisted that they got "something which somehow lasted," as one of them, since famous at the bar, expressed it.

In most of the other lectures the course of instruction followed the ways of former years. The instructor used a textbook, reading from it and making such comments as he deemed advisable, and suggesting that cases which he cited from law reports be examined. Occasionally a student would ask a question and the instructor would reply. But the textbook furnished the real subject of the hour. General discussion was very rare. The writer never heard any. It was assumed that the author of the textbook had examined the subject and had found out the true rules of law relative thereto. Thus the rules were given. There was little, if any, examination made, outside the textbooks from which the instructor read, by the students with the purpose of ascertaining how the rules originated or why they existed. It was assumed that these rules were right. Thus it was a process of absorption. One stout advocate of this system said, "Professor — and his book fairly exude law. We take it in and assimilate it." The result of the method of Langdell was active search and inquiry; that of the other professors was passive absorption. One produced work and constant discussion outside the lecture room among the students; the other, acquiescence in what was read by the lecturer. One excited earnest inquiry; the other produced a feeling of satisfaction in hearing the rule announced. On the one hand, accuracy of thought and expression were encouraged, tending to clear perception of sound distinctions and to the discovery by the student of the principles involved. On the other hand, acceptance of the conclusions of some one who announced the law was the expected and acceptable result. The second was by far the more popular method among members of the School; and it practically had the general approval of professors, graduates, and those engaged in the practice of law. Langdell's methods were novelties and were distrusted. There was much curiosity as to how they would turn out. Attendance fell off. Students wearied of the "useless" preparation for the "grammar school recitation," as it was called, and the number of those "prepared" dwindled away to very few. The consideration of quite short cases in the advance sheets occupied several lectures. It

seemed a waste of time. No advance appeared to be made. It was said that a half hour's perusal of a textbook would yield more information than could be obtained by several weeks' talk, mostly by the students themselves, in the lecture room. Comparisons were made between the two methods, much to the disadvantage of the new way. It was predicted that Langdell's course on Contracts could not be finished in two years, that one half could not possibly be gone over in a year; whereas the courses of the other professors and lecturers could plainly be gone over with ease within the allotted time.

Again it was asked why Langdell did not give his own opinion, as the others did. It is true that he failed to express himself, although in the early stages of his teaching many questions were put to him in order to draw out an expression of his views. On these occasions he became absorbed in thought and seemed to falter. Usually he asked questions in reply. This occasioned harshest criticism. It was said that he did not answer because he did not know, that Professors — and — *knew*, and therefore they replied. On one occasion one of the students who was a steadfast admirer and follower of the new way succeeded in eliciting an immediate answer to a question. After receiving the answer he put several more questions with a skill which it is doubtful whether he has surpassed in his subsequent distinguished career. Langdell was routed. There was violent applause from the greater part of the class. Dust arose in considerable quantities from the settee cushions, which were vigorously used in the demonstration. This occurred at the last of the hour. At the end there was much excitement and expressions of sentiment among the students who had applauded, who said that Langdell had been caught like a small boy — that no law could be learned in such a course and from such a man, who plainly did not know the law. It made little if any difference to them that at the next lecture Langdell took up the question again and discussed and treated it most profoundly. Not many appreciated the treat given them; and very few saw that it was a sincere pleasure to him that the students should study the subject so carefully as to be able to put such pregnant questions. The writer has known professors to make statements involving inconsistencies with what they had said a short time before; but these lapses were usually ignored by the few who no-

ticed them. The judgment of Langdell's critics was adverse and seemingly final.

Even thus early in his career it had dawned on some that Langdell was not undertaking at all to state what the rules of law were, that his real purpose was to incite the young men before him to find them by their own researches and that he felt his own opinions to be of no consequence when compared with the importance of leading them to think and form their own judgments. As before stated, it must be said that to the great majority the road to legal learning led through textbooks and bald statements of what the law was; memory against youthful logic. If it happened that decisions quoted or referred to in the textbook or lecture were in conflict, the doctrine of the textbook used by the professors was accepted. On rare occasions some Langdell follower ventured to ask question of other lecturers during their hours; but the results were different from those derived from Langdell. There was no discussion. The outcome sometimes was unsatisfactory.

A single instance by way of illustration will be sufficient. The course was on Evidence. The textbooks were two, Greenleaf and Best. The immediate subject was Burden of Proof. The lecturer stated that while the rules given in the textbooks were good, on the whole perhaps the clearest rule was that the burden was on the party who, if the case should stop at any point in the proceedings, would as a matter of law lose. One of the men asked him how it would be known who would lose. The reply was in substance that the judge would rule. The student asked how the judge would know. This caused a good deal of amusement; for this student seemed bold indeed to question in this way the wisdom of a judge. He was told that the state of the evidence would enable the judge to rule. He was quiet during the remainder of the lecture; but during the recess he approached the lecturer. A number of students were attracted and followed. He asked again, and receiving practically the same reply, said that the rule seemed to be that the burden of proof was on the party who had the burden of proof. Would the judge come to his conclusion in any way other than being convinced that the burden was or was not sustained? The lecturer said that it was necessary to distinguish between the *onus* and the *pondus*. As the next lecture was about to begin, the matter was ended so far as this course was concerned;

but not with some of the students, who got together and talked the question over earnestly, the general opinion being that of course the judge would know. That was what he was for. In those days there was a profound respect for the learning of the judges. The discussion among the students went on for some time. In later years valuable and important lectures were given in the School on the Burden of Proof and closely connected subjects, such as Presumptions of Law and Presumptions of Fact.

The contrast between the two methods became sharper. As time passed, fewer and fewer remained in Langdell's lectures. The number dwindled to seven or eight. But these were enthusiastic and persistent. They had no doubt as to the benefits derived. They argued the questions raised early and late, before and after the lectures. Some of the other students pronounced it a noisy nuisance. The library was sought by them to an unprecedented extent. They were never satisfied. It was said they criticized the opinions in actual court decisions in "a most disrespectful way." It was asked: Was law to be studied as a science, instead of what it actually was, a practical, every-day art? Were laboratory methods to be followed? What would be the end? Where could any one find out any rule of law if he pursued this iconoclastic way? Everything was made questionable and uncertain. What better course than to accept and remember a rule stated in the textbooks and said to be laid down by some court of last resort and approved by learned professors? The "new discovery" was visionary and unworkable.

But Langdell's followers were persistent in their course. The talks between these few and the many others, during the intervals between the lectures, were frequent and earnest. When asked why he so decidedly preferred the new way, one of these disciples replied that he felt freer, stronger, and better; that he got something which he found nowhere else; that there was no need to waste time in attending the reading of textbooks; that he had long before learned to read, and it was not necessary for him to go to a law school to have some one read to him; that he received more and had a keener interest in the Langdell way.

It will readily be understood that the diminution in the attendance upon Langdell's courses caused alarm. The other teachers had large numbers; he, extremely few. The contrast was painful.

This falling off was considered a demonstration of the failure of his methods; indeed, such was the well-nigh universal opinion among lawyers, professors, and students. But just after the middle of the year a strange thing happened. The attendance at his lectures began to increase, — slightly at first, to be sure, but it was a gain which grew larger slowly but surely. Those who returned became more and more interested as they continued their renewed attendance. Toward the end of the year quite a number, yet considerably less than half of those in the School, were present, and participated in the exercises now sometimes called "investigations." It should be added that these, having caught the spirit of the course, remained constant, and became strong advocates of the system. It was interesting to observe that they inquired about what had been done in their absence and sought the privilege of reading and in many instances copying the notes of those who had attended all of Langdell's lectures. It was noticeable that after reading the notes they endeavored to learn more fully of the matters briefly suggested in the short notes. One can easily understand what must have been the feelings of Langdell when the number fell to seven or eight, and also when the reaction came. Only a strong man of conscientious convictions could follow the chosen path under the discouraging conditions. And when the turn in his favor came, slight though it was, he unquestionably was greatly encouraged. He never exhibited any signs of discouragement or elation, but steadily pursued the course he had chosen. His lectures continued to be increasingly interesting.

It may be well to notice one of the outcomes of his method. For years there had been a "Parliament," which met once a week at night in the lecture room, where the students formed themselves into a representative body, choosing a speaker and practicing the ways of legislative bodies, giving attention especially to questions of parliamentary law. There had also been club courts, among them the Marshall Club, whose members, taking turns as counsel and judges, argued and rendered decisions upon law questions. These organizations were encouraged by the faculty. There had also been a moot court, as it was called, presided over by a professor or lecturer, who gave out the question to be discussed. Members of the school, usually two upon each side, argued before the presiding officer, who at the end of the arguments rendered a de-

cision. Sometimes a considerable number of students attended, but there was not a deep interest. It was found oftentimes that the results were not altogether satisfactory. It was said that the students participating were apt to be discursive, and too often inclined to rely upon oratory and striking phrases. In the year 1870-71 a new club, the "Pow Wow," was formed. It was composed of nine. One presided, acting as chief justice. Two argued the law questions, one on each side. The remaining six were puisne judges. After the arguments the counsel retired, the court advised, then, counsel being called back, rendered a decision, the judges delivering their oral opinions *seriatim*, the chief justice closing. The club met weekly at the rooms of the members, who took turns in the different capacities. Although this club still exists, it is not generally known that one of its original purposes was to practice parliamentary law; but this was never done, and the meetings were devoted exclusively to the consideration of law questions. Before the expiration of the year it became the custom to plead the case in writing, so as to develop the point or points of law thus evolved. This gave excellent practice in common-law pleading and was a most profitable procedure, even though it may have been somewhat technical occasionally. Once there was triumph when an *absque hoc* was achieved. The great advantage lay in a painstaking analysis of the facts in order, by eliminating immaterial matters, to develop in a clear-cut way the questions of law to be argued. The members of this club were attendants on Langdell's lectures. The deepest interest was taken. Able arguments were made, some of them equal to the best made in highest courts; and apparently as much was felt to be at stake as if the case were real. This practice, coupled with the mental discipline gained in Langdell's lectures, brought out the best there was in the men. A slovenly pleading or a careless argument — rare indeed — occasioned a sharp rebuke from the court through the chief justice. This developed a thoughtful and studious set of men, and formed in them habits of industry which followed them in their later years of active work in practice at the bar and on the bench.

Too much emphasis cannot be placed upon this early result of the Langdell method. His mind recoiled from temporizing or avoiding the real issue. He sought only the true solution, and when he had arrived at a conclusion, whether with reference to his method

of teaching or dealing with a law question, he adhered to it tenaciously, even in the face of apparent pecuniary loss to the School or severe condemnation for himself. The former he must meet when it came; the latter he bore patiently and without complaint. Any error on his part he was always quick to acknowledge; for in his single-minded devotion to the requirements of the task which he had undertaken he endeavored to ascertain and follow the course along which deep and incessant research and thought should lead his honest mind. His earnest endeavor was to lead his pupils to be as unerring as possible in their search for the truth. It has been said frequently, and on high authority, that he declared the law to be a science, and that it should be studied as such. Certainly his effort was to lead the pupil to analyze the cases and authorities and ascertain the principles involved so far as possible in the way science is studied. From remarks dropped by him occasionally outside the lecture room it is evident he felt from the nature of the subject that it could be resolved into comparatively few absolute rules.

The first year went along. His subjects were not completely covered. At the close the written examinations were held. Langdell's papers did not call for statements of the rules of law, but were designed to ascertain whether the students understood the principles sufficiently to apply them to supposed cases. Although they contained only matters which had been considered in his courses, they were pronounced "stiff" and even unfair. Many of those who had not attended his lectures failed to pass and were deeply disappointed, some openly indignant. They had passed the other examinations. It was discovered that a few who had not attended some of the other courses but had read the textbooks used, had passed the examinations in those courses, receiving excellent marks. Notwithstanding the success of these few, the former predictions of future disaster for the School were renewed with an increased force. The year ended with a general belief that the new way was impracticable and impossible.

Before the beginning of 1871-72 the announcement was made that the degree LL.B. would be given at the end of the school year to those who, having been in the School during the whole course of two years, should have passed satisfactory examinations at the end of the year in the prescribed studies of that year, and also

to those who, admitted one year in advance, should have been in the School one year and have passed satisfactory examinations in the prescribed studies of the second year, at the end of the year. Admission to advanced standing was allowed only on examinations in the prescribed legal subjects.

During the vacation interval between the end of the year 1870-71 and the beginning of the next, there was much discussion as to whether a method better than that followed by Langdell, and also better than that of the other professors and lecturers, could not be adopted. It was conceded at length that there was some good in Langdell's way, although at the same time it was asserted that there was greater good in the other ways. Combination of the two methods was urged: some reading or statement of summary from the textbooks, cases in law reports given to be examined by the students before the lecture, and some questioning and slight discussion. This had been tried in a way during a small portion of the past year. It was indorsed strongly by judges, practicing lawyers, writers on law, students who had not attended Langdell, and indeed by some who had. It was hoped that Langdell might see its advantages and make use of this better way. At the opening of the School year 1871-72 some adopted this intermediate or, as it was sometimes called, combination method, and some adhered to the old. There was much interest in what Langdell would do. Those who had thought that he would modify his method were disappointed. He made no change. This was attributed pretty generally to obstinacy; for it was felt, notwithstanding the enthusiasm of his followers, that the past year had demonstrated the folly of his way. He persisted, and indeed at no time made any modification whatever of his method of teaching, until in later years he was compelled to do so by reason of failing eyesight.

In 1870-71 the students without college or equivalent degree were in a slight majority. In 1871-72 they were in a minority.²

In 1871-72, as in the previous year, there were no regular classes, *i. e.*, no division into first and second year men as such. The attendance was large in the lectures of two of the professors and the five lecturers. In Langdell's the number was much smaller than in

² 1870-71, students holding degrees 76, without degrees 78
 1871-72, " " " 78, " " 56
 1872-73, " " " 64, " " 49

the others, although larger than during the year before. There was very little discussion in the courses save in his. New law clubs were formed on the same plan as the Pow Wow, omitting the parliamentary practice. Arguments were again had by the students before and after the lectures. Often the days were too short for these arguments and for the study necessary in preparation for the lecture to follow. Every proposition was subjected to severe scrutiny by the men. Langdell's lectures proceeded in the same way as before, but with increased interest, questioning, and discussions; the students were encouraged to form their own conclusions, being always advised to study court opinions given in the reports. The questions were squarely met. The men felt that all considerations pertinent to the subjects had been before them, and they learned to know that that was all to which they were entitled. It had been predicted that teaching in this way would lead to loose and irrelevant thinking. But Langdell had the rare gift of making remarks in a way which would indicate the real question, without however discouraging pertinent inquiry. And this was done quickly although quietly. So there was no appreciable loss of time. Instead of being indifferent the men were keenly attentive. They were impatient for the lecture hour to arrive. As has been said before, the results, as far as numbers in attendance was concerned, were greatly in favor of the other professors and lecturers. They were able men, highly distinguished in the law — including an ex-judge of the Supreme Court of the United States and leaders in the legal profession — and held in great respect by every one in the School. It should be borne in mind that the bench and the bar had always been looked to when a law teacher was required. But it was beginning to be predicted by a few that the time was coming when it would be realized that a most distinguished career on the bench or at the bar would not necessarily produce a successful teacher of law. Still, there were the ever present inquiries: Who is the most successful teacher? What is the best method? Very few indicated their preference for Langdell and his way. While he was well known by some eminent lawyers and profound students, yet he did not have the favorable reputation of the others. A justice of our highest court predicted that Langdell would ruin the School.

The weeks passed away. The year drew to its close. Then the

examinations came again, with a repetition of the experiences of the previous year. As in 1870-71, the results of the examinations decided the conferring or refusal of the degree.

An unprecedented occurrence happened before the beginning of the year 1872-73. While nearly all those who had completed the courses had severed their connection with the School, five of the students who had won the degree desired to remain a third year. Should they be permitted to do so? What should be their status? There was no third year's course. These five had attended Langdell's lectures. It had been decided to divide the School into two classes, — first-year students and second-year students. Without stating here the reasons which led the authorities to take this action, it is enough to say that they concluded to allow these five men to continue their studies in the School, and they were classified as Resident Bachelors of Law. This was a source of much satisfaction to the faculty, especially to Langdell; for even at this early time he earnestly desired a three years' course as a condition of the degree. His desires were not realized for some years. So this handful remained the third year, and pursued advanced courses.

Some of the club courts were remodeled. In the Pow Wow there were formed the Superior Court (first-year men), the Supreme Court (second-year men), with recourse as a last resort to the Appellate Court, the Pow Wow Chamber. These highest courts were favored with the presence and participation of eminent judges and lawyers, who gave their hearty approval to the proceeding. The writer cannot refrain from mentioning one, Mr. Justice Holmes, now of the Supreme Court of the United States, who was greatly interested, and gave time generously from his busy professional life to the club courts, and who contributed vastly to the advancement of the School, although few were aware of his unselfish devotion.

The teaching force was composed of two professors, one having resigned, and seven lecturers. There was no substantial change in instruction; yet there was some tendency toward more comment in the lectures. The general opinion of bench, bar, and students was still hostile to Langdell's method. The former predictions of disaster were repeated. It is well to examine briefly this condition.

In 1869-70 the number of students enrolled at the beginning of the year, as shown by the university catalogue, was 120; in 1870-71,

154; 1871-72, 134; 1872-73, first year 71, second year 37, resident bachelors of law 5; total 113. Thus, during the three years of his administration the number had steadily decreased until it had reached the lowest point since 1851-52, save in 1861-62 and 1862-63, two of the years of the Civil War. The comments on this decrease were many. Those who approved his method, while not disheartened, were greatly disappointed. The predictions of the critics were being realized. No excuses were or could be offered. The only reply was in fact no reply at all. It was at best an expression of belief that the future would bring better conditions. Furthermore, the money receipts had fallen away. How long would this continue? At this steady rate of reduction in numbers, how long would the School exist? To say that the university authorities, the alumni, and the friends of the School were alarmed is a mild expression of the feelings of those who had the interests of the school at heart. It was commonly thought that there should be a change in the administration and in the way of teaching; that teaching by cases should be given up and a more liberal — as it was termed — mode adopted in its stead. Again, it was urged that in the future a combination of the textbook and a few cases with much less discussion should be the basis.

The three years of endeavor to inaugurate a new mode of instruction had apparently ended in failure. The result of the long and patient trial of Langdell's system, instead of giving assurance of a fresh and vigorous life for the School, indicated rather a gradual approach toward its end. All agreed that the future of the School was at stake. This being the state of feeling, it was indeed bold if not reckless to continue longer the Langdell method, as it had come to be called. It took courage to decide to go on in this losing way, but most fortunately that decision was made and carried out. And contrary to the wishes of most of the sincere friends of the School, announcement was made accordingly, prior to the beginning of the year 1873-74.

There was deep interest amounting to anxiety as to the number of students who would enroll in that coming year. When it was found that it had increased from 113 to 138³ there was a feeling of great relief. The turning-point had been reached. The School was not wrecked. This increase was most encouraging. The signs

³ This is enrollment, not average attendance.

were favorable. Lawyers practicing in various parts of this country, and even beyond, sought the services of the students who had been developed in the School to aid them in investigating law questions. When from a lawyer in San Francisco a letter came asking urgently for the help of graduates of the School, Langdell was deeply gratified. Such facts, hardly appreciated at first save by extremely few, were to some extent the explanation of the increase. A young man who had faithfully and profitably followed the courses, could find a fairly lucrative position immediately after graduation. In after years this was well recognized. Furthermore, it was seen that graduates who started practice alone were successful in matters where legal research was required. Their opinions seemed sound and valuable. Briefs prepared by them were exhaustive and convincing, and recognized by courts to be of real assistance.

So the School continued to increase as the years went by. Langdell's system was adopted by professors and instructors, one after another, until it became the established method of instruction.

In June, 1873, while yet a student in the School, James Barr Ames was appointed assistant professor of law. This caused the most insistent remonstrance. A young man utterly inexperienced, who although admitted to the bar had never practiced law! It was unprecedented. Strong efforts were made to prevent confirmation. Happily they were unsuccessful. But so serious was the opposition and from such eminent and influential persons that it is most likely if assistant professorships had not been limited to the term of five years, the School would not have had the benefit of Ames's priceless services. To-day it is impossible to realize how there could have been any objection to this great teacher of law. To understand it, we must dismiss from our thoughts all he achieved after the summer of 1873, and also the successful teachings of the other young men who have followed him in this and other law schools. Consider it as a new and unheard-of venture. The legal profession as a rule is conservative, disliking radical changes. It always has recommended as teachers men who have had actual and successful experience in practice; and this because it has been the traditional way of selecting instructors. Educators usually are of the same mind. It must be confessed that the judgment of practically all would be unfavorable. In 1873 the feeling was dismay and grief. And yet the reason for the appointment was simple and plain to a few. Lang-

dell's view was that a successful practitioner would not necessarily be a successful teacher, any more than a successful teacher must prove to be a successful practitioner. In fact, they were two distinct professions. He considered himself a teacher of the principles of law. He distinguished between law and practice. The principles of the former were to be mastered and then applied. Practice he never undertook to teach. Although lectures on practice were given from time to time, he felt that a law school was no place in which to study it and that practice could only be learned by actual experience in practice. The different laws, rules, and customs in the various jurisdictions were so numerous and so contradictory that it would lead to confusion if it were undertaken. Ames had shown genius in his work in the School. Langdell came naturally to urge the appointment; for it was a result which naturally followed from his system of teaching. He felt that there was need of an instructor who by his work as a student had shown that he thoroughly understood and believed in his method of instruction. He had no doubt of Ames's success. That the choice was fortunate Ames's subsequent career demonstrated. This was a marked epoch in the life of the School. The subsequent wonderful success of this department of the university is well known. After condemnation, criticism, partial and at last entire adoption of his system, Langdell was entirely vindicated.

It was said that Langdell was not practical in his teaching. In fact he was unusually so. His frequent inquiries as to how the questions were raised in the different cases under examination brought out sharply practical aspects. While he disapproved instruction in the arts of practice, no one had a surer eye to the end sought. He did not teach equity until 1873-74. His course in this subject brought the best results ever achieved by him, and was as successful as his treatise is enduring. But he touched the practical key when he suggested to the students that they study the order and decree, and pointed out that the latter was the final goal in the suit in equity, and therefore should be examined with the utmost care. He referred to the success of Bell, the eminent English equity lawyer, and his skill in drafting orders and decrees, and recalled Lord Kingsdown's amusing comment that Bell "often deprived the conqueror of the spoil."⁴

⁴ One wonders who drew the final decrees in the Northern Securities cases.

Much has been said and written concerning Langdell's system. At the outset and for a long time it was misunderstood, and consequently not appreciated. We have been considering his course during the early years of his professorship. Although his title was professor, he was and is spoken of as lecturer, instructor, teacher. He was not at all a lecturer. He did not read or deliver discourse, prepared or unprepared; neither did he speak or read as with authority. To formulate or announce rules of law to be accepted by the students formed no part of his method. To say that he was an instructor in the usual sense of being one less in rank than a professor, is incorrect. If we use it within the meaning of one giving information by doctrine or precept, it cannot apply to him. He is best described as a leader or director of the thought of the learner, although leadership or directorship was hardly to be detected in his manner. He seemed to influence insensibly the mental working of the students, while he appeared to be, and indeed was, working along with them. He had the rare faculty of exciting them to do for themselves. The impulse was his. But they felt that they themselves were the discoverers, and when once convinced of the soundness of the rule they sturdily maintained it, for it was their own. Consequently his courses were followed by intelligent, industrious, and earnest men with zeal. Joseph H. Choate said at one time, as is well known, that it made them obstinate and unduly conceited. But he knew and appreciated Langdell, and was interested in favor of his appointment in 1870. He more than once sought Harvard law graduates for his office; for he understood the distinction between persistence in well-studied and matured opinion, and obstinacy in adhering to an opinion simply because it had once been expressed. In time the students themselves came to appreciate the influence Langdell had exerted upon them. One quality was preëminent: he was inexorable in his search for the truth. Every phase of a question was examined. Of course among the men opinions were formed, suggestions made. But his way of testing the opinions expressed by the students was admirable. Reasons were given. Errors if existing were detected and disclosed. If, as rarely happened, he ventured a statement of his own, he welcomed and encouraged inquiry and tests by the men with a pleasure which they knew was sincere. "That man never deceives himself. He cannot. His mind is absolutely honest," was a comment made

during the year 1870-71. His students came to have a rare confidence in him. It was these qualities which in a large way led to his success.

It has been intimated that he was not a great teacher — but not, except at the very first, by those who had the great privilege of sitting under him in the early years of his professorship, when he was at his best. Later, as his eyesight became impaired, he was driven to give up the best of his method, and lectured. The profound depth of these lectures was not fathomed by many of the students, and those who did not grasp the full meaning of what he said felt that he was not a teacher. The few who appreciated the lectures did not agree with this view of Langdell, and the many who have read with admiration and profit his lectures when published in treatises in this country and elsewhere realize the debt which the profession owes him. It is plain this was a departure from his chosen method of instruction, but a departure forced by infirmity of his eyesight. Those who were close to him knew how great was his disappointment, when he was obliged to give up the system he had so faithfully worked out and followed. His solace was, as he intimated to these few, that there were among his colleagues those who had adopted and carried on successfully his way of teaching. The excellence of his work had been demonstrated. It was indeed to him an infinite satisfaction that his method was taken up and followed, not only at Harvard but in law schools and institutions where law is taught at home and abroad. He saw the Law School under his oversight, from a small, poorly arranged School open to all, fit or unfit, diligent or lazy, and granting degrees for residence only, located in a building not much larger than some of the present lecture rooms, grow to a large, well-organized institution crowded with men who had shown by educational tests their right to enjoy its advantages, who labored early and late with enthusiasm, and who were given the degree only after searching examinations, an institution in a new and commodious building, whose graduates were eagerly sought as aids by the legal profession.⁵

⁵ The following table of attendance will show the growth of the School in numbers under the Langdell administration and afterwards. From 1817-18 to 1828-29 inclusive, the figures are taken from Charles Warren's *History of the Harvard Law School* and other sources. From 1829-30 the figures are from the annual reports of the presi-

That the library increased manyfold under his thoughtful supervision is now so well known that there is no occasion to say more concerning this branch of his career.

Mention has been made of the fears that the School would be ruined financially. It was said that he had no practical administrative sense, that he was a mere theorist. During the early years of his service these fears seemed justified. The income fell off. As has been said before, there was an insistent desire that there should be an increase in numbers and income. We need not go over in detail the financial story. It is enough to say that in 1870, when he

dent and the treasurer and from the School records, and they represent the average number of students attending in the course of the year.

1817-18	6	1852-53	125	1887-88	225
1818-19	8	1853-54	148	1888-89	225
1819-20	11	1854-55	125	1889-90	262
1820-21	13	1855-56	117	1890-91	285
1821-22	13	1856-57	115	1891-92	370
1822-23	10	1857-58	143	1892-93	405
1823-24	8	1858-59	151	1893-94	367
1824-25	12	1859-60	161	1894-95	413
1825-26	13	1860-61	148	1895-96	475
1826-27	8	1861-62	103	1896-97	490
1827-28	8	1862-63	92	1897-98	551
1828-29	6	1863-64	129	1898-99	564
1829-30	24	1864-65	139	1899-00	613
1830-31	31	1865-66	177	1900-01	655
1831-32	40	1866-67	167	1901-02	633
1832-33	38	1867-68	125	1902-03	644
1833-34	51	1868-69	142	1903-04	743
1834-35	32	1869-70	122	1904-05	766
1835-36	52	1870-71	136	1905-06	727
1836-37	50	1871-72	122	1906-07	705
1837-38	63	1872-73	113	1907-08	719
1838-39	78	1873-74	131	1908-09	690
1839-40	87	1874-75	137	1909-10	765
1840-41	99	1875-76	173	1910-11	790
1841-42	115	1876-77	199	1911-12	809
1842-43	107	1877-78	196	1912-13	745
1843-44	127	1878-79	169	1913-14	696
1844-45	129	1879-80	177	1914-15	730
1845-46	145	1880-81	161	1915-16	791
1846-47	126	1881-82	161	1916-17	857
1847-48	126	1882-83	138	1917-18	297
1848-49	100	1883-84	150	1918-19	68 (before the Armistice)
1849-50	90	1884-85	156		434 (after the Armistice)
1850-51	100	1885-86	158		
1851-52	110	1886-87	188	1919-20	880

began, the funds were small in amount, and that in 1895, when he retired, the total was \$360,000 invested and a cash surplus of \$25,000. Excellence had received its reward. We may perhaps be excused if we make the statement that this man, "not practical," with "no business sense," left a considerable private estate which was the result of his own vigilance and good judgment.

It is almost impossible to refrain from a comparison between Langdell and Ames, his pupil and successor; but this must be deferred to some future time.

It has seemed strange that one not widely known in his profession, and in the face of such powerful opposition, should have been selected as the head of the Law School, and should have worked alone such a transformation in the School. Indeed, it was more than strange; it was impossible. He had no such thought. He did not bring about this change single-handed. He had constant assistance, such as is rarely given to any one engaged in a great and difficult undertaking. The system was his. To put into practice and continue that system unaided was beyond his or any one's power. The School needed a change. The heavy burden of selecting the instrument, as well as affording the necessary support, was mainly carried by another man.

Professor Langdell was not disposed to defend himself or his invention by argument against hostile criticism. He would not even argue on the subject with members of the governing boards or members of the law faculty. He was satisfied to leave the necessary current defenses and persuasions to President Eliot, and to await the verdict of the legal profession on the success of his disciples at the bar. President Eliot supported Professor Langdell's methods and measures with all his might; and the occasions were few on which these two men did not completely agree on any action either of them proposed. They both took confidently the necessary risks, and to them both the enthusiastic work of "the Langdell men" brought early and sufficient encouragement. As the years passed it was a satisfaction to them both to receive requests from other law schools for the temporary services of Harvard professors to exemplify the Langdell mode of instruction, which was being adopted by them, and to admit to the School well-trained students, some of them sons of eminent judges and distinguished personages in England and other foreign countries, who

sought and availed themselves of its advantages. These two men together, with the powerful assistance of Dean Ames, for whose appointment they were primarily responsible, put the School many years in advance of any similar institution, making it not only first among equals, but first with a long interval.

Franklin G. Fessenden.

GREENFIELD, MASS.

LANGDELL AND THE LAW SCHOOL

WHEN, in conversation, I first proposed to Mr. C. C. Langdell of the New York Bar that he become the Dane Professor in the Harvard Law School, I saw that the proposal attracted him strongly. He apparently wished to teach law rather than practice it, but to teach it in a new way. He called my attention to the obvious fact that he was a new kind of candidate for a professorship in the Harvard Law School, and expressed a good deal of doubt as to whether he could be elected. He was right in both respects; but clearly he had in mind some reform in legal education, some reconstruction of the Law School which I much wished to hear about, having some visions of my own about educational reform. He was distinctly attracted by the fact that it was the Dane professorship that was vacant, the professorship which Nathan Dane, eminent lawyer, legal author, and politician had founded by the gift of ten thousand dollars in 1829, and which Joseph Story had held for sixteen years thereafter. It was Dane, too, who in 1832 provided the growing school with an adequate building for the accommodation of its students and its library. When Dane founded his professorship, he provided that the lectures delivered on the foundation should be published. This provision Langdell thought a very wise one; and it accorded with his own purposes and anticipations. On the whole, my proposal fell in with Langdell's views of life, and he soon accepted the risks of the unusual candidature.

The Corporation consented, though with some reluctance, to elect Mr. Langdell Dane Professor, probably out of some general purpose to support their young President — all the members of the Board were old enough to be my father — whom they had placed in a difficult position in spite of much public and private criticism. The Board of Overseers in their turn consented to the election, but with even more reluctance, which was overcome mainly by the testimony of James C. Carter and Joseph H. Choate of the New York Bar to the effect that Langdell was a man of prodigious learning in the law and of remarkable industry, and that he had a legal mind of extraordinary acumen and sagacity.



WESTENGARD
BEALE

STROBEL
J. B. THAYER

AMES

CLASS



BRANNAN WILLISTON LANGDELL
 SMITH WAMBAUGH

1901

The next step was to make him Dean of the School. A new statute required that the Faculty of each professional school should elect from among its members a dean, whose duty it should be to keep the records of the Faculty and prepare its business. At the Faculty meeting called for this purpose there were present President Eliot, Professor Washburn, who had been for fourteen years one of the three professors who really managed the School, Professor Nathaniel Holmes, who had been a professor in the School for only two years and had never taken any active part in its administration, and the new Dane Professor. So far as can now be ascertained, there never had been any Faculty meeting in the Law School with a record of proceedings. Professor Washburn testified that he had never heard of one. The intervention of the President in any Law School proceedings was also unexampled. A few months after I entered on the duties of President, I stepped into Professor Washburn's office in Dane Hall to ask him some question about the state of the School. At sight of me Professor Washburn held up both hands and exclaimed, "This is the first time I have ever seen a President of the University in this building." Presidents Kirkland and Quincy took some interest in the Law School because of their warm friendship for Judge Story; but no subsequent President and no earlier one had manifested an interest in the School. The meeting was rather an awkward one. The President stated its object — to elect a Dean. Now deans were rather recent creations in Harvard University. The Medical School had had a Dean since 1864; but his chief function was friendly and charitable intercourse with the students. Professor Gurney had just been appointed Dean of the College Faculty; but the nature of his functions and influence was not yet visible. Whether the functions of the Dean of the Law School were to be chiefly clerical and eleemosynary or not was not clear to Professors Washburn and Holmes; but at any rate neither of them desired the office. The only candidate seemed to be Professor Langdell, who had only just come to the School; but Professor Langdell himself said nothing. Professor Washburn, after explaining his complete ignorance of such matters, moved that Professor Langdell be elected Dean. This motion was carried by the votes of Professors Washburn and Holmes, Professor Langdell not voting. Then began in 1870 a process of conservative experimentation and construction in the Law School which is not yet finished. The phrase

in the new statute that the Dean should prepare the business of the Faculty gave the new Dean all the powers he needed.

The first subject Dean Langdell was called upon to deal with was the construction of a new curriculum for the School, divided into first and second year courses. To fill out this new programme required some additional courses; which the President and the Dean coöperated to procure. A similar reform was going on in the Medical School for like reasons. For three years the needed enlargement was procured by appointing eminent lawyers at the bar or on the bench to give instruction on special subjects in relatively short courses. Eight such lecturers were appointed during the first three years of the new régime, of whom three, Messrs. Bradley, Gray, and O. W. Holmes afterward became regular professors. Professor Langdell was distrustful of this method of increasing the instruction in the School; because he held that the fact that a man had become a distinguished lawyer or a respected judge did not prove that he knew how to teach law, or indeed that he could learn to teach law. He was inclined to believe that success at the Bar or on the Bench was, in all probability, a disqualification for the functions of a professor of law. He cordially assented, however, to the appointment of Messrs. Gray and Holmes; because he thought them genuine scholars in the law, capable both of discriminating research and of accurate exposition. President Eliot had seen at the Medical School that a distinguished practitioner of medicine or surgery might easily prove to be a poor teacher; although he might continuously interest medical students as an example of professional success. In the Law School he thought it prudent to provide for a few years the best possible examples of the old-fashioned method of teaching law, partly to break the force of the flood of criticism which was pouring in from members of the American Bar, but chiefly that the good students in the School might have the best possible opportunity to compare the old method with the new.

Professor Langdell's views concerning teachers of law received a striking illustration when in 1873-74 James Barr Ames, a recent graduate of the School, who had had no experience in practice, was appointed Assistant Professor of Law. Both the Corporation and the Overseers consented to this appointment with reluctance; and in all probability their consent was given only because the appointment was one limited by statute to a term of five years. The

President was prepared to support Dean Langdell in this bold adventure; because he had already seen that there were parts of professional teaching which young men could do better than old men, even though the young men had had but little professional experience. Before the expiration of the five years Mr. Ames was appointed full Professor of Law with general approbation, so conspicuous was his success.

As soon as Dean Langdell had completed his reorganization of the courses of study in the Law School, and put into operation his progressive programme covering two years, he turned his attention to the condition of the School's library, and set about, first, providing protection and safe management for the library, and, secondly, enlarging it. Langdell knew well the lack of supervision of the library before 1870. He had been himself its student-librarian for several years. He had himself used the books of the library with complete freedom, especially in the preparation of his valuable notes to Parsons on Contracts. He knew what extensive losses and damages the library had suffered because of the lack of supervision and the carelessness of the students. He regarded a well-selected, well-kept, and ample library as the one essential piece of apparatus for any law school, and especially for the Harvard Law School he hoped for. It had been the practice of the School to supply all the students gratuitously with copies of the textbooks they used. To abolish this costly practice was one of Langdell's first measures. He soon procured the services of a permanent librarian, who should be in constant attendance in the library. These measures for the protection and better ordering of the library were taken within a few months of Langdell's becoming Dean; but it was not till 1873, when Mr. John Hines Arnold became librarian, that the future of the Law School library conducted on Langdell's principles was assured.

As the case system came into use, another principle with regard to the conduct of the library had to be often applied. Duplicates had to be supplied of reports and other books which were in frequent demand. With a special appropriation made by the Corporation much was done during the year 1870-71 to improve the fittings of the room occupied by the library, to repair the bindings, and fill the numerous gaps in the series of important reports which the School had acquired during its first fifty years. When Mr.

Arnold became librarian in 1873 the librarian and the Dean worked together in perfect harmony, and indeed in the same spirit; and both lived to see the library increase greatly in number of volumes, serviceableness to the students and teachers, and pecuniary value.

To Professor Langdell books had a kind of sacrosanct character. They were to be handled carefully, preserved from dust and heat, and never defaced by pencil marks or words written on the margins of the pages. Mr. Arnold shared these sentiments of the Dean, especially in regard to books which had been obtained at high cost and could not certainly be replaced. These feelings were very much injured when certain teachers in the Law School, who were writing books, contracted the habit of sending books direct from the School library to one of the Cambridge printing offices, in order that the type might be set directly from the printed book, instead of from copies of the passages the authors proposed to use. Inevitably the books came back to the library with some of their pages defaced with black finger-marks and other smooches, and in some instances with pages torn. This state of things being reported by the librarian to the Dean, the Dean made some mild suggestions that the offending authors do as he had done, — have passages they wished to quote copied. When he found that this proposition was regarded by the offenders as unreasonable and was wholly ineffectual, he came to the President's office one morning with a grave aspect indeed, and in his official capacity requested my aid. He regretted the necessity of asking me to intervene; but the evil was intolerable. I had some difficulty in convincing the offenders that the Dean was right, and that his request should be respected. This is the only instance I can recall in which Dean Langdell procured the enforcement of his wishes by an exercise of the President's authority. In general, he eagerly desired to convince his associates and his students by argument that his way of looking at measures or doctrines was right or sound.

The instructive story of the success of Professor Langdell's method of teaching law has been well told by competent witnesses in the Centennial History of the Harvard Law School. Professor Langdell and I waited patiently, but anxiously, for the verdict. The number of students declined more than either of us had expected, and the demonstration of success achieved in prominent law offices and in practice by graduates of the School, who had en-

joyed Langdell's system and thoroughly utilized it, came more slowly than we had anticipated. On the other hand, that demonstration, when it came, was accepted by the legal profession with surprising readiness.

Other restrictive measures, such as the requirement for admission to the School of the degree of Bachelor of Arts or its equivalent, had to be postponed somewhat, but not for long. Dean Langdell thought that English and American law should be studied by itself without admixture of other subjects, such as government, economics, international law, or Roman law; but he also wanted every law student to have had a preliminary training in a good secondary school and a good college. When Professor Ames wished to include in the purchases for the library many books on Roman law, Dean Langdell acquiesced reluctantly, but was ultimately convinced that a great law library should include even that somewhat remote or detached subject.

During this long struggle with adverse circumstances, and especially with severe criticism of the case method and its results, Dean Langdell never cared to defend himself in print or by public speech. He knew that there was only one way to refute criticism, namely, to exhibit the professional success of his disciples. His silence did not mean lack of confidence in his method; far from it. Even when the failure of his eyesight compelled him to modify his method in his own classroom, he remained sure of the superiority of his original case method to any other, although he could no longer use it successfully himself.

Professor Langdell had, I think, no acquaintance with the educational theories or practices of Froebel, Pestalozzi, Seguin, and Montessori; yet his method of teaching was a direct application to intelligent and well-trained adults of some of their methods for children and defectives. He tried to make his students use their own minds logically on given facts, and then to state their reasoning and conclusions correctly in the classroom. He led them to exact reasoning and exposition by first setting an example himself, and then giving them abundant opportunities for putting their own minds into vigorous action, in order, first, that they might gain mental power, and, secondly, that they might hold firmly the information or knowledge they had acquired. It was a strong case of education by drawing out from each individual student mental

activity of a very strenuous and informing kind. The elementary and secondary schools of the United States are only just beginning to adopt on a large scale this method of education, — a method which is not passive but intensely active, not mainly an absorption from either book or teacher but primarily a constant giving-forth. Professor Langdell's method resembled the laboratory method of teaching physical science, although he believed that the only laboratory the Law School needed was a library of printed books. His case system has been widely applied in this country to the teaching of clinical medicine and surgery, as a useful addition to the ordinary practice of teaching those subjects at the bedside of actual patients. The combination he used of the lecture and the recitation is capable of wide application in both primary and secondary schools and in colleges and universities. Indeed, the conference method used with small advanced groups in universities is an earlier example of his method, the merits of which have been recognized for at least a century wherever such groups have existed.

Langdell's disposition or character was singularly honest, just, candid, and serene; although he was also capable of indignation, quick and evanescent, or slow-gathering and persistent. He was a curious mixture of the conservative and the radical, having the merits of both. His relation to his wife, who was much younger than himself, and to her mother was so delicate and tender that it was a high privilege to witness it. About his own affairs he was reticent or reserved. Cut off in youth and manhood from the amusements and relaxations of most educated men, he took pleasure in the careful investment of his savings, as soon as he could make any. I was one of the few persons with whom he sometimes discussed investments; although he soon learned that, compared with him, I knew little about the subject. I heard from him something about farm mortgages in Iowa and other fertile western states. I found he held strong opinions about the security of the mortgage bonds of certain western railroads, and the insecurity of others, and that he enjoyed the careful researches which led him to these opinions. Such studies, however, were only the by-play of his mind. He was as successful there as he was in his other mental work; so that he left an estate whose amount surprised all his friends. He was as sagacious and far-seeing in this his sport as he was in his serious labors.

A striking characteristic of Professor Langdell was courage, both physical and moral. His moral courage was perfectly illustrated by his acceptance of the Dane professorship and his whole conduct as Dean of the Law School. His physical courage was illustrated by his going about alone on foot by day and by night in the streets of Cambridge, when he could see hardly anything, especially in the glare of bright sunshine. His daily walks between Austin Hall and his house were terrifying to onlookers, particularly after the advent of the automobile, but never to him. He would wait to cross the streets till his ears assured him that no horse or horse vehicle was very near; but his ears could not warn him in time of the rapid approach of a quiet automobile. Then he had to trust that the chauffeurs would see that a blind man was crossing the broad street. For several years he was quite unable to go alone on an unfamiliar path. This helplessness was a great trial to a man who had always been self-reliant in high degree; but he bore the calamity with unfaltering patience. As a teacher, Langdell was a great benefactor of the legal profession, and hence of every free and orderly community. As a man, he was worthy of all love and reverence.

Charles W. Eliot.

CAMBRIDGE, MASS.

THREE SUGGESTIONS CONCERNING FUTURE INTERESTS

I. THE TRANSMISSION OF REMAINDERS

GEORGE GOLLADAY died in 1854, his widow Nancy, who died in 1907, surviving him by over half a century. By his will he gave his real estate to his wife and to her children after her death; "and if the said Nancy Golladay does not have children that will live to inherit said real estate, that said real estate, at the death of Nancy Golladay and her children, fall to Moses Golladay and his heirs." Nancy, then childless, remarried, and had a daughter who died before her mother. No children survived her. Moses Golladay died in 1855, leaving two children, William and Mary. William in 1900 made a warranty deed purporting to convey his interest in the real estate left by the will, and died intestate in 1904, leaving children as his heirs. The Supreme Court of Illinois holds that no title ever vested in William Golladay, the son of the remainderman named in the will, since he died before the life tenant. His children are not estopped by the covenants of his deed, for they do not assert title by descent from him, but as heirs of their grandfather Moses. Had William survived the life tenant, the warranty deed would have transferred the remainder, which in that event would not have passed to others under the terms of the will. Passing as it did to others, his deed conveyed nothing.¹

This decision revives for Illinois, and for contingent remainders; the common-law rule regarding the descent of remainders and reversions, according to which he who claims by descent must make himself heir to him in whom the estate first vested by purchase,² ignoring the qualification added by Watkins that one who exercises acts of ownership shall be regarded as the purchaser of the reversion or remainder.³ The rule that in the descent of a reversion and remainder there is no "mesne heir" but that the one claiming when the expectant estate vests in possession, claims as heir of the original

¹ Golladay v. Knock, 235 Ill. 412, 85 N. E. 649 (1908); KALES, CASES ON FUTURE INTERESTS, 178.

² WATKINS, LAW OF DESCENTS, 118.

³ *Ibid.*, 112, 118.

remainderman or reversioner, is the law in Maryland,⁴ but has been changed by statute in other jurisdictions.⁵

The following remarks are intended to show why the older rule revived in part for Illinois is preferable to the rule which is at present more generally observed.

When a testator creates life estates with remainders, he does one of two things: he either gives property to a designated person or persons, subject to a life provision for some other person, or he makes a life provision and leaves it to be determined by circumstances existing at the end of the life where the property is to go. These two alternatives represent the real difference between vested and contingent remainders; "vested subject to be divested," when applied to an estate in expectancy, is in reality contingent; and the treating of such a remainder as vested subject to be divested, for the purpose of avoiding certain restrictions or liabilities attaching to contingent remainders,⁶ is a mere conventional mode of construction that should not mislead or confuse us. Whenever a testator makes a disposition dependent on circumstances existing at a future time, he seeks to project himself and his will, as far as feasible, to that point of time; if he could, he would only then make his dispositions. It may safely be assumed that he does not intend to benefit persons who would not be the natural beneficiaries of his will were his will made at the later point of time. Results contrary to his presumed interest may, however, easily follow, if remainders are treated as vested, or if contingent remainders are treated as descendible, devisable, or alienable. It will then not infrequently happen that his property at the time to which he desires to project his control will pass to persons who are strangers to him. So in the very common case that the remainderman dying in the life of the life tenant leaves a wife or husband as heir, or that the remainder descends to a child and the child later dies, leaving the other parent

⁴ *Barnitz's Lessee v. Casey*, 7 Cranch (U. S.), 456, 469, 470 (1812); *Buck v. Lantz*, 49 Md. 439 (1878); and in Georgia, *Payne v. Rosser*, 53 Ga. 662 (1875).

⁵ *Cook v. Hammond*, 4 Mason (U. S.), 467 (1827); *Kean's Lessee v. Roe*, 2 Harr. (Del.) 103 (1835); *Hillhouse v. Chester*, 3 Day (Conn.), 166 (1808); *Cote's Appeal*, 79 Pa. St. 235 (1875); *Early v. Early*, 134 N. C. 258, 46 S. E. 503 (1904); *Hicks v. Pegues*, 4 Rich. Eq. (S. C.) 413 (1852). See the citations in note in *KALES, CASES ON FUTURE INTERESTS*, 184.

⁶ Nonalienability: *Blanchard v. Blanchard*, 1 Allen (Mass.), 223 (1861); 5 GRAY, *CASES ON PROPERTY*, 2 ed., 77; destructibility: *Doe v. Martin*, 4 T. R. 39 (1790); 5 GRAY, *CASES ON PROPERTY*, 2 ed., 55.

as its heir. To avoid this result, the Supreme Court of Illinois has in several cases interpreted a remainder not only as contingent, but as contingent upon the remainderman outliving the life tenant. So in the common form of limitation "to my wife for life, upon her death to my children, and if any of my children die leaving issue either before me or before my wife, then the issue of the child so dying shall take the share which the parent would have taken if living at her death," the children take remainders contingent upon their surviving the wife,⁷ with the result that if a child leaves husband or wife, but no issue, the husband or wife will take nothing. In most states there is probably no hard and fast rule preventing courts from seizing upon slight forms of expression to read a contingent remainder as contingent upon the contingent remainderman surviving the life tenant, and particularly the provision in favor of his issue, should he die before the life tenant, will aid that construction. The trouble is that such a construction would aid the testator's scheme only if he had made express provision for issue of the contingent remainderman, for normally the testator desires that a contingent provision for a relative should inure to the benefit of the latter's children should he die prior to the happening of the contingency. The rule in *Golladay v. Knock* is an additional aid in carrying out the testator's presumable intent, for while it lets in the son of the contingent remainderman, it does not let in either the son's wife or the son's mother, should the son die before the interest vests in possession. If, however, the testator's presumable intent is to shut out all those who are strangers to his blood, the rule of *Golladay v. Knock* does not go far enough, for it lets in the contingent remainderman's wife, so far as she is her husband's heir. The shutting out of all strangers requires either an explicit appropriate provision or a statute.

An abstract direction inserted in a will that a remainder shall not, while it is still an interest in expectancy, pass to strangers, would of course be futile; a testator can neither alter the legal course of descent nor render property inalienable. The only common-law exception to this rule is the estate tail. At common law a remainder in tail will prevent the property from passing out of the stock

⁷ *Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264 (1906); *KALES, CASES ON FUTURE INTERESTS*, 175; *People v. Byrd*, 253 Ill. 223, 97 N. E. 293 (1912); *KALES, ibid.*, 477.

by any testamentary act; and before the remainder has vested in possession, the remainderman in tail cannot dispose of his interest (by common recovery or its statutory substitute) without the concurrence of the life tenant. In this country the entail legislation of the state where the land is situated will have to be carefully examined, and in most states it will be found that the remainder in tail is not available for the testator's purpose. In any event it would not serve in case of personal property.

What the testator can do is to create alternative contingent limitations. This is what the Supreme Court of Illinois did for the testator in *Golladay v. Knock*. It construed the contingent remainder in fee as a remainder in the alternative to the person named or to his heirs at the time of the vesting of the possession. Under the facts of that case the construction operated to exclude the stranger claiming under the nonsurviving heir of the remainderman. Had the remainderman, however, died leaving no children, but a widow surviving the life tenant, she would under the law of descent of Illinois have been the heir to the extent of one half of the property. The form of limitation "to B or his heirs" is therefore not adequate. The proper form is: *to A for life, remainder to B and his heirs, or if B dies during the life of the life tenant, to such heirs of B as would be also heirs of my own, had I died immediately after the life tenant.*

If this form is substituted for "to A for life, remainder to B and his heirs" (instead of for: to A for life, remainder to B *or* his heirs), the testator should bear in mind that he turns a vested into a contingent remainder, and that the latter may violate the rule against perpetuities where the former would not. That simply means that a testator, intent upon pushing his tying-up scheme to the furthest limits, will encounter legal obstacles of one sort or another. In the ordinary case of life estates confined to the first generation, the testator has his free choice between vested and contingent provisions following the life estate, and the natural desire of keeping remainders from passing to strangers can be given full effect.

The difficulty arising from the rule against perpetuities would be avoided by a statutory rule for the transmission of remainders. The rule would be substantially as follows: "A remainder given to a relative shall before it vests in possession be transmissible by intestacy, will, or gift in the nature of a provision, to such heirs of the

remainderman only as would be also heirs of the original testator or donor had he lived until after the death of the life tenant. This rule shall apply by analogy to personal property and to executory limitations." This rule would, in accordance with the presumed intent of the giver, exclude also the adopted child of the remainderman.

A gift in remainder not to a relative may well be left to explicit testamentary provision, if testator desires to keep it in the stock of the donee. If a statutory provision were deemed desirable, it would have to restrict transmission to descendants of the remainderman.

The suggested rule would not touch alienation *inter vivos* except where it is a gift in the nature of a provision. In so far as speculative dispositions are considered undesirable, they may be left to any existing restrictive rules, and they would in any event be effectually discouraged by the risk purchasers would run of not outliving the life tenant; a disposition in the ordinary course of business or management, however, which may be effected by remaindermen joining with life tenants, so far as it is possible now, ought not to be rendered impossible, but on the contrary facilities should be created where they are now lacking.

A rule restricting the transmissibility of remainders would in a manner revive the policy of the doctrine of "last seised" in the common law of descent. So long as the law did not recognize husband or wife as possible heirs, and so long as here was a rule forbidding the passing of property from the paternal to the maternal stock and *vice versa*, that doctrine had an extremely limited application. The rule now suggested would in one sense be of much wider application, for it would include devise as well as descent, and personal as well as real property, but it would recognize, as the common law recognized, that so long as a person has a merely expectant or future interest in property, the expectancy is not an asset to which persons having no blood connection with the source of the property have any equitable claim. If it be suggested that the rule would operate harshly with respect to a widow, let it be remembered that dower presupposes seisin, and that the law makes no provision for the widow of a son dying before his father, out of the father's estate, while it makes such provision for the issue of the son.

2. THE SEPARABILITY OF LIMITATIONS

Gray, in *The Rule Against Perpetuities*, says:

"Very often, indeed generally, a future contingency which is too remote may in fact happen within the limits prescribed by the Rule against Perpetuities, and a gift conditioned on such a contingency may be put into one of two classes according as the contingency happens or does not happen within those limits; but unless this division into classes is made by the donor, the law will not make it for him, and the gift will be bad altogether."⁸ And he illustrates: "Thus a gift to B. if no child of A. reaches twenty-five is bad, although A. dies without children; while if the gift over had been if A. dies without children, or if his children all die under twenty-five, then on A.'s death without children, the gift over would have taken effect."⁹

The rule may be English law; but it is submitted that it is a most unreasonable rule. The rule should be that if a remote limitation not only in its terms logically includes a valid limitation, but also leaves no doubt whatever as to what the valid limitation thus included is, and the valid limitation plainly carries out the testator's intent, the valid limitation will be given effect.

To apply this rule, not only should, in the instance given by Gray, the gift over be given effect if A died without children, but also if his children all died under twenty-one. "To the unborn son of A., but if he dies under twenty-five, over" — clearly includes: but if he dies under twenty-four, under twenty-three, under twenty-two, or under twenty-one; and if he dies under twenty-one, the gift over is valid. If he dies over twenty-one, the gift, unless it can be saved on some other principle, is invalid, because remotely taken away from him, and therefore remains in him. There cannot be the slightest difficulty of validating a limitation under the circumstances indicated. It is conceded that there is no sense in the English rule. Jessel, M. R., says: "This is a question of authorities." "The law is purely technical."¹⁰ Why should American courts follow such a rule? Simply from that sense of reverence which, as has been happily said, is always at the service of the incomprehensible. The English Real Property Commissioners recommended a change

⁸ § 331.

⁹ § 332.

¹⁰ *Miles v. Harford*, 12 Ch. D. 691, 703, 704 (1879); quoted, GRAY, *THE RULE AGAINST PERPETUITIES*, § 349, note.

of the rule by statute, but it can be changed by the simple process of logical reasoning.¹¹

The rule may be put in this way: If I am promised more than can be validly promised, I am at least entitled to as much as can be validly promised if it can be separated from the excess. In New York a person having wife or children may not give by will to charity more than one half of his estate; should he give all, is not the charity entitled to one half? The law expressly so provides, but any court would give this construction to the statute. An option unlimited in time was held void in *London & S. W. R. Co. v. Gomm*.¹² The option there was bargained for in 1865; it was sought to be exercised in 1880, *i. e.*, within sixteen years. In *Barton v. Thaw*,¹³ the option was sought to be exercised after thirty years. The option would have been good if in terms limited to twenty-one years; why should it not have been sustained for that period? It is not convincing to answer that the courts cannot arbitrarily fix upon twenty-one years, since the parties might have stipulated for a life in being plus twenty-one years. Business transactions, particularly where a corporation is concerned, are normally measured by years and not by lives, and the reasonable period for which powers of sale unlimited in time are sustained is twenty-one years.

In some classes of cases it may be doubtful whether the court should cut down rather than annul. If I have bargained for more than I can validly take, I may be entitled to less, but I am not necessarily required to take less, and this works both ways, if the transaction is a two-sided one. If a lease is good only for twenty-one years, the question whether a ninety-nine year lease should be sustained for twenty-one years must depend upon a variety of circumstances, the amount of rental, covenants, etc. In a sense a court in such a case must speculate as to intent, and this the English courts seem averse to doing, while American courts are more liberal. It is true that the Supreme Court of the United States has a rule similar to the English rule now under discussion against separating the valid from the invalid aspects of a statute where both aspects are covered by the same phrase;¹⁴ but in these cases

¹¹ See GRAY, *ibid.*, p. 600, note 3.

¹² 20 Ch. D. 562 (1881).

¹³ 246 Pa. 348, 92 Atl. 312 (1914).

¹⁴ *United States v. Reese*, 92 U. S. 214 (1875); *Trademark Cases*, 100 U. S. 82 (1879); *Employer's Liability Cases*, 207 U. S. 463 (1908).

the court was justified in refusing to give to a legislative policy effect in a more restricted field of application than Congress had specified. The rule is not one of mechanical operation, and where a statute contains in different clauses valid and invalid provisions, courts regularly inquire into the presumable legislative intent. It seems that in England, where a testator separates his gift into parts, and then gives part under valid, part under invalid limitations, the valid part is sustained without question,¹⁵ whereas an American court will ask whether by reason of the entirety of the testator's scheme the invalid part does not also vitiate the valid.¹⁶ The American rule is sensible, although it cannot be applied without speculating as to testator's intent.

The conclusion must be in favor of a judicial power of cutting down unlimited or excessive periods to the permissible limit. The trouble with the doctrine of separable limitations is the failure to distinguish between that which is matter of clear logical implication and that which is not. It is common sense to assert that a gift over upon dying under twenty-five may be sustained as a gift over upon dying under twenty-one; it does not follow that a gift to an unborn person at twenty-five can be sustained as a gift to an unborn person at twenty-one. When Sir William Grant suggested¹⁷ that it might have been as well if the courts had held a limitation transgressing the limits to be void only for the excess where that excess could be clearly ascertained, he lent some countenance to a theory of cutting down which certainly cannot be supported as a mere matter of logic. A gift at twenty-one is not logically included in a gift at twenty-five, because the former is a larger gift, and the more is not included in the less.

Is it possible to sustain the gift to the unborn son of A at twenty-five by making it read as follows: "to the unborn son at twenty-five if he reaches that age within twenty-one years from his father's death"? This is clearly included in the contingency of his reaching twenty-five at any time. The usual objection to this method of validation is that the law permits the selection of any life as a "criterion" life. If Herbert Spencer could by his will postpone the ultimate vesting of interests to the death of the last survivor of

¹⁵ *Cattlin v. Brown*, 11 Hare, 372 (1853).

¹⁶ *Barrett v. Barrett*, 255 Ill. 332, 99 N. E. 625 (1912).

¹⁷ *Leake v. Robinson*, 2 Meriv. 363 (1817).

the descendants of Queen Victoria living at his death, why should not a similar implication be made in favor of every will? The objection is specious, and it can be readily understood why, with the latitude permitted by the law as to the selection of criterion lives, the cutting down process suggested might have appeared to the courts to be too conjectural.

Still in practically every case the criterion life naturally suggests itself. "To the unborn son of A at twenty-five;" not only would A's life be the one to be naturally selected, but it is also the normal expectation that A will not die until his children are four years old. It would be a simple matter to frame a rule to the effect that any gift to unborn persons at an age older than twenty-one shall be construed as implying the condition that such age shall be reached within twenty-one years from the death of the parent (if a relative of the testator), through whom they are related to the testator. It would not have been impossible for the courts to imply such a condition; it would certainly be possible for the legislature to imply it without in any way altering the substance of testator's gift. Such an implied condition would also save many gifts to classes now held invalid. It would be a more satisfactory way of saving them than through construction. I do not subscribe to the rule that "every provision in a will or settlement is to be construed as if the Rule [against Perpetuities] did not exist, and then to the provision so construed the Rule is to be remorselessly applied."¹⁸ If this is the rule of the English law, it is an unreasonable rule which American courts should be slow to follow. However, if a gift to a class under ordinary rules of construction violates the rule against perpetuities, it is a very dubious remedy to save the gift by cutting down the class; for this means benefiting some members of the class at the expense of others, while the invalidity of the entire gift may let in all the members of the class as heirs or next of kin. In which way the most equitable result will be reached may depend entirely upon circumstances unforeseeable at the time of testator's death. The choice is therefore between adhering to established rules or permitting the courts to speculate upon probabilities, and the established rule is preferable. But I am inclined to think that the courts should have the right to limit a class to the members existing at testator's death, notwithstanding a postponed period of distribution, where the

¹⁸ GRAY, *THE RULE AGAINST PERPETUITIES*, 2 ed., § 629.

admission of possible additional class members would produce invalidity, and where by reason of the age of parents the testator may be presumed to have contemplated no additional members. Of course, if the rule is altered so as to admit additional members of the class without any risk of invalidity, so much the better.

Wherever reasonable construction can save a gift which, under purely technical rules of construction, violates the rule against perpetuities, the gift ought to be saved. If the law is now otherwise, it ought to be changed; if the English law is otherwise and is nineteenth-century law, it should not be followed. But an alteration of the rule so as to make it operative only for the excess of a gift above the permissible limit will probably be found to be an impossibility. The result would be an arbitrary enlargement of gifts quite outside of testator's intent. The illustrations given in Gray, sections 886-893, will make this clear. The only method of cutting down limitations is upon the theory of severability, and that method ought to be applied more liberally than it is.

Even under the law as it stands it is open to a testator to guard against the construction that has proved fatal to so many wills. The following provision would serve the purpose:

"All limitations in this will contained shall be deemed to be conditioned upon their taking effect as vested interests or estates in possession or remainder within twenty-one years from the death of the last survivor of the beneficiaries named in this will [or of the descendants of my parents]¹⁹ who shall be living at my death."

3. THE POLICY AGAINST REMOTENESS

Most of the highly developed systems of law have some policy against perpetuities; but in the systems other than that of the common law it is a policy confined to testamentary or family settlements of property made for successive generations, and to dispositions in mortmain. The common law of England alone formulates the policy as a general rule of the law of property. However, not only does the rule find its common application in family settlements, but as soon as we pass beyond these we encounter uncertainty, if not confusion. Confined to family settlements, the

¹⁹ The words in brackets would operate to save gifts to grandchildren, nephews or nieces, and grand-nephews or grand-nieces whose parents are not beneficiaries under the will.

question whether the rule is one against remoteness or one against inalienability is of little practical importance, for remote limitations normally result in inalienability, and inalienability was undoubtedly the inconvenience against which the rule was primarily directed. When we come to other arrangements involving remoteness, the remote interest is normally alienable, or at least releasable, and we search laboriously for a reason that will explain why a remote option is against public policy. Professor Gray suggests, that property that is liable to be divested by a remote contingency is not apt to be used to the best advantage of the community.²⁰ This is true only if we understand "remotely contingent" as meaning contingent for a period lasting until a remote time, not if it means contingent at a remote time; yet the rule applies also in the latter sense, although it is clear that an option exercisable only at the end of fifty years leaves the property freer than an option exercisable at the end of twenty-one years.

In a family settlement we are also ordinarily relieved from making a distinction between vested and contingent, for remote limitations are normally affected by the chances of birth and death, and hence contingent; but in a remote option the difference between vested and contingent becomes extremely fine.²¹ In *Woodall v. Clifton*²² the court, in holding a remote option void, does not refer to the difference between vested and contingent, but merely to all executory limitations other than those subsequent to an estate tail.

According to Gray,²³ a devise to A and his heirs, to begin from a day fifty years after the testator's death, is too remote, although admittedly there is nothing contingent about it. What other than a technical reason can be given for such a rule? It can be defeated by a slight change of form, for the validity of a devise to A and his heirs subject to a term of fifty years given to my executors, is unquestioned.

A devise to A and his heirs, to begin from a day fifty years after my death, is a form of disposition that is not likely to occur. A similar devise to an institution or charity is less improbable and deserves consideration. There may be a sound legal policy against remotely effective dispositions; if so, such policy should not be

²⁰ GRAY, *THE RULE AGAINST PERPETUITIES*, 2 ed., § 603 f.

²¹ *Ibid.*, § 230 a and b; *Barton v. Thaw*, 246 Pa. 348, 357, 92 Atl. 312 (1914).

²² [1905] 2 Ch. 257.

²³ GRAY, *THE RULE AGAINST PERPETUITIES*, 2 ed., § 201, note.

bound by the technicalities of the rule against perpetuities. There should be a clear realization of the substantial difference between vested and contingent; between a rule of property and a rule of contract, and between individual and corporate transactions.

Assuming a devise to some university to begin after fifty years to be void for remoteness, the same would be true of a bequest of a library, the same of a fund consisting of securities, whether already existing or directed to be set aside. How about a legacy of \$10,000? The rule against perpetuities is a rule of property, not of contract.²⁴ A promise to pay \$10,000 fifty years after my death would generally be regarded as good. It may be said that a promise is a pure obligation, while a legacy is enforceable in equity and can be collected by making the residuary legatee refund after the executor has paid him. But in this respect the position of the creditor is even better than that of the legatee. The effect of the law of administration of decedent's estates is to transform every pure obligation after the death of the obligor into an obligation of a specific fund, namely, the estate left by the obligor. In reason, therefore, legacies and promises to pay should stand on the same footing as far as the question of remoteness is concerned. The difference between property and contract breaks down.

We are not prepared to declare a promise payable fifty years after the death of the promisor to be void; for that would nullify every promise to pay at a time later than twenty-one years from date, considering that it is not certain that the promisor will live for an hour after making the promise. We should therefore be prepared to sustain also a legacy payable fifty years after death.

Practically, under the law of administration, the executor would have to make the same provision in both cases. He would have to set apart a sum sufficient to produce in fifty years the required amount. That would be equivalent to setting aside a fund for accumulation. A question would arise under statutes against accumulations: can a thing be done by indirection which cannot be done directly? In England the *Thellusson* Act makes in this respect a distinction between debts and ordinary legacies, permitting accumulations for the payment of the former; but in America debts and legacies would generally be subject to the same rule. Assuming that accumulation is not forbidden by law, may the legatee or

²⁴ *Worthing Corporation v. Heather*, [1906] 2 Ch. 532.

creditor on general principles demand immediate payment of the sum, which by accumulation would produce the amount of his claim, considering that he represents the only interest that is to be protected? The law of Illinois gives every holder of a nonaccrued claim after the death of the debtor the right to immediate payment on deduction of an appropriate discount. A legacy payable thirty years after testator's death was sustained in Illinois as a vested interest;²⁵ but there the interest was given with the principal and directed to be paid annually, and the court refused to enter upon the question of the postponed payment of the principal.²⁶ It thus appears that the postponed or remote promise has its problems and difficulties, and the striking fact is that they apply to legacies and to debts alike. No similar difficulty would arise in case of a gift of a library or a gift of a piece of land, to become effective fifty years after death. In other words, where remoteness creates embarrassment, we have no clear rule against remoteness, while we have one where it serves little purpose. What do we gain by asserting the rule as a rule of property and denying it as a rule of contract? It would be better to have no rule at all against remote executory interests which are free from any contingency.

The importance of any such rule is much diminished by the fact that remoteness without some element of contingency is of infrequent occurrence outside of corporate transactions. An individual promise to pay at a time beyond the period of the rule against perpetuities is even more rare than a legacy remotely postponed without any contingency. But we approach a much more practical question when we come to consider contingent promises. A covenant for title and an indemnity bond are obligations of common occurrence; they are apt to be made for contingencies without limit of time, and it has never been suggested that the rule against perpetuities should apply to them.

But how does such an obligation operate after the death of the obligor? That depends upon the state of the law* of the administration of decedent's estates with regard to contingent claims against the estate. And here we enter upon a somewhat obscure field. Under the English law the executor is normally liable indefinitely;²⁷ he can discharge himself by refusing to pay legacies

²⁵ *O'Hare v. Johnston*, 273 Ill. 458, 113 N. E. 127 (1916).

²⁶ *Ibid.*, 478.

²⁷ But note the application of the Trustee Act, 1888, § 8, sub-sec. 1 (b).

except under order of a court, and the liability then devolves upon legatees or distributees.²⁸ In America the matter is governed in a general way by statutory provisions regarding presentation of claims against the estate, which however frequently neither mention nor fit contingent claims. In some states contingent claims are required to be presented within the brief period prescribed by law (often only one or two years). Such is the law of California.²⁹ This mode of provision will be presently considered. In other states the provisions of law are such that it may well be contended that contingent claims require no presentation, since there is no conceivable method indicated of dealing with them. Illinois is in that category. In that state the executor's liability ceases, the same as in England, after he has distributed under the order of the court.³⁰ It has been said that in Illinois the statute is interpreted to mean that the claim is barred also against the legatees or distributees.³¹ But this seems to be an error. The opinion in *People v. Brooks*³² may seem to lend some countenance to this view; but if the facts of the case are examined as they appear from the Appellate Court Reports,³³ it will be found that the claim was on a guardian's bond and that the infant became of age before the expiration of the period of administration, so that the obligation of the bond was then broken, and the claim should have been presented as a matured or accrued claim against the estate of the surety; failure to present discharged the distributees, and the claim was absolutely barred.

It must frequently happen that a contingent liability first becomes an actual liability long after the obligor's death and after his estate has been distributed to next of kin and legatees. They may therefore for years be liable to a remotely contingent obligation, of the existence of which as likely as not they will be entirely ignorant. If there is a policy against remoteness, it operates with the same force whether it is a question of a liability to incur a pecuniary obligation or of losing some specific property. If there is a rule of law in the latter case, why not in the former? The law

²⁸ *Re King*, [1907] 1 Ch. 72.

²⁹ CODE OF CIV. PROC., §§ 1648, 1651.

³⁰ *Snydacker v. Swan & Co.*, 154 Ill. 220, 40 N. E. 466 (1895).

³¹ Professor Warren in 32 HARV. L. REV. 315, 321, 332.

³² 123 Ill. 246, 14 N. E. 39 (1887).

³³ 15 Ill. App. 570 (1884).

may well permit a person to bind himself contingently for the period of his life or a shorter period, or to bind himself and his estate for a reasonable time; but to bind indefinitely successive generations of beneficiaries by will or intestacy does not seem reasonable.

But can any remedy be suggested that will relieve the situation? If the rule against perpetuities were applicable, it would mean that every contingent liability would have to be expressly limited to a period, the most natural maximum limit of which would be the life of the obligor and twenty-one years thereafter. Under a theory of separability of limitations an unlimited contingent obligation might be reduced to the same limit. A statutory rule establishing a like maximum limit for noncorporate obligations would therefore not seem inappropriate.

Were such a statute proposed, conservative legal sentiment might be expected to protest against so radical an innovation upon the law of warranty and suretyship.

Let us then consider a much more plausible proposition and see how it would operate. In California, and in the states following her legislation, a contingent claim must be presented against the estate of the obligor in due course of administration; otherwise it will be barred. A similar requirement was recently proposed in Illinois in connection with a comprehensive revision of the law of administration but failed to become law. If the claim is presented, the court is in a general way required to make provision for meeting or protecting it, and the claim will be saved in the absence of other arrangements.

Under legislation of this kind the practical result will be in the great majority of cases that the contingent liability will be extinguished at the end of the period prescribed for presenting claims. For contingent claims of the perpetual kind, such as warranties and indemnity assurances, while as yet contingent, are very apt to appear to their holders as unsubstantial; the beneficiaries rarely watch them with any care because they do not expect they will ever have occasion to have recourse to them; hence only in the rarest cases will they be presented. An almost inevitable default will have the practical effect of a limitation. If the contingent claim is presented, the court may require next of kin or legatees to renew the obligation to the extent of the assets received by them respectively. That would at least have the advantage of placing them

on their guard; otherwise the liability would remain as it is now. However, in jurisdictions in which the necessary facilities exist, the court might well consider the transformation of the obligation into an insurance policy, to the acceptance of which in lieu of his personal claim the obligee might be expected to consent readily. Such a course would result in the final extinguishment of all individual liability.

The simple provision requiring the presentation of contingent claims will therefore in normal cases have the effect of reducing the life of such claims to the life of the obligor and a brief period thereafter. In view of this, a direct change of the law to the same effect can hardly be pronounced revolutionary. It would simply serve to express the true nature and function of contingent obligations. If they are not by their terms or by the nature of the subject matter limited to brief periods, they should be treated as purely personal liabilities. If conditions call for indefinite or perpetual warranties or indemnities, that need should be met by corporate insurance or suretyship.

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LIABILITY FOR SUBSTANTIAL PHYSICAL DAMAGE TO LAND BY BLASTING— THE RULE OF THE FUTURE¹

Class 1. Where defendant's blasting has cast rocks or other tangible substances upon plaintiff's premises, thereby doing substantial physical damage to land or buildings, it is now commonly said that defendant is absolutely liable, and that it is unnecessary to prove negligence.

This view is now commonly asserted by the great weight of authority. A leading case is *Hay v. Cohoes Co.*² Authorities likely to be cited to-day as sustaining this view are given in the footnote.³ Whether the result reached in these cases could be better rested on another ground will be considered later.

¹ Notice that we are here considering only instances where blasting inflicts substantial physical damage on land or buildings. We are not now dealing with cases where continuous annoyance renders land untenable or materially reduces the rental value, but without doing physical damage to the land itself or the buildings thereon.

² 2 N. Y. 159 (1849).

³ *Hay v. Cohoes Co.*, 2 N. Y. 159 (1849); *Tremain v. Cohoes Co.*, 2 N. Y. 163 (1849); *Scott v. Bay*, 3 Md. 431, 446 (1853); *Adams v. Sengel*, 177 Ky. 535, 197 S. W. 974 (1917) (citing earlier Kentucky cases); *Bessemer Coal Co. v. Doak*, 152 Ala. 166, 44 So. 627 (1907); *Central Co. v. Vandenheuk*, 147 Ala. 546, 41 So. 145 (1906); *Somerville, J.*, in *Ex parte Birmingham Realty Co.*, 183 Ala. 444, 448, 63 So. 67 (1913); *Mulchanock v. Whitehall Mfg. Co.*, 253 Pa. St. 262, 267, 98 Atl. 554 (1916); *s. c. L. R. A.* 1917 A, 1015; *Johnson, J.*, in *Knight v. Donnelly*, 131 Mo. App. 152, 163, 110 S. W. 687 (1908); *Henry Hall Sons Co. v. Sundstrom Co.*, 138 App. Div. 548, 123 N. Y. Supp. 390 (1910); affirmed without opinion in 204 N. Y. 660, 97 N. E. 1106 (1912); *Interborough Rapid Transit Co. v. Williams*, 168 N. Y. Supp. 688 (1918); *E. T. Bartlett, J.*, in *Page v. Dempsey*, 184 N. Y. 245, 251, 77 N. E. 9 (1906); *Forrester v. O'Rourke & Co.*, 48 Misc. 390, 95 N. Y. Supp. 600, 601 (1905); *Vann, J.*, in *Sullivan v. Dunham*, 161 N. Y. 290, 300, 55 N. E. 923 (1900) (as to reasons for decision in *Hay v. Cohoes Co.*).

In *Gourdier v. Cormack*, 2 E. D. Smith (N. Y. Com. Pleas), 200 (1853), one effect of the blasting was to split out (force out?) rocks three or four feet under the foundation of plaintiff's house. The judgment below for defendant was reversed. It is not entirely clear whether the splitting out of the rocks was the result of concussion (result of the force of the blast) or was caused by pieces of rock thrown by the blast. The defendant's liability, whether his conduct was negligent or not, seems rested on the authority of *Hay v. Cohoes Co.*, 2 N. Y. 159, 162 (1849).

The authorities favoring the view asserted in Class 1 do not restrict its application to damage done to land or buildings. It has been regarded as extending to cases where missiles thrown from a blast have hit, or damaged, an individual who was upon land where he had a right to be. This includes not only an individual who was upon his own land, but also a laborer at work upon his employer's premises,⁴ or a traveler upon the highway struck by blasting done by defendant upon his adjacent premises.⁵

Class 2. Where substantial physical damage is done to plaintiff's land or building by vibrations or concussions due to blasting, but no tangible substance is thrown upon plaintiff's premises, it has been held by some authorities: first, that the case differs in principle from Class 1; and second, that the defendant is not liable unless negligence is proved.

This view is sustained in New York. The leading case is *Booth v. Rome, etc. R. R.*,⁶ and it is supported by the authorities given in the note below.⁷

⁴ *St. Peter v. Denison*, 58 N. Y. 416 (1874).

⁵ *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923 (1900); *Wright v. Compton*, 53 Ind. 337 (1873).

In *Turner v. Degnon, etc. Co.*, 99 App. Div. 135, 90 N. Y. Supp. 948 (1904), "a traveler was struck while upon a city street by a stone thrown by a blast set off by a contractor engaged in constructing an underground railway," described as "a public improvement authorized and directed by the legislature." (See statement of case in 1 BOHLEN'S CASES ON TORTS, 611, note 2.) The Appellate Division held, by three judges against two, that the plaintiff could recover.

In *Miller v. Twiname*, 129 App. Div. 623, 114 N. Y. Supp. 151 (1908), defendant was a contractor building a highway. Plaintiff, who was bringing him coal, was hit by a blast while on the highway, which was then in the lawful possession of the defendant. Held, that plaintiff, at the time he was injured, was not a traveler upon a public highway within the rule declared in *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923 (1900).

⁶ 140 N. Y. 267, 35 N. E. 582 (1893), overruling the decision in the lower court, 44 N. Y. St. 9 (1892).

⁷ The Booth case has repeatedly been reaffirmed in New York. See, for instance, *Holland House v. Baird*, 169 N. Y. 136, 62 N. E. 149 (1901). For authorities in other states, approving the Booth case, see *Simon v. Henry*, 62 N. J. L. 486, 41 Atl. 692 (1898); *Cherryvale v. Studyvin*, 76 Kan. 285 (1907), *Smith, J.*; *ibid.*, 287-288; *Rost v. Union Pacific R. R.*, 95 Kan. 713, 714, 149 Pac. 679 (1915), *West, J.* (In both these Kansas cases the plaintiff recovered. The court held that the evidence in each case justified the jury in finding negligence.) *Simpson, J.*, in *Bessemer, etc. Co. v. Doak*, 152 Ala. 166, 177, 44 So. 663 (1907).

In New York, where distinction between the Hay case and the Booth case is still upheld, troublesome questions sometimes arise as to which of these two precedents

Outside of New York, the cases are not unanimous. The weight of recent authority is against the New York view that Class 2 is distinguishable in principle from Class 1. Cases to this effect (contrary to the New York view) are cited in the note below.⁸

Query: Whether the rejection of the view taken in the Booth case, as to the alleged distinction between Class 2 and Class 1, necessitates the rejection of the further view taken in the Booth case—that negligence is the test (the requisite) of liability in cases of vibration and concussion. This question will be considered later.

Is the above distinction between Class 1 and Class 2 tenable?

We think not. Defendant's liability (the test of liability), whatever it may be, should be the same in both cases. This is upon the assumption that there is no difference between the two classes, except the one therein indicated: *viz.*, as to the manner in which the damage is inflicted by the blast.

In the leading case of *Booth v. Rome, etc. R. R.*⁹ the principal reasons¹⁰ given for distinguishing Class 2 from Class 1 are: that in

govern a new case; as to when it may be said that the blast has thrown tangible substances upon the plaintiff's premises. Compare, for instance, *Wheeler v. Norton*, 92 App. Div. 368, 86 N. Y. Supp. 1095 (1904), with *Derrick v. Kelly*, 136 App. Div. 433, 120 N. Y. Supp. 996 (1910), and *Adler v. Fox*, 74 Misc. 483, 132 N. Y. Supp. 302 (1911). See also *Conron v. Fox*, 90 Misc. 425, 153 N. Y. Supp. 425 (1915), and *Conwell v. Degnon & Co.*, 154 N. Y. Supp. 182 (1915).

⁸ *Fitzsimmons & Co. v. Braun*, 199 Ill. 390, 65 N. E. 249 (1902); *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395 (1886); *Watson v. Mississippi, etc. Co.*, 174 Iowa, 23, 156 N. W. 188 (1916); *Louden v. City of Cincinnati*, 90 Ohio St. 144, 106 N. E. 970 (1914); *Patrick v. Smith*, 75 Wash. 407, 134 Pac. 1076 (1913); *Longtin v. Persell*, 30 Mont. 306, 76 Pac. 699 (1904); *Schade, etc. Co. v. Chicago, etc. R. R.*, 79 Wash. 651 (1914); *Parker, J., ibid.*, 658-659.

⁹ 140 N. Y. 267, 35 N. E. 592 (1893).

¹⁰ In *Hill v. Schneider*, 13 App. Div. 299, 43 N. Y. Supp. 1 (1897), the decision in the Booth case is explained as being based on special concessions made by defendant during the argument of that case, in substance: (1) that the blasting was necessary in order to adapt defendant's premises to a lawful use, and (2) that it was conducted with due care. As to the alleged concessions, see 140 N. Y. 267, 269, 35 N. E. 592 (1893), and *Andrews, C. J.*, 274; and comments of *Rumsey, J.*, in 13 App. Div. 299, 305, 306, 43 N. Y. Supp. 1 (1897).

See also discussion in later part of this article as to the contention that the blasting was "necessary," and that the defendant, in blasting, was only making a reasonable use of his land (was only reasonably exercising his rights as a landowner). In regard to the latter position Mr. Lewis says that the decision in the Booth case "would seem to be fairly open to criticism." See 9 LEWIS, AM. R. R. AND CORP. REP. 103.

Class 2 the damage is "consequential"; that there is "no technical trespass"; and that there is "no physical invasion." ¹¹

None of these reasons are satisfactory.

The term "consequential damage" is an equivocal one. On the one hand, it is sometimes used to denote damage which is so remote a consequence of an act that the law affords no recovery for it. It is thus used as practically "synonymous with non-actionable." On the other hand, it is used to denote damage which, though distinctly traceable to defendant's tort as the effective cause, did not follow immediately upon the doing of the act complained of; what Sir William Erle aptly terms "consequential damage to the actionable degree." ¹² In the latter case, as in the present instance, the term "merely indicates that the action must be in Case rather than in Trespass." ¹³

"For it can hardly be supposed that a man's responsibility for the consequences of his act varies as the remedy happens to fall on one side or the other of the penumbra which separates trespass from the action on the case." ¹⁴

"The phrase 'consequential damage' has never served any useful purpose except in marking a distinction between damage which was formerly recoverable in an action of case and that which was formerly recoverable in an action of trespass." ¹⁵ Mr. Salmond ¹⁶ says that the term is now "merely an inheritance from an obsolete system of procedure." ¹⁷

If the term is appropriate here, it must be taken as used in the second sense above stated; and as denoting "consequential damage to the actionable degree." But we submit that the term does not apply at all to a case like *Booth v. Rome, etc. R. R. Co.* We concur with the view expressed by Macomber, J., in the report of the Booth case in the court below,¹⁸ that the damage here was direct, and not in any sense consequential.

¹¹ 140 N. Y. 267, 279, 280, 35 N. E. 592 (1893).

¹² See *Brand v. Hammersmith & C. R. Co.*, L. R. 2 Q. B. 223, 249 (1867).

¹³ 10 COL. L. REV. 465, 467.

¹⁴ HOLMES, THE COMMON LAW, 80.]

¹⁵ 17 COL. L. REV. 383, 388.

¹⁶ TORTS, 4 ed., 184, note 7.

¹⁷ See also discussion by present writer: 15 COL. L. REV. 13-14; 17 COL. L. REV. 383, 388; 25 HARV. L. REV. 223, 250-251; *Eaton v. B. C. & M. R. R.*, 51 N. H. 504, 519-521 (1872). See also *Doe, J.*, in *Thompson v. Androscoggin R. R. Co.*, 54 N. H. 545, 550-554 (1874). And see 10 COL. L. REV. 465, 467.

¹⁸ See 44 N. Y. St. 9, 11 (1892).

As to the objection that there is "no technical trespass:"

This objection seems founded on the theory that there is a distinction in principle, as to liability for damage to real estate, between cases where the remedy at common law, if there were any remedy, would have been an action of trespass, and cases where that form of action would not have been an appropriate remedy under the old common-law system of procedure. It was formerly supposed that if the facts of a case (excluding defenses) would have constituted a *primâ facie* foundation for an action of trespass, then the defendant could not clear himself by proving an entire absence of fault on his part.¹⁹ But this view no longer prevails in England since the decision in 1890 of the case of *Stanley v. Powell*,²⁰ and it had previously been rejected in this country.²¹ Hence the rule of liability for blasting cannot depend on the question whether an actual physical trespass upon the *res* has been committed; nor is it material to inquire whether "the vibratory effects of blasting cannot constitute an actual trespass."²²

To this objection — that there is "no technical trespass" — it would be a sufficient general answer to say that substantive law is no longer "controlled by the forms of procedure." To determine a question of substantive law it is not now necessary to discuss the refined technical distinctions by which the common-law system of forms of action was "perplexed and incumbered." Professor Maitland says that now "the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law."²³ But notwithstanding Professor Maitland's sweeping statement, this desirable result is not yet completely achieved. Unreasonable though it may be, it must be admitted that sometimes "the substantive obligations imposed by law are still influenced by the old forms."²⁴ Indeed, Professor

¹⁹ See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 74, 75.

²⁰ L. R. [1891] 1 Q. B. 86.

²¹ See *Brown v. Kendall*, 6 Cush. (Mass.) 292 (1850); *Brown v. Collins*, 53 N. H. 442 (1873); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 80.

²² See Willard Bartlett, J., in *Sullivan v. Dunham*, 10 App. Div. 438, 442, 41 N. Y. Supp. 1083 (1896).

²³ MAITLAND, EQUITY AND FORMS OF ACTION, 375.

²⁴ ROBERT CAMPBELL, PRINCIPLES OF ENGLISH LAW, 425.

Maitland himself says: "The forms of action we have buried, but they still rule us from their graves."²⁵

The objection that there is "no physical invasion" is sufficiently answered in the following quotations from recent opinions.

The New York court attempts a distinction

"by pointing out that, in the Cohoes case and in others following it; the injury was done by casting debris upon the plaintiff's premises; while in cases of the kind we have now before us, the injury complained of results from concussion of the atmosphere, or from vibrations of the earth. The former, it is said, constitutes a physical invasion, a trespass, upon the plaintiff's property, while the latter does not. The deduction is neither obvious nor convincing. Physical invasion of the property of another does not necessarily imply an actual breaking or entering of the plaintiff's close by the wrongdoer in person, or casting upon his premises any particular kind of missile or other particular thing or substance. The employment of force of any kind which, when so put in operation, extends its energy into the premises of another to their material injury, and renders them uninhabitable, is as much a physical invasion as if the wrongdoer had entered thereon in person and by overpowering strength had cast the owner into the street. . . . It has often been held that the casting or discharge of noxious vapors or gases into the air, which, spreading abroad, invade the home or place of business of another, constitutes an actual wrong. In a legal sense how does an injury inflicted by the act of one who casts a rock against his neighbor's house or destroys his property by turning loose the ungoverned energy of water in motion differ from an injury caused by one who voluntarily imparts destructive force and energy to the air, or who, by the use of the almost limitless powers of modern explosives, creates a little earthquake?"²⁶

"It is insisted by counsel for defendants in error that because no rock, soil or debris was actually thrown upon plaintiff's premises there was no actual trespass. . . . We are unable to distinguish between a case where a fragment of rock or a portion of the soil is thrown onto an adjoining property and a case where the force of an explosion is transmitted through the soil and substratum, jarring, cracking and breaking it, destroying the cistern and foundation of the building and wrecking the building

²⁵ MAITLAND, *EQUITY AND THE FORMS OF ACTION*, 296. Compare Professor J. W. Salmond, 21 *L. QUART. REV.* 43, quoted in 30 *HARV. L. REV.* 245. And see further discussion in a later part of this article.

²⁶ Weaver, J., in *Watson v. Mississippi, etc. Co.*, 174 *Iowa*, 23, 31, 32, 156 *N. W.* 188 (1916).

itself by a concussion of the air around it, thereby doing far more injury than a fragment of rock could do. It is a distinction without a difference. . . . Is not a concussion of the air and jarring, breaking and cracking the ground with such force as to wreck the buildings thereon as much an invasion of the rights of the owner as the hurling of a missile thereon? If there is any difference whatever, it is purely technical, and ought to find no favor with the courts. Certainly the application of a force sufficient to crack the surface of the land to such a depth as to destroy the foundations of buildings, to break windows, and throw down chimneys, is a direct invasion of property rights." ²⁷

"We see no valid reason why recovery should be permitted for damage done by stones, or dirt thrown upon one's premises by the force of an explosion upon adjoining premises, and not be permitted for damage resulting to the same property from a concussion or vibration sent through the earth or the air by the same explosion. There is really as much a physical invasion of the property in one case as there is in the other. The force does the injury in both cases, and the fact that it causes stones or other *débris* to be thrown upon the land in one case, and in the other only operates by vibrations or concussions through the earth or air, seems to us to be immaterial.

"It is perhaps true that an action of trespass could not be maintained in the latter case, because there would be no breaking of the close by the entry of any person or thing; but there would seem to be no reason, on principle, why an action of the case could not be maintained when the injury is really of the same character and is caused by the same powers intentionally set in motion by the defendants, knowing that they will be projected through the earth and air and may cause damage to the plaintiff's property. In such case, one who thus causes dangerous forces to pass through another's property should be held liable for the damage directly resulting therefrom. And there is no more reason for requiring that negligence be shown in the one case than in the other." ²⁸

Thus far, we have been considering the question whether there is, or should be, any difference between the liability of a blaster in Class 1 and in Class 2. And our conclusion is, that there should be no distinction in liability between the two classes if there is no difference between the two except the one above stated; *i. e.*, as to the manner in which the blast affected the land.

²⁷ Donahue, J., in *Louden v. City of Cincinnati*, 90 Ohio St. 144, 158, 159, 106 N. E. 970 (1914).

²⁸ Johnson, J., in *Hickey v. McCabe*, 30 R. I. 346, 355, 356, 75 Atl. 404 (1910). See also Gose, J., in *Patrick v. Smith*, 75 Wash. 407, 134 Pac. 1076 (1913); Holloway, J., in *Longtin v. Persell*, 30 Mont. 306, 313, 76 Pac. 699 (1904).

But back of this question whether there is any substantial distinction between the two classes there lies a more fundamental inquiry. Assuming that one and the same rule of liability should apply to both the above cases, what should that rule be and upon what principle should it be based? Shall it, in both cases, be the rule of absolute liability — the blaster acting at peril; or shall there be liability only in case of negligence? If the latter, the negligence may consist (1) in making an attempt to blast at all, at the place and time in question; or it may consist (2) in negligently conducting blasting operations when undertaken at a proper time and place.

The alternative result is correctly stated in a note in 27 HARVARD LAW REVIEW,²⁹ where the annotator, after saying "There seems no sufficient reason for distinguishing these two classes of cases," adds:

"and the law should either treat blasting as an action at peril and give a recovery in both, or it should deny it in both and only apply the test of negligence aided by the doctrine of *res ipsa loquitur*." ³⁰

In attempting to decide which of these alternative views should be adopted, two things should be noticed:

First: An attempt to extract an answer from the language of the authorities is made difficult by the fact that the law is now in a state of transition; and that the old phraseology is still used by some courts which are really adopting as their *ratio decidendi* more modern views.³¹ The literal language at present used by some judges may fail to indicate their tendency to change the law, or to suggest the probable rule of the future.

Second: A decision as to which of the above alternative views should be adopted is not now, in the great majority of cases, of such vital importance to the plaintiff as it might once have been. If the defendant is *not* held to act at peril, yet a plaintiff who has a meritorious case can generally succeed on the ground of negligence,

²⁹ Pages 188, 189.

³⁰ Of course, the blasting differs from an accidental explosion of a powder magazine in this: that in blasting the explosion is intentionally produced. Compare EARL, COM., in *Losee v. Buchanan*, 51 N. Y. 476, 480 (1873), and Vann, J., in *Sullivan v. Dunham*, 161 N. Y. 290, 294, 55 N. E. 923 (1900). But, though the defendant intends to produce the explosion, he does not, in the cases now under discussion, "intend," in the sense of "desiring," to produce the damage which actually results to the plaintiff.

³¹ "Legal phraseology is, however, the part of the law which is the last to alter." MAINE, *ANCIENT LAW*, 1 Eng. ed., 337-338.

which is a modern conception with a scope and effect much enlarged in these later years.

Formerly, a plaintiff might have been allowed to recover against a faultless defendant, on account of the fact that the plaintiff's property which was damaged consisted of real estate. He might, perhaps, have recovered not only on account of (or irrespective of) the dangerous instrumentality used by defendant, but also (as a distinct ground) on account of the peculiar protection which the law was supposed to afford to the ownership and occupancy of real estate. This is spoken of as "the sanctity which the ancient common law attached to ownership and occupancy of real property," and especially "to one's dwelling-house."³² But to-day the better view is that an unintentional entry upon, or damage to, real estate is not generally actionable in the absence of fault. In some quarters entitled to respect³³ "there is still a tendency to hold that, when real estate is damaged or invaded, the old rule of absolute liability remains unchanged." But the weight of modern authority is otherwise.³⁴

The history of law as to the former absolute liability in the absence of fault, and as to the present general requirement of fault as a requisite to liability, can be stated very briefly. Speaking generally, the modern law is a reversal of the ancient law.

In old days it was the general rule that a man, though acting entirely without fault, was liable for the damaging consequences of his innocent acts. In some cases where this doctrine worked extreme hardship, an innocent actor was exonerated; but these instances of nonliability were exceptions.

At the present time, it is the general rule that fault is requisite to liability. In rare instances the law imposes liability in the absence of fault; cases where a defendant is held to have "acted at peril." But these instances are exceptions to the general rule which requires fault as an element of liability.³⁵

³² See 1 THOMPSON ON NEGLIGENCE, § 764.

³³ See MARKBY, ELEMENTS OF LAW, 3 ed. § 711.

³⁴ See discussion and citations in article by present writer, 30 HARV. L. REV. 319, 321-323; and SALMOND ON TORTS, 4 ed., 186.

³⁵ These exceptions are attempted to be justified on the ground that they are cases of "extra hazardous uses." It is alleged that there are various classes of extra hazardous acts "which are performable only at the peril of the doer." Some prominent in-

The earlier and later standards are thus compared by Professor Ames:

"The early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of to-day, except in certain cases based upon public policy, asks the further question 'Was the act blame-worthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."³⁶

The gradual adoption of the modern and now prevailing doctrine — that fault is generally a requisite element of liability in tort — has naturally induced an examination of the essence of fault in the legal sense. And this has given rise to the modern conception of a particular fault which formerly was hardly mentioned; *viz.*, negligence.

The three following paragraphs, I, II, and III, are here substantially reprinted from an article by the present writer on "Tort and Absolute Liability" in 30 HARVARD LAW REVIEW.³⁷

I. The doctrine that a man, in certain cases, acts at peril and is absolutely liable for nonculpable accidents is, as we have already said, a survival from the early days when *all* acts were held to be done at the peril of the doer. When the courts, in more recent times, were gradually coming to adopt the doctrine that fault is generally a requisite element of liability in tort, the law on the subject of liability for negligence was not so fully developed as it is now. If the wide scope and far-reaching effect of the law of negligence had then been fully appreciated, it is quite

stances (including blasting) are enumerated in 30 HARV. L. REV. 319, 329-334. This doctrine imposing absolute liability for nonculpable accident — this holding that a man in certain cases acts at his peril — is regarded unfavorably by some of the best modern text writers. (See SALMOND ON TORTS, 4 ed., Preface v; POLLOCK'S LAW OF TORTS, 10 ed., 505, 511, 671, note 5; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 84, 85.) One objection to this classification is found in the difficulty of drawing "the line between the danger which calls for care and the 'extra' hazard." "There are, as yet, no 'unanimously approved rules or criteria'" as to this subject. (See Professor E. R. Thayer, 29 HARV. L. REV. 801, 811.) The highest English court some fifty years ago, in *Rylands v. Fletcher*, L. R. 3 H. L. 330, 339-340 (1868), undertook to lay down the so-called Blackburn Rule. But this rule "has not met with universal and cordial approval by English lawyers" (see SALMOND ON TORTS, 4 ed., Preface; POLLOCK'S LAW OF TORTS, 10 ed., 671, note 5); and it is "rejected by what we consider the decided weight of American authority." See 30 HARV. L. REV. 409, 413, note 14.

³⁶ 22 HARV. L. REV. 99.

³⁷ Pages 409, 413-415.

probable that the courts would not have thought it necessary to retain any part of the old law of absolute liability for application in certain exceptional instances.

II. There was "a time when the common law had no doctrine of negligence." It has been said that, in the earlier stages of the law, "there is no conception of negligence as a ground of legal liability." In Holdsworth's "History of English Law,"³⁸ the author speaks of "the manner in which the modern doctrines of negligence have been imposed upon a set of primitive conceptions which did not know such doctrines." Mr. Street says that the law of negligence "is mainly of very modern growth." "No such title is found in the year books, nor in any of the digests prior to Comyns (1762-67)."³⁹ Sir Frederick Pollock⁴⁰ says: "The law of negligence, with the refined discussions of the test and measure of liability which it has introduced, is wholly modern; . . ." Professor E. R. Thayer⁴¹ says "that law" (the law of negligence) "is very modern—so modern that even the great judges who sat in *Rylands v. Fletcher* can have had but an imperfect sense of its reach and power." ". . . the law of negligence in its present development is a very modern affair, rendering obsolete much that went before it."⁴²

III. At the present time it is generally unnecessary, in order to do justice to a plaintiff, to adopt the doctrine of acting at peril.⁴³ Professor E. R. Thayer says: ". . . the law has at its hands in the modern law of negligence the means of satisfying in the vast majority of cases the very needs which more eccentric doctrines are invoked to meet."⁴⁴ If the case is a meritorious one and proper emphasis is laid on the test of "due care according to the circumstances," then "the theory of negligence" will generally be "sufficient to carry the case to the jury." "How powerful a weapon the modern law of negligence places in the hands of the injured person, and how little its full scope has been realized until recently, is well shown by the law of carrier and passenger. . . ."⁴⁵

³⁸ Vol. 3, p. 306.

³⁹ 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 182.

⁴⁰ 27 ENCYCLOPAEDIA BRITANNICA, 11 ed., 66.

⁴¹ 29 HARV. L. REV. 805.

⁴² *Ibid.*, 814.

⁴³ In some American cases the courts, while deciding in favor of the plaintiff, have approved the Blackburn Rule in *Rylands v. Fletcher*. But in the great majority of these cases the facts did not call for an application of that rule; the defendant being liable on other grounds, frequently on the grounds of his negligence. See Professor Bohlen, 59 UNIV. OF PA. L. REV. 423, 433-439. See *post*, that by the weight of modern authority the decision for plaintiff in the case of *Rylands v. Fletcher* itself might have been based on negligence.

⁴⁴ 29 HARV. L. REV. 815.

⁴⁵ *Ibid.*, 805.

At the present time, in an action for blasting, if the courts apply the modern law as to negligence, a plaintiff who has a meritorious case can generally recover without calling in aid the old rule of absolute liability (acting at peril).⁴⁶

The plaintiff is likely to derive material assistance from two doctrines, one as to the amount of care required from defendant, the other as to the method of proving negligence.

Assuming that there are no degrees of care *as matter of law*, yet there must obviously be a great difference in the amount of care required in various cases *as matter of fact*. A jury will be told, and will usually find, that the amount of care required *in fact* will increase in proportion to the danger to be apprehended in case of neglect. Hence they will generally find that the amount of care required of a blaster is *in fact* very great.⁴⁷

But not only is great care in fact required of the blaster. In addition the plaintiff is much aided, as to the method of proving defendant's absence of care, by the application of the doctrine of *res ipsa loquitur*.

This rule, taken literally, and without explanation, is liable to misapprehension.

The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only

⁴⁶ The plaintiff could not now safely rely on the former theory as to the sanctity of real estate (see *ante*, and see 30 HARV. L. REV. 319, 321-323), but he generally does not need help from that theory.

⁴⁷ *Denver Electric Co. v. Simpson*, 21 Col. 371, 41 Pac. 499 (1895), was an action to recover for negligence in the use of electricity. The trial judge charged, as matter of law, that the defendant, though not an insurer, was bound to "the highest degree of care, skill and diligence" in the construction and maintenance of its lines and in carrying on its business. There was a verdict for the plaintiff, which the Supreme Court refused to set aside. The court held, in substance, as follows: The instructions were erroneous as matter of legal theory or phraseology; but no injustice was done in this case. Colorado does not recognize degrees of negligence or of care, *as matter of law*. The jury should have been instructed that the defendant company was bound to exercise "that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances"; with the additional instruction that (under the foregoing standard) the care (required in fact) increases as the danger does. But the jury, if so instructed, would have unquestionably found that this standard (of the care of the ordinary prudent man under the circumstances) required, in fact, the exercise of the highest degree of care. Hence no harm was done by the judge's erroneously telling the jury that *the law* required the highest degree of care, when the jury (under the ordinary prudent man standard) would have found, *as matter of fact*, that ordinary prudence would have required the exercise of the highest degree of care in this case.

to the mode of proving it. The isolated fact that an accident has happened does not afford *primâ facie* evidence that the accident was due to the negligence of the defendant. But if the accident, viewed in the light of the surrounding circumstances, is one which "commonly does not happen except in consequence of negligence," then, if no explanation is offered, the jury *may*, not *must*, find that it was due to the negligence of the defendant. There is, however, no presumption of law, or fact, to this effect. The existence of negligence is "an inference which the jury are authorized to draw, and not an inference which the jury are compelled to draw."

This rule, even on a very conservative statement of it, would permit a jury to find the fact of negligence (a *primâ facie* case of negligence) in a very large proportion of instances of damage due to the blasting, and the jury would often so find.

One reason why juries are permitted to apply, and are generally willing to apply, this rule in blasting cases, is found in the great difficulty, not to say impossibility, of proving specific acts of negligence on the defendant's part. By the explosion, "every trace of the material used and the methods employed are usually blown out of sight, and beyond all possibility of direct proof, except by witnesses who will be naturally unwilling, if not hostile."⁴⁸

The adoption by the courts of another rule favorable to plaintiff is not impossible; *viz.*, shifting upon the defendant the burden of proof as to care. Sir Frederick Pollock, in his draft of an Indian Civil Wrongs Bill, section 68, proposed a provision that a person keeping dangerous things is bound to take all reasonably practicable care to prevent harm, and is liable as for negligence to make compensation for harm, unless he proves that all reasonable practicable care and caution were in fact used.⁴⁹ In his work on the common law of torts, in discussing cases like *Rylands v. Fletcher*, he says:

"... one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk (not merely the diligence of himself and his servants, but the actual use of due care in the matter, whether by servants, contractors, or others), and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge."⁵⁰

⁴⁸ See Stiles, J., in *Klepsch v. Donald*, 4 Wash. 436, 439, 30 Pac. 991 (1892).

⁴⁹ POLLOCK ON TORTS, 6 ed., 623-624.

⁵⁰ POLLOCK ON TORTS, 10 ed., 511.

As to the present tendency of the courts in regard to imposing absolute liability in exceptional cases of nonculpable accidents:

On the one hand, there is a judicial tendency to extend (to recognize more fully) the obligation of using care; to call some conduct negligent which would not have been held so a century ago.

On the other hand, there is a tendency to restrict or deny liability in the absence of negligence or wrongful intention. Professor Wigmore,⁵¹ speaking of the principle enunciated by Blackburn, J., in *Rylands v. Fletcher*, says:

"... the tendency may perhaps be said to be in many states to restrict to as few as possible the classes of situations to be governed by the principle. An example of the latter attitude is found in the masterly opinion of Mr. Justice Doe, in *Brown v. Collins*, 53 N. H. 442."

Leaving out of sight, for the moment, the influence which modern legislation may have on the views of judges as to the common law,⁵² we should predict that the present tendency of the courts will continue, and that the ultimate result will be reached in the near future; viz., that, in cases of blasting, the exceptional doctrines of absolute liability will no longer be applied, and that decisions in favor of plaintiff will be based upon negligence.⁵³ Should this be so, just results will be reached in blasting cases. And, at the same time, the modern statements of the law will tend to legal symmetry; while "most of the serious difficulties and complexities which now exist" would be "eliminated."⁵⁴

(To be concluded.)

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⁵¹ 7 HARV. L. REV. 441, 455, note 3.

⁵² As to which see the second instalment of this article which is to appear in the March issue.

⁵³ In 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 80, the author says that, under modern law, "a defendant in trespass can always excuse himself by showing that the injury complained of was purely accidental, and that it happened without any fault of his." Later, on page 84, he says: "That some degree of fault or blameworthy negligence is essential to liability for unintended harm wrought by things not dangerous *per se* goes without saying. In regard to damage done by things inherently dangerous, we cannot speak with such certainty; for the grounds of liability in this field have not been fully canvassed and the subject has not been generally understood. *Unquestionably the law must in the end reach the same basis as in the field of trespass.*" (The italics are ours.)

⁵⁴ See SALMOND ON TORTS, 4 ed., Preface, page v.

THE PROGRESS OF THE LAW, 1918-1919

WILLS AND ADMINISTRATION¹

THE MAKING OF WILLS

I

THE Great War has not yet furnished us much litigation of American soldiers' wills. Doubtless instances will soon arise, and therefore two recent English decisions should be noted. In *Godman v. Godman*² it is stated that intention to make a will at the time of the creation of the matter offered for probate as a soldier's will is not necessary. It is enough if the testator deliberately intended to express his wishes for the disposition of his property after death. And so a letter of instructions for the alteration of a will would have been provable as a codicil, had it not been objectionable on other grounds. And likewise, a statement of the deceased to his fiancée, such as, "If I stop a bullet everything of mine will be yours," deliberately made in the presence of a witness, is good as a will, though there is some evidence that the deceased soldier thought he was incompetent to make a valid testament.³

We had never sympathized with the loose practice in the ecclesiastical courts under the Statute of Frauds which allowed written instructions to an attorney to operate, if necessary, as a will of personalty.⁴ That practice clearly justifies, however, the action of Horridge, J., in the two recent cases. And we confess that, appearing in its present form, the practice does not seem so objectionable. The spirit of the provision governing this special class of wills certainly reaches to this situation. Expressions of soldiers in the trenches of their desires in regard to the disposition of their personalty after their death will, we predict, be given

¹ The subject of Future Interests is not discussed herein.

² [1919] P. 229.

³ *In re Stable*, [1919] P. 7.

⁴ *Fawcett v. Jones*, 3 Phillim, 434, 485-487 (1810); *Blackwood v. Damer*, 3 Phillim, 458, note (1783); *Masterman v. Maberly*, 2 Hagg. 235, 247 (1829). See p. 620, *infra*.

effect to by our probate courts, though it cannot be proved that the deceased thought he was making a valid disposition of his worldly goods.

II

A joint will or a joint and mutual will may be executed in accordance with a contract between the testators to leave their property to the survivor, or to the survivor and after his death to others. Such a will is now held not against public policy. And some courts find the contract from the mere provisions of the will itself.⁵ The better view is, however, that the contract should be clearly proved by other evidence than the mere execution of such an instrument.⁶ In *Lewis v. Lewis*⁷ a husband and wife by a joint and mutual will left their property to the survivor, and after the death of the survivor to their children. The wife died, the husband accepted benefits under the will, remarried, and died. The children of the first marriage brought a bill to quiet title to the husband's realty which the defendant, the second wife, claimed under the Statute of Distributions. The plaintiffs secured judgment, which was affirmed by the Supreme Court on the ground that there was a contract to leave the property as directed in the will, which after the receipt of the benefit was irrevocable by the second marriage or otherwise. Assuming, which is doubtful, the existence of a contract thus to dispose of the property, the result is correct, though the reasoning is not wholly satisfactory. If there is a will made in pursuance of a contract to devise, the will is indeed revocable, but the contract should be enforced in equity. And this view represents the weight of authority and the trend of the later cases.⁸ Indeed the California court⁹ has recently held that a second marriage revokes a will made in pursuance of a contract, but the agreement to devise is enforceable in equity. This is the neater handling of the matter, for the Probate Court in the old sense did not have

⁵ *Frazier v. Patterson*, 243 Ill. 80, 90 N. E. 216 (1909).

⁶ *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265 (1898). Compare *Cooke v. Burlingham*, 105 Misc. 675, 173 N. Y. Supp. 614 (1919).

⁷ 104 Kan. 269, 178 Pac. 421 (1919).

⁸ Professor G. P. Costigan, "Constructive Trusts," 28 HARV. L. REV. 237, 250-251; *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696 (1919).

⁹ *Rundell v. McDonald*, 182 Pac. (Cal. App.) 450 (1919). Compare, however, *Chase v. Stevens*, 34 Cal. App. 98, 166 Pac. 1035 (1917).

equitable powers.¹⁰ In a modern probate court which by statute has full chancery powers, however, it may be expected that the short cut will be taken of probating a revoked will made in pursuance of a contract. It does not appear from the Kansas statutes that the Court of Probate has general equitable jurisdiction.¹¹

III

The burden of establishing that a will is the act of a sane testator is upon the proponent in England and in many, but not all, of the United States.¹² The proponent, however, is often aided by the rule that if the will is rational on its face and appears to be duly executed, it will be held valid in the absence of evidence to the contrary.¹³ The burden of proving undue influence, *i. e.*, coercion, however, is placed generally upon the contestant. This appears clear enough from the United States decisions;¹⁴ but the English doctrine seems not wholly settled, though probably Baron Parke's remarks,

"the *onus probandi* lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator,"¹⁵

would there be followed.

In *Spradlin v. Adams*¹⁶ the court assumes that the burden of proving sanity is on the proponent, but declares that he has discharged the burden of going forward with evidence upon showing that the paper was not irrational in its provisions.¹⁷ That the burden is upon the proponent is laid down specifically in *In re Dale's Estate*¹⁸ and in *Johnson v. Shaver*.¹⁹ *Adams v. Cooper*²⁰ puts the matter thus:

¹⁰ 27 YALE L. J. 546-547.

¹¹ GEN. STAT. (1915), chap. 27, art. 9.

¹² 1 JARMAN, WILLS, 6 Eng. ed., 48; 1 WOERNER, AM. LAW ADM., 2 ed., § 26.

¹³ *Ibid.*

¹⁴ 1 WOERNER, AM. LAW ADM., 2 ed., § 31.

¹⁵ Barry v. Butlin, 2 Moo. P. C. 480, 482 (1838). And see 1 JARMAN, WILLS, 6 Eng. ed., 48. But compare Parfitt v. Lawless, L. R. 2 P. & D. 482 (1872), where it seemed to be assumed that the contestant had the burden of establishing coercion.

¹⁶ 182 Ky. 716, 207 S. W. 471 (1919).

¹⁷ On this latter point see Keller v. Lawson, 261 Pa. 489, 104 Atl. 678, 679 (1918); *In re King's Will*, 172 N. Y. Supp. 869, 872 (1918); *In re Dow's Estate*, 183 Pac. (Cal.) 794 (1919).

¹⁸ 179 Pac. (Ore.) 274 (1919).

¹⁹ 172 N. W. (S. D.) 676 (1919).

²⁰ 148 Ga. 339, 343, 96 S. E. 858 (1918).

"The burden is . . . upon the propounder . . . to make out a prima facie case by showing the factum of the will, that is, to show that [the testatrix] executed the paper in the manner the law requires wills to be executed; that at the time of its execution the testatrix apparently had sufficient mental capacity to make it, and in executing the will she acted freely and voluntarily. . . . The burden is thereby shifted to the caveators to prove the validity of the objections they have made to the probate of the will."

In *Oilar v. Oilar*²¹ the contestant failed to sustain the burden put upon him by the court to establish the invalidity of the will and the codicil for undue influence and insanity.²² This general doctrine as to undue influence has been reaffirmed in *In re Dale's Estate*, *supra*, and in *Re Fenstermacher's Estate*,²³ but observe the statement to the contrary in the extract from *Adams v. Cooper*, *supra*. A series of Illinois cases has reiterated the doctrine already enunciated in Illinois that the mere fact that a beneficiary is in a confidential relation to the testator does not shift to him the burden of proof that he did not coerce the deceased,²⁴ and that presumption of coercion only arises when the beneficiary prepares the will.²⁵ A person not a blood relation to the testator, but whom he treated as a sister, is not in a confidential relation to him within the meaning of this rule.²⁶

The burden of establishing sanity and freedom from undue influence should be upon the proponent. A will, unlike a contract, is a unilateral transaction, upon which other parties do not act until the court passes upon it. It may well be said that insanity and coercion are not affirmative defenses to be alleged and proved by the heir, but must be negated by those who insist on the will. The slight recognition of this in undue influence by *Adams v. Cooper* is gratifying in view of the great weight of authority to the contrary. The current decisions in general fall into the common error of failing to distinguish clearly between the burden of going forward with evidence and the burden of establishing the issue.

²¹ 120 N. E. (Ind.) 705 (1918).

²² See *accord* as to insanity, *Gilmore v. Griffith*, 174 N. W. (Iowa) 273 (1919).

²³ 102 Neb. 560, 168 N. W. 101 (1918).

²⁴ *McCune v. Reynolds*, 123 N. E. (Ill.) 317 (1919).

²⁵ *Wunderlich v. Buerger*, 287 Ill. 440, 122 N. E. 827 (1919); *Snyder v. Steele*, 287 Ill. 159, 122 N. E. 520 (1919).

²⁶ *Gager v. Mathewson*, 107 Atl. (Conn.) 1 (1919).

The Illinois cases on beneficiaries in a confidential relation to the testator represent a compromise between those decisions which follow the rule as to transactions *inter vivos* and those which reject it.²⁷ On principle the analogy of deeds should not be followed. Such advisers are the natural objects of the testator's bounty. Each case should be dealt with on its own facts; in each the question being: has, on all the evidence, the propounder of the will sustained the burden of establishing that the deceased acted freely? The relation to the testator is merely one of the facts of more or less importance depending upon the circumstances.²⁸

IV

Mistakes in a will conceivably might be remedied by either (a) construction or (b) reformation. By the first method the court finds that though the testator has made a mistake, the rest of the will has enough in it to express poorly yet sufficiently the testator's meaning. In all jurisdictions this power, of course, lies in the courts. By the second method the mistake might be remedied by striking out in the Probate Court, and in the court exercising similar jurisdiction, words inserted by mistake, as has occasionally been done in recent English decisions, but rarely, if at all, in the United States; or by inserting words erroneously omitted, which has never been allowed in any common-law jurisdiction.

In *Stevenson v. Stevenson*,²⁹ the testator owned land in township 6 north, range 7, west of the fourth principal meridian, in Hancock County. He devised land in township seven (7) north of the base line, and range six (6) west of the fourth principal meridian, situated in the county of Hancock, which described an existing lot never owned by him. There was nothing in the will indicating that he intended to devise land he owned. The court, following *Kurtz v. Hibner*,³⁰ declined to allow the lots in township 6 north to pass under the will. Three judges dissented.

A similar result on similar facts was reached in *Rivard v. Rivard*,³¹

²⁷ See *Parfitt v. Lawless*, L. R. 2 P. & D. 482 (1872); *Ginter v. Ginter*, 79 Kan. 721, 743, 101 Pac. 634 (1909); *St. Leger's Appeals*, 34 Conn. 434 (1867); *Morris v. Stokes*, 21 Ga. 552, 575 (1857).

²⁸ See *Barry v. Butlin*, 2 Moo. P. C. 480 (1838).

²⁹ 285 Ill. 486, 121 N. E. 202 (1918).

³⁰ 55 Ill. 514 (1870).

³¹ 285 Ill. 564, 121 N. E. 212 (1918).

decided on the same day; but the contrary was held last fall in Iowa in *Wilmes v. Tiernay*.³² In *Perkins v. O'Donald*³³ the facts were the same, except that the will recited at the beginning that the testatrix was desirous of settling her worldly affairs and of "directing how the estate with which it has pleased God" to bless her should be disposed of after her death; and under item 5 (the device in question being numbered "Item 3") she settled the "rest and residue" of her estate in trust. The court refused to allow the ~~not~~ actually owned by the testatrix to pass under the will.

The case of *Stevenson v. Stevenson* caused Mr. H. Clay Horner to propose last spring to a committee of the Illinois Legislature the following amendment to the Chancery Act, Section 50:

"50. 'The court may hear and determine bills to construe wills, notwithstanding no trust or questions of trust, or other questions are involved therein; and in so construing wills, the court shall, in all cases, take into consideration the material facts and circumstances surrounding the testator at the time the will construed was executed, and at the time the testator died and if such facts and circumstance show that a mistake was made in writing the will, and also show the actual intent of the testator, the court may correct such mistake and give effect to the actual intent of the testator.'"

He has also supported the bill in three editorials in the Illinois Law Bulletin.³⁴ Mr. Albert M. Kales has written notes opposing it.³⁵ The bill was later narrowed by its proposer to limit its terms strictly to descriptions of property in wills. Mr. Kales suggested as a substitute the following:

"that the court may find by implication in a will the words 'belonging to me' in connection with any description of real estate devised, provided it is satisfied from the context of the instrument, and evidence admissible under the existing rules of law, that the intent of the testator's inducement was to devise land belonging to himself."

Mr. Horner finds necessity for his legislation in the narrow doctrine of *Kurtz v. Hibner*, which has in effect been overruled in Illinois, and in a desire to extend to wills the jurisdiction in equity to reform transactions *inter vivos*, and adds that "the highest court

³² 174 N. W. (Iowa), 271 (1919).

³³ 82 So. (Fla.) 401 (1919).

³⁴ 2 ILLINOIS L. BULL. 175, 286, 293.

³⁵ *Ibid.*, 287; 14 ILLINOIS L. REV. 147.

in the land has added the jurisdiction to correct mistakes in wills without legislation." Here he refers to the decision of the Supreme Court of the United States in *Patch v. White*.³⁶

Mr. Kales, on the other hand, finds that *Kurtz v. Hibner* has not been departed from in Illinois, that it is clearly distinguishable from *Patch v. White*, wherein the will clearly showed on its face, first, the desire of the testator to devise property belonging to him, and all of it; second, his belief expressed in the residuary clause that he had already disposed of his lot now in litigation; and third, the added description of the land as containing "improvements."³⁷ Mr. Kales dissents from the view that the Supreme Court reformed the will in *Patch v. White* for mistake, and considers Mr. Horner's proposed legislation a calamity to the law of the state, as giving unlimited jurisdiction to reform a will for mistake. Mr. Horner replies that in applying the rule of *falsa demonstratio* courts have many times corrected mistakes, and that the minority in *Patch v. White* said that the court reformed the will for mistake. The Kurtz case follows *Miller v. Travers*,³⁸ where the words "all my freehold estate" were in the will and disregarded, yet the Stevenson case clearly holds that had those words been in the will all devises would have been good. Mr. Horner therefore fails to find the harmony in the Illinois cases and in *Patch v. White*. He finally quotes Professor J. B. Thayer on *Kurtz v. Hibner*, that the true view.

"appears to be that there is no question of ambiguity in the matter; there is a mistake; and the question is whether the will, taken as a whole, admits of a construction which will correct the mistake. All extrinsic facts which serve to show the state of the testator's property are to be looked at, and then the inquiry is whether, in view of all these facts, anything passes. The method of the court in that case is justly discredited. In reality Wigram's book, in 1831, gave it a death-blow."³⁹

We can view Mr. Horner's proposed legislation in no other light than giving the court power to go so far as to fill in a complete blank in a will provided there is clear enough evidence of the testator's intent. Mistakes of course can to a limited extent be

³⁶ 117 U. S. 210, 217 (1886).

³⁷ See Mr. Kales' article in 28 YALE L. J. 33, 46-48.

³⁸ 8 Bing. 244 (1832).

³⁹ THAYER, PRELIMINARY TREATISE ON EVIDENCE, 467, 468.

corrected by construction if something is found in the will upon which to hang the testator's intent.⁴⁰ But the proposed bill, in spite of the words "and in so construing wills," would seem to go far beyond this. And indeed Mr. Horner intended that it should, for he says of it:⁴¹

"the power to *correct mistakes* is all that is new, and this power is given only where, as in Stevenson's case, the court can see the mistake, but feels powerless under the 'construction-throttling' precedents, to correct it."

No court — much less our Supreme Court — has or will fill in a blank in a will by reformation. Our Supreme Court was speaking of correcting mistakes by construction where it said in *Patch v. White*,

"where it [the ambiguity] consists of a misdescription . . . if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected."

Patch v. White was rightly decided on the ground of construction of the whole will, and is distinguishable in its facts from the Stevenson case and *Kurtz v. Hibner*. Professor Thayer, while he preferred the attitude of the court in *Patch v. White* to that in *Kurtz v. Hibner*, and thought the two cases indistinguishable, clearly felt that the correction of the mistake by the United States Supreme Court was through the process of construction. He deals with the case under the heading of construction, paragraph 10 (i).⁴² Under paragraph 13⁴³ he discusses *Miller v. Travers*,⁴⁴ and shows that no question of construction was involved therein, but an unsuccessful attempt to reform a will for mistake. That Professor Thayer would have been opposed to filling in a blank in a will is clear from his reference to an imperfection of expression which is in its nature inconceivable: "as a gift 'to one of the sons of J. S.,' or 'to Mr. —.'" ⁴⁵ In such cases, of course, no 'parol evidence' can help."

We cannot but feel that the attitude of the chancellors and the

⁴⁰ Compare *In re Wolverton Mortgaged Estates*, 7 Ch. D. 197 (1877).

⁴¹ 2 ILLINOIS L. BULL. 175, 179.

⁴² THAYER, A PRELIMINARY TREATISE ON EVIDENCE, 449, 466.

⁴³ *Ibid.*, 474.

⁴⁴ 8 Bing. 224 (1832).

⁴⁵ THAYER, A PRELIMINARY TREATISE ON EVIDENCE, 435.

judges in refusing to reform a will for mistake is wise. Historically perhaps the reason for this refusal was, as Mr. Horner points out,⁴⁶ the absence of consideration,⁴⁷ but an equally important reason is the dangerous character of the jurisdiction to inquire into a man's intent after his death,⁴⁸ and the additional objection, in the case of inserting words omitted through error, that to that extent the requirement of witnesses in the Wills Act will be violated. Extrinsic evidence must be gone into in aid of construction, for there is no

"lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes."⁴⁹

But to substitute the testator's intent for what he has said in the will or omitted therefrom is an entirely different matter.

We are therefore glad to hear that Mr. Horner's proposals have been rejected by the committee of the Illinois legislature.

Turning for a moment to the four recent cases, we find that *Stevenson v. Stevenson* and *Rivard v. Rivard* are not inconsistent with *Patch v. White*, for in neither of the two cases was there anything on the face of the will to show that the testator, as in *Patch v. White*, was trying to dispose of property which he owned. In the Iowa case of *Wilmes v. Tiernay* the provisions of the will are not given except the clause in dispute, which does not show that the lot referred to belonged to the testator. The report states that the rest of the will disposed of all his property except the lot in question, and that the lot described in the will was to be sold and the proceeds applied for masses. These two facts are hardly enough to justify a result similar to that in *Patch v. White*. In the Florida case, however, it is clear from the face of the will that the testatrix meant to dispose of property she then owned, that she owned no other property in North Pablo Beach than the lot in question, and the disputed devise referred by exact description to actual property in North Pablo Beach which did not in fact belong to her. It would

⁴⁶ 2 ILLINOIS L. BULL. 296.

⁴⁷ Mr. Roland Gray in 26 HARV. L. REV. 212.

⁴⁸ SUGDEN, LAW OF PROPERTY, 197; Kales, 2 ILLINOIS L. BULL. 291.

⁴⁹ THAYER, A PRELIMINARY TREATISE ON EVIDENCE, 428, 429.

seem, therefore, that the Florida case is in its result at variance with *Patch v. White*, though it must be admitted that the latter will more clearly described the lot in litigation than the former.

WILLS — MISCELLANEOUS CASES

I

Some miscellaneous cases on the making and revocation of wills may be considered. A young man in good health about to start on a long journey made the following will, duly witnessed:

"In case of any serious accident, after my just debts are paid, I direct that my aunt Miss Mary E. Clark, take entire charge of my estate for disposal as she sees fit."

Apparently the deceased died several years later, not because of an accident. The court held the will not conditional and admitted it to probate.⁵⁰ Even if it be said that the words "in case" tend toward condition, that clause used by a young man in full health to whom death presented itself only in the form of an accident may, in a will disposing of all his property to a near relative, be construed to be interpreted as absolute.⁵¹

II

The provision of the New York statute that a will must be signed "at the end of the will" ⁵² still fosters litigation, even in cases which had all but been previously decided. In *Lowden's Estate* ⁵³ the will was on a sheet of paper folded to form four pages. The first page contained a printed form of will. Some bequests were on page one in the space allotted to them. There was not, however, room enough for all, and in the middle of the fourth bequest the testatrix had written "continued on back," and other gifts covered page two and part of page three. The signatures of the testatrix and witnesses were in the spaces provided for them on the first page. The court rightly, in view of prior New York decisions, ⁵⁴ declined to probate any part of the instrument. As an

⁵⁰ *In re Tinsley's Will*, 174 N. W. (Iowa) 4 (1919).

⁵¹ *Eaton v. Brown*, 193 U. S. 411 (1904).

⁵² CONSOL. LAWS 1909, Decedent Estate Law, § 21.

⁵³ 106 Misc. 707, 175 N. Y. Supp. 591 (1919).

⁵⁴ *Matter of Conway*, 124 N. Y. 455, 26 N. E. 1028 (1891).

original question — not now open in New York — a strong argument might be made for probating the parts of the will which preceded the testator's signature.

III

The federal court, administering the law of Missouri, has held that whether or not under the statute the witnesses of a blind woman's will have signed in her presence depends upon the same rule as that which would be applied to her if she had had sight. Apparently in the case of a normal testator the court thinks that for Missouri the rule is or ought to be the usual one,⁵⁵ a signing within view of the testator. The test for the blind man is, then, Could he have seen the act of the witnesses had he had his sight? And this test was found to be satisfied where the witnesses were ten feet away in an adjoining room connected by an open archway with the chamber in which the testatrix was.⁵⁶ Thus the court follows the English rule for decedents who cannot see.⁵⁷ The dissenting judge, however, has the better of the argument in requiring a narrower rule for the blind. There is no hardship in insisting that consciousness through other senses of the witnesses' act should be required of a testator who cannot see. Indeed the protection of the statute can be secured to him in no other way; for the test within view of a person of full capacity can give him no aid; and yet his hearing and touch are unusually developed. An exception to a rule, sensible in the normal situation, should be made in the case of a person thus disabled, even though a closer proximity of the witnesses is thereby required.⁵⁸

IV

A testatrix just before her death wrote a letter to her attorney which she signed and had witnessed by two persons as follows: "Dr. O'Kennedy — Dear Friend: Please destroy the will I made in favor of Thomas Hart." Dr. O'Kennedy had the will in his possession but did not destroy it. A New York surrogate court

⁵⁵ *Quirk v. Pierson*, 287 Ill. 176, 122 N. E. 518 (1919).

⁵⁶ *Welch v. Kirby*, 255 Fed. 451 (1918).

⁵⁷ *Goods of Piercy*, 1 Rob. Eccl. 278 (1845).

⁵⁸ See *Riggs v. Riggs*, 135 Mass. 238 (1883).

admitted the will to probate.⁵⁹ The court seems right in saying that as the writing showed an intent to revoke by an act and not an intent to revoke by instrument, the letter cannot operate as a revocation. In England the same point — with less reason — has been decided in favor of the revocation,⁶⁰ though a slight difference in wording between the New York Act and the Wills Act of 1837 gives the American court an excuse for distinguishing the case.⁶¹

V

It is very unusual that a will with an express revocation clause fails to revoke a prior will, yet of course if from the whole of the second document it can be gathered that the testator meant both wills to be probated his intention will be carried out.⁶² A recent and sound decision of this sort is *Owens v. Fahnestock*.⁶³ The first will contained nine numbered items. The ninth item contained the appointment of an executor. The second paper was headed "Item Ten," began with an exact copy of the formal preamble and the general revocatory clause of the first will, and then appointed W. L. Verner as attorney to take charge of the property after death "and hold same together until the arrival of my said executor. And that my said attorney immediately notify my said executor and also my other relatives." That was all. The court very properly probated both wills.

VI

Conditional revocations by subsequent instrument are possible but infrequent. The Pennsylvania court found no condition in a codicil reducing legacies in the will "in order to avoid a possible deficiency, which may grow out of the shrinking of investments." ⁶⁴ This seems sound.⁶⁵

⁵⁹ *In re McGill's Will*, 107 Misc. 109, 177 N. Y. Supp. 86 (1919).

⁶⁰ *Goods of Durand*, L. R. 2 P. & D. 406 (1872).

⁶¹ 107 Misc. 109, 177 N. Y. Supp. 86, 89, 90 (1919).

⁶² *Denny v. Barton*, 2 Phillim. 575 (1818); *Dempsey v. Lawson*, 2 P. D. 98, 107 (1877); *Simpson v. Foxon*, [1907] P. 54.

⁶³ 96 S. E. (S. C.) 557 (1918).

⁶⁴ *In re Prevost's Estate*, 107 Atl. (Pa.) 388 (1919).

⁶⁵ Compare *Att'y-Gen'l v. Lloyd*, 1 Ves. Sr. 32 (1747); *Penick's Ex'r v. Walker*, 99 S. E. (Va.) 559 (1919).

VII

A bill in equity in New Jersey to set aside the probate of a will because of fraud in its procurement and in obtaining letters of administration and to enjoin defendant from using the surrogate's decree has been dismissed by the Vice Chancellor.⁶⁶ Here is an attempt to attack collaterally the decree of the Probate Court which has jurisdiction. No authority allows this.⁶⁷ Whether the court of equity will fasten a constructive trust on the fraudulent beneficiary in favor of those best entitled is, as the court points out, a different question.⁶⁸

VIII

In *Sussex Trust Co. v. Polite*⁶⁹ the testator devised all land in Sussex County "where I now reside" to P. At the date of the will this tract contained about forty-five acres. He then conveyed twelve of these and at the same time acquired thirty-three acres of contiguous land. The court held that the latter tract had passed under the will. By the Delaware statute land acquired after the making of the will passes as if possessed at that time, unless a contrary intention is shown. This the court said with good reason was not as broad as the similar provision in the English Wills Act,^{69A} and made no new rule of construction for specific devises but applied rather to general devises.⁷⁰

Having found this devise to be a specific devise, the court then said that of course the ultimate question was as to the testamentary intention in the light of the facts existing at the death of the testator. How this conclusion is consistent with the rule of construction just enunciated it is hard to see. We believe that under the rule of the Delaware statute as to this devise the intention of the testator at

⁶⁶ *McCormack v. Burns*, 89 N. J. Eq. 274, 105 Atl. 70 (1918).

⁶⁷ *Noell v. Wells*, 1 Lev. 235; *Plume v. Beale*, 1 P. Wms. 388 (1717); *Allen v. M'Pherson*, 1 H. L. Cas. 191 (1845); but see *Barnesly v. Powel*, 1 Ves. Sr. 119, 284 (1748).

⁶⁸ *Marriot v. Marriot*, 1 Strange, 666; *Segrave v. Kirwan*, Beatty (Ir.) 157 (1828); *Broderick's Will*, 21 Wall. (U. S.) 503 (1874); *Mellor v. Kaighn*, 89 N. J. L. 543, 99 Atl. 207 (1916) (*semble*). Compare *Lewis v. Corbin*, 195 Mass. 520, 81 N. E. 248 (1907); *Dulin v. Bailey*, 172 N. C. 608, 90 S. E. 689 (1916).

⁶⁹ 106 Atl. (Del.) 54 (1919).

^{69A} 1 Vict. c. 26, § 24.

⁷⁰ *Hines v. Mercer*, 125 N. C. 71, 34 S. E. 106 (1899).

the date of the making of the will is important, and that subsequent acts of his are only admissible to clarify doubt as to his meaning at that time. His later purchase of thirty-three acres and use of them in connection with the balance of his Sussex property can hardly override his use of the words "where I now reside."⁷¹ The decision, therefore, seems questionable.

IX

We are reminded by *In re Shirley's Estate*⁷² that the modern tendency is to uphold a condition in a devise that the beneficiary, if he contests the will, shall lose his gift. That case reaffirms the California view, which enforces without reservation such a provision.⁷³ In Pennsylvania such a condition is enforced if the contest is without reasonable foundation, but otherwise not.⁷⁴ Pennsylvania reaches a highly desirable result, but it is difficult to see how a condition broadly framed, as is usual, to cover any sort of contest, can be divided by the court when the testator has not split it. We are left to choose, then, between supporting a provision preventing all litigation by the beneficiaries, or rejecting it entirely. The modern view seems to be that the chance for abuse of the process of the courts in will contests outweighs the disappointing of honest litigation. Even California does not go so far as to deprive a beneficiary under such a will of her legacy where she attempts, honestly but unsuccessfully, to probate a later document purporting to revoke the earlier instrument.⁷⁵

EXECUTORS AND ADMINISTRATORS

I

Statutes defining claims which survive against the representatives of a deceased person do not prevent litigation. *In re Brace's*

⁷¹ 30 HARV. L. REV. 298. Cranworth, V. C., in *Stilwell v. Mellersh*, 20 L. J. Ch. 356, 361 (1851). But see *Garrison v. Garrison*, 5 Dutch. (N. J.) 153 (1861), where, however, the statute differed slightly from that of Delaware.

⁷² 181 Pac. (Cal.) 777 (1919).

⁷³ *Estate of Hite*, 155 Cal. 436, 101 Pac. 443 (1909).

⁷⁴ *Friend's Estate*, 209 Pa. 442, 58 Atl. 853 (1904).

⁷⁵ *In re Bergland's Estate*, 182 Pac. (Cal.) 277, 278 (1919). "Should any one or more of the beneficiaries named in this will object to the distribution as made, or attempt to defeat the provisions of this will that said person or persons shall receive the sum of five dollars (\$5.00) each and no more."

*Estate*⁷⁶ holds that under the Code of Civil Procedure relating to debts against estates, a claim for unpaid alimony decreed to a wife for the maintenance and education of a son, who had predeceased his father, and which had accrued at the latter's death, was payable out of his estate. This broad interpretation of the word "debt" seems sound, and the result is in accordance with the cases elsewhere.⁷⁷ A claim in tort for deceit, however, has just been held in Washington not to survive against the administratrix of the tort-feasor.⁷⁸ The authorities are divided and continued litigation can only be prevented by very explicit language in the statute.⁷⁹

The common-law rule that a personal action does not survive in favor of administrators is illustrated in decidedly modern form in a case under the Sherman Act. The heirs of one who had acquired a right in tort under that act against the defendants for damage caused by a conspiracy to monopolize the sugar refining business were not allowed to recover.⁸⁰ The Sherman law being silent as to revival and there being no other statute of the United States affecting the case, the court decided that the common law applied, and, on the analogy of actions of deceit, the cause abated, with the death of the plaintiff. By Statute 4 Edw. III, c. 7, executors and administrators may sue for injury done to the personal estate of the deceased. In England the statute has been held to apply to an action against the promoters of a company for damage caused by a fraudulent prospectus,⁸¹ and to an action of slander of title to a trade-mark.⁸² This statute should be part of the common law of the United States and might well be extended by interpretation to any instance where the defendant's wrongful act has deprived the plaintiff's intestate of property, as in the principal

⁷⁶ 105 Misc. 178, 173 N. Y. Supp. 636 (1918).

⁷⁷ See *Knapp v. Knapp*, 134 Mass. 353 (1883); *Martin v. Thison*, 153 Mich. 516, 116 N. W. 1013 (1908); *Hassaurek v. Markbreit*, 68 Ohio St. 554, 67 N. E. 1066 (1903); *In re Stillwell*, [1916] 1 Ch. 365.

⁷⁸ *State v. Blake*, 181 Pac. (Wash.) 685 (1919).

⁷⁹ *Arnold v. Lanier*, 1 Car. Law Repository (N. C.) 529 (1813); *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397 (1888); *Tichenor v. Hayes*, 41 N. J. L. 193 (1879); *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438 (1886); *Henshaw v. Miller*, 17 How. (U. S.) 212 (1854); *Jones v. Ellis*, 68 Vt. 544, 35 Atl. 488 (1896); *Boyles v. Overby*, 11 Gratt. (Va.) 202 (1854); *Lane v. Frawley*, 102 Wis. 373, 78 N. W. 593 (1899).

⁸⁰ *Caillouet v. American Sugar Refining Co.*, 250 Fed. 639 (1917).

⁸¹ *Twycross v. Grant*, 4 C. P. D. 40 (1878).

⁸² *Hatchard v. Mège*, 18 Q. B. D. 771 (1887).

case. Under recent statutes there is a conflict of decision on the survival of the action for deceit in favor of the representatives of the plaintiff.⁸³ The nearest analogy to the situation under the Sherman Act that we have found is *Frohlich v. Deacon*.⁸⁴ There executors sued for conspiracy and unlawful combinations and restraint of trade. The Michigan act provided that an action of assumpsit might be brought by representatives in any case where injury to person or property would be ground for action on the case for fraud or deceit at common law. The eight judges were equally divided as to whether the action for such conspiracy fell within the statute.

In *Pruett v. Caddigan*⁸⁵ the testator at the time of his decease was surety on a bond for \$2500 given by the guardian of a minor's estate. In April, 1916, his executor filed his final account. In March, 1916, the guardian filed his first account, which was rejected, and in June, 1916, a judgment of \$3421.96 was recovered against him for breach of trust. Execution being wholly unsatisfied, the new guardian sued the executor of the deceased as surety, who demurred on the ground that the claim had never been presented to him under § 5964 and § 6057 of the Revised Laws of Nevada. These provisions require that all claims should be filed in three months, and that as to any claim not due, or any contingent or disputed claim, the amount, or such part thereof as holder would be entitled to if claim were due, shall be paid into court. The court held that the present claim was not a contingent demand, but was on a contingency whether there would ever be a demand. Here nothing could be paid into court but the penal sum of the bond, which at the time for the presentation of claims might not only never be the amount due, but might never become payable at all. Such claims need not be presented before maturity. This is in accordance with the practice in other states.⁸⁶ The writer has discussed within the year the authorities and principles involved.⁸⁷

The common law of England as modified by Stat. 11 Geo. II, c. 19,

⁸³ *Cutting v. Tower*, 14 Gray (Mass.) 183 (1859); *Lane v. Frawley*, 102 Wis. 373, 78 N. W. 593 (1899); *Billson v. Linderberg*, 66 Minn. 66, 68 N. W. 771 (1896); *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438 (1886).

⁸⁴ 181 Mich. 255, 148 N. W. 180 (1913).

⁸⁵ 176 Pac. (Nev.) 787 (1918).

⁸⁶ MASSACHUSETTS REV. LAWS (1902), c. 141, §§ 9, 13, 26-32, as amended by Acts (1914), c. 699; *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. 461 (1898).

⁸⁷ 32 HARV. L. REV. 329-332.

§ 15, giving an executor or administrator of a life tenant on whose death a lease granted by him had determined, the right to recover a ratable portion of the rent from the last day of payment to the death of the lessor, has been said to be part of the law of Oregon.⁸⁸ The technical rule that rent is not apportionable has been modified in many states by statute.⁸⁹ The Oregon case points a way to a just result where the legislature has not acted.

INHERITANCE TAXES

I

The decision in *In re Parker*⁹⁰ is entirely sound, and represents an important point of transfer tax law in a typical American family settlement. A New York testator left a large estate to trustees in trust for a niece, Mrs. P., for life, and after her death to divide the principal into as many shares as there were children of the niece then living and children then deceased leaving issue then surviving, the latter to take *per stirpes*. The residue was left to Mr. P., a nephew. By a possible though remote contingency, for the niece had several young children living at the testator's death, the nephew would receive the remainder to the class. In that event the tax would be higher than if the issue of Mr. and Mrs. P. took, for the residuary legatee was entitled at once under the will to an estate, exclusive of the remainder, of about \$450,000, and the New York tax increases with the size of the legacy. The contingent remainder was held taxable as if it passed to the residuary legatee under the New York act,⁹¹ which taxes forthwith a contingent interest at the highest rate that would be possible on the happening of any of the contingencies or conditions which the transfer may involve subject to a refund when the estate takes effect in possession. No other conclusion could have been reached by the court; yet the result is the tying up of property for the sake of a contingency little likely to occur. And it suggests to conveyancers the desirability in the future of drawing settlements as far as possible in the form of vested interests.

⁸⁸ *Perry v. Fletcher*, 182 Pac. (Ore.) 143 (1919).

⁸⁹ 1 WOERNER, AM. LAW ADM., 2 ed., § 301.

⁹⁰ 226 N. Y. 260, 123 N. E. 366 (1919).

⁹¹ LAWS OF 1919, c. 62, § 230.

II

Two recent Illinois cases have decided that in estimating "the clear market value of . . . property received by each person" upon which the state inheritance tax is to be estimated, the federal estate tax is to be considered an expense of administration and to be deducted.⁹² Under the federal statute the tax is an estate tax, and not a charge against the particular beneficiary. This is sufficient to warrant the Illinois result and to account for the general unwillingness of the federal officers to deduct the state tax in estimating the amount due to the United States; for most state taxes are not based on the estate itself, but on the amount received by each distributee, and are a charge on him. Yet a federal judge has recently decided that if the state tax is, like the federal, on the estate and not paid by the beneficiary, it should be deducted in estimating the federal tax, under the provision allowing a deduction for "administration expenses . . ." and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.⁹³ If the same state under its decisions allows a deduction of the federal tax, puzzling questions will arise as to the method of estimating the amounts due to each jurisdiction. The subject should be cleared up by Congress and the state legislatures. The point is sufficiently important for their consideration, for it arises in connection with every estate of any magnitude.

III

The Illinois case of *People v. Northern Trust Co.*⁹⁴ contains a point by which conveyancers must not be misled. The testator during his life made trust deeds in favor of four of his children by which the trustee was to pay income to these children in equal shares, and after the death of each child his share was to pass as he

⁹² *People v. Pasfield*, 284 Ill. 450, 120 N. E. 286 (1918); *People v. Northern Trust Co.*, 124 N. E. (Ill.) 662 (1919); and see *Appeal of Tyler*, 104 Atl. (N. J.) 298 (1918); *In re Knight's Estate*, 261 Pa. 537, 104 Atl. 765 (1918); *Hooper v. Shaw*, 176 Mass. 190, 57 N. E. 361 (1900). In *Estate of Gihon*, 169 N. Y. 443, 62 N. E. 561 (1902), the court declined to deduct the United States tax, because under the law then in force the tribute was levied on the succession and not on the estate.

⁹³ *Northern Trust Co. v. Lederer*, 257 Fed. 812 (1919); 39 STAT. AT L. 777, § 203.

⁹⁴ 124 N. E. (Ill.) 662 (1919).

appointed with usual provisions in default of appointment, and other clauses common in American settlements. The agreements finally reserved to the settlor the power of revoking the deeds and trusts by notice in writing to the trustee. The court held that this reservation did not make the transfer taxable as "intended to take effect in possession or enjoyment at or after" death. One must not jump to the conclusion that such reservations are in all cases of no effect from the point of view of the transfer tax. In the principal case there was evidence that this provision was introduced not at the suggestion of the testator, but by the attorney by way of abundant caution to provide against the possible unworthiness of a beneficiary, and that the testator always declined to be consulted about the property. The court based its decision on the ground that the object of the power of revocation was not to evade the tax but merely to protect the grantees. No further effect, therefore, should be attributed to the decision.

IV

In *State v. Probate Court*⁹⁵ the testatrix left one third of a small estate to her husband and two thirds to her niece. To avoid a contest the will was probated by the consent of the legatees, the only parties interested, and a compromise agreement filed by which the husband and niece each took one half. Whether the husband took under the will or under the compromise was immaterial so far as taxing his interest was concerned. In either event his \$10,000 exemption protected him. The court held, however, that the niece should pay taxes on one half only and not on the two thirds given her by the will. The decision has some support in Pennsylvania and Colorado.⁹⁶ But the contrary doctrine of Illinois, Massachusetts, and New York,⁹⁷ which taxes the estate according to the terms of the will and not according to the provision of the agreement, is preferable. It is true that a legatee may renounce, and if he does, the legacy is not taxable to him but to the residuary legatee; and if he may renounce in full, it is said he may by a com-

⁹⁵ 172 N. W. (Minn.) 902 (1919).

⁹⁶ *Pepper's Estate*, 159 Pa. 508, 28 Atl. 353 (1894); *People v. Rice*, 40 Colo. 508, 91 Pac. 33 (1907); *Matter of Cook*, 187 N. Y. 253, 79 N. E. 991 (1907).

⁹⁷ *Estate of Graves*, 242 Ill. 212, 89 N. E. 978 (1909); *Baxter v. Treas. and Rec'r Gen'l*, 209 Mass. 459, 95 N. E. 854 (1911).

promise renounce in part, escape the burden, and let the person who actually receives the property pay the tax. But in renunciation, as in the case of lapsed⁹⁸ or void legacies, the law of wills or the intestate law — not the agreement of parties — carries the property to the person taxable. The doctrine of the Minnesota case lays the foundation for collusive agreements to deprive the government of its just due.

V

Both New York and Massachusetts have recently decided that the Federal Inheritance Tax is an estate tax, not a legacy or succession tax, and is not payable out of the interests of legatees, but from the residuary estate.⁹⁹

Joseph Warren.

HARVARD LAW SCHOOL.

⁹⁸ Compare *In re Hedenberg's Estate*, 89 N. J. Eq. 173, 104 Atl. 221 (1918).

⁹⁹ *In re Hamlin*, 124 N. E. (N. Y.) 4 (1919); *Plunkett v. Old Colony Trust Co.*, 124 N. E. (Mass.) 265 (1919).

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PROTECTION OF PUBLIC SERVICE ENTERPRISES FROM COMPETITION. — One of the most significant features of the modern law of public utilities has been the adoption of a new policy regarding the protection of the public service enterprise from competition.

Twentieth-century conditions, under which the great mass of the people are dependent upon the public utilities for their very existence, have demonstrated the impracticability of the old policy of free competition in the public service field, and have proved that its characteristic duplication of investment, organization, and operating expense is an economic waste, not only productive of high rates and inadequate service to the public, but frequently resulting in total abandonment of that service.¹ Necessity has overthrown prejudice until it has come to be recognized that there is as direct a public interest in insuring a safe, adequate, and efficient service by providing for the stability of the public utility enterprise as there is in protecting the public utility patron from exploitation.² This modern conception has found expression in the widespread enactment of Public Utilities Acts inaugurating a new policy of comprehensive public regulation in the public utility field.

The former policy of free competition in action has been admirably illustrated by the recent case of *United Railroads of San Francisco v.*

¹ See *Attorney-General v. Walworth Light & Power Co.*, 157 Mass. 86, 87, 31 N. E. 482 (1892); *Weld v. Board of Gas & Electric Light Commissioners*, 197 Mass. 556, 558, 84 N. E. 101 (1908).

² *Idaho Power & Light Co. v. Blomquist*, 26 Idaho, 222, 241, 141 Pac. 1083 (1914).

City and County of San Francisco.³ A street railway had accepted its franchise and built its system forty years before under a general law providing that no two railroad corporations should occupy and use the same street or track for a greater distance than five blocks. The franchise contained a similar provision. The company was held not entitled to an injunction to prevent the city from constructing a competing railway in the same streets on either side of its tracks, on the ground that this limitation was not intended to affect the city when constructing a municipal street railroad under a later statute and an amendment to the state constitution.⁴ The court further decided that in so far as the harm to the utility was the inevitable consequence of the city doing what the franchise did not make it unlawful for it to do, that did not constitute such a taking of property as to require eminent domain proceedings.⁵ No better example of the policy of "cut-throat competition" in the public utility field, with its attendant waste, could be imagined than this duplication of the plant, equipment, organization, and operating expense of a great metropolitan transportation system; and this, in order to give the same form of service in a similar manner over the same routes to the same public, for the very purpose of destroying the established utility.⁶

³ 249 U. S. 517 (1919).

⁴ Cf. *White v. City of Meadville*, 177 Pa. 643, 35 Atl. 695 (1896), where on facts similar to this case the court, recognizing the economic waste from such competition, held it would not impute to the legislature an intent to permit such destruction of property without compensation from the mere fact that at the same session statutes were enacted providing for creation of water companies to serve municipalities, and also authorizing certain class cities to construct and operate their own water system, and therefore enjoined the municipality from competing with the privately owned water company which was giving a satisfactory service under contract.

In the San Francisco case, however, the later statute specifically authorized not only the paralleling of the roadway of the existing utility by the municipality, but also the use of its tracks. Act April 24, 1911 (CAL. STAT. 1911, c. 580).

⁵ Although the municipal charter here required the city to consider offers for the sale of existing public utilities before constructing new ones, the court ruled that this did not aid the case in view of a general solicitation of offers for sale to the city of any existing street railway therein passed by the Board of Supervisors, and sent to the complainant among others, but in regard to which it seems to have taken no action. The case therefore stands as if there had been no such charter provision.

⁶ From the time of the classic *Charles River Bridge* case (*Charles River Bridge v. Warren Bridge*), 11 Pet. (U. S.) 420 (1837), we find the public utility enterprise seeking legal protection from the competition of a similar utility. There the competition was allowed on the principle that a corporate charter which simply authorized the erection of a bridge and taking of tolls thereon conferred no exclusive privilege, but in the almost equally famous *Binghamton Bridge* case, 3 Wall. (U. S.) 51 (1865), the desired protection was secured, the statute of 1805 incorporating the established bridge and forbidding the erection of any bridge within two miles above or below it being held to constitute an inviolable contract even as against the state. However, following the decision in the case of *Dartmouth College v. Woodward* 4 Wheat. (U. S.) 518, 625 (1819), holding a corporate charter to be a contract between the state and the corporation, protected by the contract clause of the Federal Constitution, the states were careful to reserve their legislative power, hence the doctrine of the *Binghamton* case proved of little practical value to the public utility proprietor.

Where the competing utility is operating without lawful authority, either as beyond its corporate powers or for lack of a state or municipal permit or license, the courts have been quick to grant injunctive relief to the lawfully established utility. *Citizens' Electric Illuminating Co. v. Lackawanna & Wyoming Valley R. Co.*, 255 Pa. 176, 99 Atl. 465 (1916); *Memphis St. Ry. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 179

In striking contrast is the modern policy as applied in *Chicago Motor Bus Co. v. Chicago Stage Co.*⁷ In that case the state public utility commission had granted a certificate of convenience and necessity for a motor-stage service in a certain district of Chicago to a newly organized company in preference to an established company. The latter had expended a large sum in developing its business, and had for some time satisfactorily served other sections of the city. The action of the commission was set aside on appeal as arbitrary and unreasonable, in the absence of any evidence that the new company would render a better service to the public. Briefly stated, the court held that, assuming both applicants equally capable of rendering an adequate service, the established company should be preferred in view of its past services, its expenditures, and its experience in the local field.

Here we have a case involving the entrance of a public utility into an unoccupied field. To be sure, in Illinois, as in most jurisdictions, the modern statute⁸ goes much further than protection of the established utility; it requires a certificate of public convenience and necessity from the state public utilities commission as a prerequisite to the right to serve a given territory whether already occupied or not. But the underlying policy is the same, for, as this common treatment suggests, from the viewpoint of the paramount public interest the two situations are fundamentally alike. With the recognition that the public interest is in general best advanced by protecting the existing utility from competition, it became equally plain that the public utility enterprise should not be permitted to enter an unoccupied field until there is a sufficiently developed public need to assure its probable support, and then only if it is so equipped with capital, skill, and credit as to be potentially capable of maintaining an adequate service at reasonable rates. If there is to be protection from competition, it is desirable that there arise no necessity of competition to meet the normally expanding requirements of the public.⁹

How may we account, then, for the decision in the San Francisco case? The explanation lies in the fact that in California by constitutional provision¹⁰ not only are municipal utilities exempted from the jurisdiction of the state commission, but except as to rates, the privately owned utilities operating in municipalities may be, and usually are, also exempted.¹¹ The public utilities acts in a number of states likewise specifi-

S. W. 635 (1915); *Bartlesville Elec. L. & P. Co. v. Bartlesville Interurban Ry. Co.*, 26 Okla. 457, 109 Pac. 228 (1910); *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.*, 127 Ind. 369, 24 N. E. 1054 (1890). *Seemle*, *Millville Gas Light Co. v. Vineland Light & Power Co.*, 72 N. J. Eq. 305, 65 Atl. 504 (1906). For case where state commission was held entitled to an injunction to prevent illegal supply of electricity to the public as beyond corporate power of the offending company and done without a certificate of public convenience and necessity, see *Pub. Serv. Com'n of N. Y. (2d Dist.) v. J. & J. Rogers Co.*, 184 App. Div. 705, 172 N. Y. Supp. 498 (1918).

⁷ 287 Ill. 320, 122 N. E. 477 (1919).

⁸ Illinois Public Utilities Act, June 30, 1913, § 55 (HURD'S REV. STAT. 1915-1916, c. 111A).

⁹ *Chicago Motor Bus Co. v. Chicago Stage Co.*, 287 Ill., 320; 122 N. E. 477 (1919).

¹⁰ Amendment of November 10, 1911, Art. 11, § 19, California Constitution, STAT. 1911, Part II, p. 2180.

¹¹ Amendment of November 3, 1914, Art. 12, § 23, California Constitution, STAT. 1915, p. lvi.*

cally exempt from their provisions utilities owned and operated by municipalities.¹² This limitation upon the scope of the modern policy seems unfortunate in view of the need for uniformity of regulation of methods, service, and rates throughout the entire public utility field, and many states quite properly make no such distinction.¹³

There are two views of the legal nature of this modern policy. That most generally accepted treats it as substituting a régime of regulated monopoly for unrestricted competition;¹⁴ the other considers it to be merely a modification of policy from free competition to regulated competition.¹⁵ Indeed, these views seem to predicate an issue between regulated competition and regulated monopoly.

But why the issue? Take the normal situation of a single utility enterprise lawfully furnishing a particular public service to a given community. There, as Professor Wyman has well pointed out,¹⁶ the facts present a condition of virtual, *i. e.* actual, monopoly; hence, so far as that utility is subjected to the jurisdiction of the state utilities commission, clearly it is regulated monopoly. Now assume the usual statutory requirement of a certificate of public convenience and necessity, and a second utility

¹² Illinois Public Utilities Act, June 30, 1913, § 10 (LAWS OF ILL. 1913, p. 465); Pennsylvania Public Service Company Law, July 26, 1913, Art. I (PA. LAWS 1913, p. 1374); Michigan Public Utilities Commission Act, May 15, 1919, § 4 (PUBLIC ACTS 1919, p. 753).

The constitutionality of this exemption has come before the Supreme Courts of Illinois and Pennsylvania, the contention being that it violates the constitutional prohibition against grants of special privilege.

In the *Springfield Gas & Electric Co. v. The City of Springfield*, decided April 15, 1919 (15 Rate Research, 115), the Illinois Supreme Court held the exemption unconstitutional; but a rehearing has been granted and therefore the case has not been reported.

The Pennsylvania Supreme Court upheld the constitutionality of the exemption in *Consolidated Ice Co. v. City of Pittsburgh*, decided January 5, 1920.

¹³ REPORT OF NATIONAL CIVIC FEDERATION COMMISSION ON PUBLIC OWNERSHIP AND OPERATION, Part I, Vol. I, p. 26—Municipal and Private Ownership of Public Utilities.

The Indiana Public Utilities Act of 1913, § 97 (BURNS' ANN. STAT. 1914, § 10052, u. 3), includes both municipal and privately owned utilities and expressly provides against such duplication as that in the San Francisco case by giving the municipality the right to take over the existing utility enterprise by eminent domain proceedings.

The administrative experience of the state public utilities commissions has shown that, tested by actual conditions, the public interest demands that the public service enterprise, whether privately owned or the subject of municipal ownership, should be brought within the provisions of the public utilities acts and the jurisdiction of the commissions, since they present the same fundamental problems. *Re Village of Schenevus* (N. Y. Pub. Serv. Com'n, 2d Dist.), P. U. R. 1919 E, 735 (certificate denied to municipality to establish plant to compete with existing public utility); *Mackay Light & Power Co. (Idaho Pub. Util. Com'n)*, 15 Rate Research, 227 (1919) (certificate granted to privately owned utility to compete with municipal plant); *Re Borough of Kittanning* (Pa. Pub. Serv. Com'n), P. U. R. 1919 F, 182 (certificate denied to municipality until established utility had notice and opportunity to comply with its duty). The Pa. Pub. Serv. Co. Law 1913, Art. III, § 2 (PA. LAWS 1913, p. 1388), expressly includes proposed municipal corporation utilities within the provisions of the certificate of public convenience and necessity clauses.

¹⁴ I WYMAN, PUBLIC SERVICE CORPORATIONS, 1911, preface, p. ix., and §§ 33, 156; *Idaho Power & Light Co. v. Blomquist*, 26 Idaho, 222, 141 Pac. 1083 (1914).

¹⁵ *Farmers' & Merchants' Co-operative Tel. Co. v. Boswell Tel. Co.*, 119 N. E. (Ind.) 513 (1918).

¹⁶ I WYMAN, PUBLIC SERVICE CORPORATIONS, 1911, § 36, and chap. IV.

seeking to enter that field to provide a similar service. Is it not equally apparent that in placing the determination of whether this competition shall be allowed or not in the power of the state commission the result is a situation of regulated competition? Thus the truth of each view must be admitted when looked at in conjunction with the facts to which it properly applies; and since in the actualities of life these two situations work in harmony with each other, there seems to be no reason in the nature of things why the respective theories resting upon them should not be reconciled and the modern policy made to fulfill its broad purpose. It is submitted that neither the one interpretation nor the other can be adopted as the exclusive criterion. Nothing short of both functioning in coöperation will suffice to protect the public interest. In other words, the modern policy looking to comprehensive regulation is a synthetic policy, possessing the dual aspect of regulated monopoly and regulated competition.¹⁷

It is strange that the adherents of the theory of regulated monopoly seem to consider the certificate of convenience and necessity clause, characteristic of the modern policy, as proof of their contention. They base their argument on the evident assumption that monopoly is thereby legalized and a right of monopoly introduced into the law of public utilities.¹⁸ The words of those clauses indicate the fallacy of such a construction, for they expressly place the public interest above every other consideration and reserve to the commission the power to permit competition if it may reasonably be deemed necessary under the circumstances.¹⁹ It follows that neither the grant of such a certificate to a particular utility, nor its refusal to a second utility seeking to enter an occupied field, creates a legal monopoly in favor of the fortunate utility. Thereafter, as before, the monopoly remains one of fact and not as of legal right.²⁰

Again, to regard the grant or refusal of such a certificate as conferring an exclusive legal privilege would react to defeat the chief aim of the

¹⁷ Thus far the courts have adhered to the broad spirit of the modern policy irrespective of which of these views they considered it to represent, but the danger lies in repetition being taken for precedent to the destruction of its true purpose. A warning against this very thing was sounded in the case of *State ex rel. Electric Co. of Missouri v. Atkinson*, 275 Mo. 325, 204 S. W. 897 (1918).

¹⁸ REPORT OF NATIONAL CIVIC FEDERATION COMMISSION ON PUBLIC OWNERSHIP AND OPERATION, Part I, Vol. I, p. 26. — Municipal and Private Ownership of Public Utilities: "Public utilities, whether in public or private hands, are best conducted under a system of *legalized* and regulated monopoly."

¹⁹ This is particularly well brought out in the Tennessee Railroad and Public Utilities Commission Act, Feb. 21, 1919, § 7 (PUBLIC ACTS 1919, p. 149), which provides: "That no privilege or franchise hereafter granted to any public utility . . . shall be valid until approved by said commission, such approval to be given when, after hearing, said commission determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest. . . ." For the correct construction of such a clause see *State ex rel. Electric Co. of Missouri v. Atkinson*, 275 Mo. 325, 204 S. W. 879 (1918).

²⁰ *Farmers' & Merchants' Co-operative Tel. Co. v. Boswell Tel. Co.*, 119 N. E. (Ind.) 513 (1918). In an analogous case, *Gill v. Dallas* (Texas Civ. App.), 209 S. W. 209 (1919), a city ordinance forbidding operation of jitneys within a certain district was held not unconstitutional as creating a (legal) monopoly in favor of a street railway company operating under municipal license therein, since such license was revocable at will.

modern policy, — promotion of the public interest, — for it would hamper progress in the public service field and render impossible that approximation to the advancement of science and invention which has been the feature of the wonderful development of the public utility. The draftsmen of the modern statute wisely foresaw that only a flexible policy would meet the needs of the situation, and that the way must be left open for the public to benefit promptly by discoveries of new forms of public service.²¹ This was accomplished by a general restriction of protection from competition to service of a similar kind.²² However, the newly introduced form of service was also subjected in most jurisdictions to the requirement of a certificate of convenience and necessity in order to make sure that the public would be benefited by its installation under the circumstances then and there prevailing.²³

Virtual monopoly must not be confused with complete monopoly; rather is it a relative matter representing a normal condition of substantial monopoly under the circumstances.²⁴ To treat the modern policy as one of legal monopoly is inconceivable, for not only must the policy adapt itself to admit competition between different types of public service, but there are many other forms of competition from which as a practical matter it is impossible to protect the public utility enterprise. This fact has been emphasized by the recent era of rate increases throughout the public service field. The consumer's potential power of competition, which had been quite lost sight of, suddenly sprang into vital prominence. This the street railways found in their attempts to derive an increased revenue from increased rates in the face of the former passenger's foot and private automobile competition.²⁵ Again, the compe-

²¹ The competition between different types of public service supplying the same general need figured prominently in Public Service Commission of Washington v. Puget Sound Gas Co. (Wash. Public Serv. Com'n), P. U. R. 1918 F, 728. The commission said (p. 729): "In the main we can attribute this loss [in consumption of gas] to but one thing, and that is the great development in hydroelectrical energy and the cheapness of its productivity. Probably in no other line of activity has inventive genius played a greater rôle in the last decade than in the electrical field. There was a time when it appeared as if the Welsbach burner would bring gas for lighting purposes into general use. Following this invention, however, appeared the Tungsten electric lamp, which, owing to its low consumption of electric energy . . . relegated gas as a lighting factor, and has left it only in the field as a heat; and in this field it has, as never before, hydroelectric energy as a competitor. . . . This commission is not much concerned with competition between two distinct sources of energy; their efficiency is beyond our control; thus we should not be too much concerned when a newly developed form of producing energy displaces some older form. . . ."

²² The Indiana Public Utilities Act of 1913, § 97 (BURNS' ANN. STAT. 1914, § 10052, t. 3), only requires a declaration of public convenience and necessity where a utility enterprise seeks to serve a municipality in which another public utility is lawfully engaged in a similar service.

²³ The Pennsylvania Public Service Company Law, July 26, 1913, Art. III, § 2 (PA. LAWS 1913, p. 1388), requires a proposed public utility enterprise to obtain approval of the public service commission to its incorporation, and in addition that it obtain the certificate of public necessity and convenience before it exercises any rights under any franchise, municipal grant, etc. Fagan v. Pittsburgh Transportation Co. (Pa. Pub. Serv. Com'n), P. U. R. 1919 E, 990.

²⁴ 32 HARV. L. REV. 170.

²⁵ *Re Northampton, Easton & Washington Traction Co.* (N. J. Board Pub. Util. Com'ts), P. U. R. 1919 A, 867 — foot competition; *Re Massachusetts N. E. St. Ry. Co.* (N. H. Pub. Serv. Com'n), P. U. R. 1919 F., 603 — private automobile competi-

tition of the people by a shifting of patronage²⁶ from one form of a public service to another, for example from the street railway to the steam railroad,²⁷ or from both to the jitney,²⁸ has proved a very effective weapon of defense against higher rates in spite of the modern policy. And always lurking in the background is the competition from various forms of private business, the wood lot, the coal yard, and the kerosene cart, ever ready competitors of the luckless gas plant.²⁹

It must be recognized that protection of the public utility enterprise from competition can, of necessity, be but an incident in the new policy of comprehensive regulation for the conservation of the public interest which so admirably adapts itself to the actualities of the business facts.

TAXES MEASURED BY WEALTH. — The theory that foreign chattels have a *situs* at the domicile of the owner so as to be taxable there is now fallen into disrepute;¹ where such a tax is imposed it is properly viewed as a personal tax, the amount of which is determined by the wealth of the subject.² The practice of measuring taxation by wealth, however, may be subject to constitutional limitation. In the case of a tax on property the fundamental law of the states usually requires that the amount taken be fixed by the value of the thing taxed.³ On the other hand, if the tax is *in effect* either a privilege tax or a tax on the person,⁴ the method of fixing the rate is not thus limited by constitutional prescription. "Due process of law" and the "equal protection of the laws" do not demand absolute equality of taxation,⁵ and privilege and personal taxes will not run foul of these guarantees unless unnecessarily unfair,⁶

tion; also: Milk and Cream Rates to Philadelphia, Pa., 45 I. C. C. Rep. 379 (1917) — automobile truck and wagon competition with steam railroad.

²⁶ Bedford-Fulton Telephone Co. v. Chapmans Run Mutual Co. (Pa. Pub. Serv. Com'n), P. U. R. 1919 A, 911 — holding commission had no authority to prevent a patron changing to a competing public service company.

²⁷ Re Interurban Railroads (Ind. Pub. Serv. Com'n), P. U. R. 1919 F, 192 — competition between interurban and steam railroads; Re Massachusetts N. E. St. Ry. Co. (*supra*, note 25) — steam railroad competition with street railway.

²⁸ Re Union St. Ry. Co. (Mass. Pub. Serv. Com'n), P. U. R. 1919 C, 900 — competition between jitneys and street railway; Re Pearl (Nevada Pub. Serv. Com'n), P. U. R. 1919 F, 299 — auto-truck competition with steam railroad; Re King (Cal. Railroad Com'n), P. U. R. 1919 F, 377 — competition of auto stage with steam railroad; Re Increased Freight Rates (Ind. Pub. Serv. Com'n), P. U. R. 1918 F, 304 — competition of auto-transportation with interurban electric railways.

²⁹ This was pointed out in Pub. Serv. Com'n of Washington v. Puget Sound Gas Co. (Washington Pub. Serv. Com'n), P. U. R. 1918 F, 728, where the commission said: "We have here a contest between the coal mine, the forest, and the hydroelectric plant, on one hand, and gas upon the other."

¹ Hoyt v. Commissioners of Taxes, 23 N. Y. 224 (1861).

² See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 590.

³ See JUDSON ON TAXATION, § 438, and appendix, pp. 760 *et seq.*

⁴ Although the legislature may have had in mind the kind of tax which was beyond its constitutional power, if the courts can uphold the tax on some other theory as to its nature, they will do so. See Nicol v. Ames, 173 U. S. 509, 515 (1899). See JUDSON ON TAXATION, § 519.

⁵ See BEALE ON FOREIGN CORPORATIONS, §§ 508, 509, 465; JUDSON ON TAXATION, § 450; GRAY, LIMITATIONS OF TAXING POWER, § 1122.

⁶ Hatch v. Reardon, 204 U. S. 152 (1907); People *ex rel.* Farrington v. Mensching,

plainly discriminatory, or unequal in their application to subjects placed, for the purposes of taxation, in the same class.⁷

Only the law of the domicile may impose a tax on the person.⁸ As has been suggested, a tax imposed by the state of the domicile on foreign chattels is to-day regarded in this light. If the state can tax its citizens and compute the tax on the basis of their foreign movable estate as well as property at home, there is no logical reason why foreign land could not also be made the basis of computation.⁹ But the maxim *Mobilia sequuntur personam*, indicating that movables may be distributed according to the law of the domicile, was given a larger meaning by the courts.¹⁰ They went so far as to give movables a fictitious *situs* for taxation at the domicile, and by way of compensation treated foreign land as peculiarly immune. The consequence is an apparent absence of cases in which a direct tax on foreign immovables has been sustained as a personal tax at the domicile based on wealth.¹¹ In *Union Transit Co. v. Kentucky*¹² the Supreme Court, in disregard of settled practice, decided that it was a denial of due process for the state of domicile to tax tangible movable property permanently situated and taxable abroad. Hence as to both foreign land and chattels the question is the same — can a state accomplish indirectly by means of a personal tax what it cannot do directly? The fact that the Supreme Court in the Transit Company case ignored the personal feature of the tax is some evidence that such a proceeding will be discountenanced, but the question must be considered as still open.

Inheritance taxes, one form of privilege or license taxation, may be imposed by the state of the decedent's domicile on the succession to chattels in another state, the rule of *Union Transit Co. v. Kentucky* having been expressly declared inapplicable to inheritance taxation.¹³ Here again the *mobilia sequuntur personam* idea was the theoretical panacea. A better justification is that although foreign movables pass according to the law of the actual *situs*, the rule of distribution is furnished by the state of the domicile which, having furnished something, is entitled to tax its enjoyment.¹⁴ But since the state where the goods

187 N. Y. 8, 79 N. E. 884 (1907). See 19 HARV. L. REV. 460; 20 HARV. L. REV. 408. In *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512 (1894), it was held that an inheritance tax exempting estates under \$10,000 was valid under a constitutional provision requiring taxes to be reasonable. See 8 HARV. L. REV. 226.

⁷ *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283 (1898); *Booth's Ex'r v. Commonwealth*, 130 Ky. 111, 113 S. W. 61 (1908); *In re Fox's Estate*, 154 Mich. 5, 117 N. W. 558 (1908). See 12 HARV. L. REV. 127.

⁸ *The State v. Ross*, 23 N. J. L. 517 (1852).

⁹ "Logically there is no reason why, in taxing its residents, the state may not measure such tax by reference to their realty outside the state, as well as by any other method. The reason it cannot be done in fact is that such taxation would be so contrary to the settled habits of our governments and peoples as to be a denial of due process of law." GRAY, LIMITATIONS OF TAXING POWER, § 168 a.

¹⁰ *Hoyt v. Commissioners of Taxes*, *supra*, p. 228.

¹¹ Since domestic corporations owe their existence and capacity to own property, wherever situated, to the state of creation, a tax on the capital stock representing in part foreign land is sometimes upheld. *Kansas City Ry. v. Kansas*, 240 U. S. 227, 232 (1916). *Contra*, *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 Atl. 443 (1888).

¹² 199 U. S. 194 (1905).

¹³ 199 U. S. 194, 211 (1905).

¹⁴ See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 590, 628 *et seq.*

are can distribute them in accordance with the law of the domicile or otherwise at its pleasure, this explanation is also unconvincing. The alternative remains to conclude either that the practice is theoretically unsound or that only the transfer of property within the jurisdiction is taxed, but that the amount taken is based on the wealth of the decedent exclusive of foreign realty.¹⁵ Under this last theory such deduction must be explained as a historical survival. Since the visible result is the same under any theory supporting the levy on foreign transfers, the law being settled that the state of the domicile can so tax, we must turn to the case of non-residents as affording the most illuminating test of taxes in proportion to wealth.

Here if foreign wealth, either movable or immovable, is to be taxed, it must be done indirectly in the form of privilege taxation. Suppose, for example, for permitting the succession to property owned by a non-resident within the state the state deducted a fixed percentage of the entire wealth of the decedent.¹⁶ Another device, slightly less outrageous, would be to increase the rate of taxation in proportion to the entire estate of the non-resident.¹⁷ Or the state might appropriate a certain percentage of the entire property received by the beneficiary. A more moderate method would make the rate of taxation depend on the entire amount received. This was in substance the theory of the New Jersey Inheritance Law,¹⁸ the constitutionality of which was lately confirmed by the Supreme Court in *Maxwell v. Bugbee*.¹⁹ The dissenting opinion written by Mr.

In re Cumming's Estate, 142 App. Div. 377, 127 N. Y. Supp. 109 (1911), upheld a tax on the succession to California property on the ground that the decedent died domiciled in New York although the California court had found him domiciled in California and had distributed the property in accordance with California law. The result of this case, if supported at all, must be explained on some other theory than the one suggested. See 24 HARV. L. REV. 573.

¹⁵ It has been held that the federal government has even greater power to tax its citizens in respect to property held abroad and privileges exercised there than have the states. A federal license tax on vessels permanently in foreign waters has been held due process of law under the Fifth Amendment. *United States v. Bennett*, 232 U. S. 299 (1914). In the light of the great benefits conferred on its citizens by the national government one might expect greater latitude would be allowed it in assessing personal taxes on the basis of wealth. Perhaps the Bennett case may be supported on this ground. See 27 HARV. L. REV. 675.

¹⁶ In *People v. Equitable Trust Co.*, 96 N. Y. 387 (1884), a privilege tax of \$.0015 on the dollar on the cash value of the capital stock of a foreign corporation was sustained. On the other hand in *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 364 (1914), a tax of \$.0005 was imposed on foreign corporations "upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state." In holding the tax due process of law the Supreme Court (opinion of Mr. Justice Pitney) relied on the fact that the tax was "measured by reference to property situate wholly within confines of the state."

¹⁷ For example, the inheritance tax act might provide that where the decedent's wealth was under \$10,000 the beneficiary should pay 10 *per centum* of the amount of the bequest; where the decedent's wealth was between \$10,000 and \$20,000, 20 *per centum*, etc. It was argued with some merit in *Magoun v. Illinois Trust & Savings Bank*, *supra*, that the act in question determined the rate in this fashion, but the court decided (page 298) that it was "... the estates which descend or are received which ... are to pay a tax in proportion to their value." Had the act been given the construction contended for, it is questionable whether it would have been upheld.

¹⁸ See PAMPH. L. 1909, p. 325, as amended PAMPH. L. 1914, p. 267.

¹⁹ U. S. Sup. Ct. Nos. 43 and 238, October Term, 1919. See RECENT CASES, p. 616, *infra*.

Justice Holmes and concurred in by the Chief Justice and Justices Van Devanter and McReynolds suggests that in a flagrant case of assessment on the basis of wealth a majority would be opposed. Mr. Justice Holmes thought that "when property outside the state is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used." Of course if the doctrine of *Union Transit Co. v. Kentucky* should be carried so far as to immunize all tangible property abroad from both property and transfer taxation, then it might well be held that such property is exempt for all purposes. Moreover, it may be hoped that the law will take such a direction. But in the light of actual decisions is it sound to conclude that *any* valuation of foreign property to determine the rate of taxation is an attempt to accomplish indirectly with "ulterior purpose" what is beyond the "constitutional power"? An affirmative answer would deprive the practice of taxing foreign wealth, or its transfer, at the domicile, of its only sound theoretical foundation. For why is not a tax at the domicile when based in part on foreign wealth as much a tax on such wealth by indirection as is a privilege tax similarly assessed against a non-resident? That theory is best which without resorting to fictions may be reconciled with the most decisions which are still law. The majority view that "property not in itself taxable by the State may be used as a measure of the tax imposed" seems the more workable. The purpose and effect of the New Jersey statute was to prevent beneficiaries of non-resident decedents from escaping the increased rates on larger bequests.²⁰ Consequently the decision does not seem objectionable.²¹ Only when taxation measured by wealth is carried beyond the line of fairness should it be upset, and then not as being in substance a levy on something beyond the jurisdiction, but as being so unreasonable and out of proportion to the benefits conferred as to be a denial of due process and the equal protection of the laws.²²

PROHIBITION AND THE WAR POWER. — Since the time of Chief Justice Marshall's illuminating comments as to the branches of the government in whose province political questions lie,¹ there would seem to have been reason for the assumption that in such an exclusively political question as whether or not the country is still at war the Supreme Court would be reluctant to interfere with the legislative and executive decision. The

The leading New Jersey case under the law as amended is *Maxwell v. Edwards*, 89 N. J. L. 446, 99 Atl. 207 (1916).

²⁰ For an illustration of the method of the New Jersey law see *Maxwell v. Edwards*, 90 N. J. L. 707, 101 Atl. 283 (1917).

²¹ The law was also attacked as a denial of privileges and immunities under Article IV, Sec. 2, of the Federal Constitution. On this question see *Ward v. Maryland*, 12 Wall. (U. S.) 418 (1870); *State v. Lancaster*, 63 N. H. 267 (1884); *Wiley v. Parmer*, 14 Ala. 627 (1848); *Board of Education v. Illinois*, 203 U. S. 553 (1906); *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364 (1902); *Estate of Mahoney*, 133 Cal. 180, 65 Pac. 309 (1901); *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424 (1903); *Maxwell v. Edwards*, 89 N. J. L. 446, 99 Atl. 207 (1916).

²² *People ex rel. Farrington v. Mensching*, *supra*. See, on the general subject of this note, Thomas Reed Powell, "Extra-territorial Inheritance Taxation," 20 COL. L. REV. 1.

¹ *Luther v. Border*, 7 How. (U. S.) 1 (1849).

dissent of four justices in a case upholding the constitutionality of the Volstead Act² comes as a somewhat staggering blow to what was thought a basic conception of our governmental system.

The upholding of the War-Time Prohibition Act³ seemed only a well-advertised illustration of the division-of-powers principle. It seemed quite clear that Congress did not overstep the boundaries of its discretion when it decided that the declaration of an armistice did not mean that the war emergency was over, and that preventing the grain of the country from being made into liquor was one way of meeting that emergency. But the court conceded, for the purposes of the case, that the continued validity of the act might depend upon whether or not it appeared to the court that its necessity still existed. The meaning of that concession became evident when three of the four dissenting justices in *Ruppert v. Caffey*⁴ based their dissent on the ground that, in their opinion, when the act was passed the necessity had ended.

Other questions raised in that case present no difficulty. A state statute providing for prohibition without compensation has been upheld on the ground that the restriction of use is not a taking of property;⁵ the restriction in the Volstead Act, moreover, was not permanent, for at the time of the passage of the act there was nothing to show that the war would not end and demobilization be completed before the Eighteenth Amendment took effect. Mr. Justice Brandeis shows that eighteen states have enacted that a malt beverage containing one half of one per cent alcohol is intoxicating as a matter of law; state legislation prohibiting the sale of a beverage which may be innocuous in itself has been upheld,⁶ and, apart from the constitutionality of national prohibition, certainly the court could not say that a method of achieving prohibition reasonable for a state is unreasonable for the nation. As for the constitutionality of national prohibition itself, the court was unanimous in upholding the War-Time Prohibition Act; the least the *Hamilton* case⁷ can stand for is that, if the war emergency exists, prohibition is a constitutional way of meeting it. The real issue in *Ruppert v. Caffey*, then, is clear — is it for the court to decide whether or not the war emergency has passed?⁸

² *Ruppert v. Caffey*, U. S. Sup. Ct. No. 603, October Term, 1919. The armistice with Germany was signed on November 11, 1918. The War-Time Prohibition Act, providing that after June 30, 1918, until the conclusion of the war and the termination of mobilization, the date to be proclaimed by the President, it should be unlawful to sell for beverage purposes any distilled spirits, was approved on November 21, 1918. The Volstead Act, providing that the War-Time Prohibition Act should include any liquors containing in excess of one-half of one per cent alcohol, was enacted on October 28, 1919, over the President's veto.

³ *Hamilton v. Kentucky Distilleries and Warehouse Co.*, *Dryfoos v. Edwards*, U. S. Sup. Ct. Nos. 589 and 602, October Term, 1919.

⁴ *Supra*, note 2.

⁵ *Mugler v. Kansas*, 123 U. S. 623 (1887). The court, in construing the Fourteenth Amendment, has often referred to cases under the Fifth; Mr. Justice Brandeis, in his opinion in the *Hamilton* case, inverts the process.

⁶ *Purity Extract Co. v. Lynch*, 226 U. S. 192 (1912).

⁷ *Supra*, note 3.

⁸ Mr. Justice McReynolds, in his dissenting opinion, says, "The power of Congress recognized in *Hamilton, Collector, etc.* . . . should be restricted to actual necessities consequent upon war. . . . Whether these essentials existed when a measure was enacted or challenge presents a question for the courts."

Of all questions of fact, it would seem that this is peculiarly appropriate for Congress, and peculiarly inappropriate for the court.⁹ Mr. Justice McReynolds, in his dissenting opinion, attempts to draw a distinction between the scope to be allowed Congress in the exercise of an express power and that to be allowed it in the exercise of an implied power. That attempted distinction Mr. Justice Brandeis effectively explodes. In the first place, it is hard to see why the power to pass acts for the carrying on of war is not expressly given to Congress;¹⁰ in the second, assuming the power is only implied, the question of whether the power is there because the Constitution says it exists, or because the court says the Constitution must mean that it exists, is only a preliminary one—given the existence of the power, the court has only one standard for deciding how far it goes.

Whether peace has come is not a question of fact but a question of expediency; not a fact, but the way facts should be met, is involved. With our troops in Siberia and on the Rhine, with the economic life of the country and of the world still profoundly disorganized, the situation at the time *Ruppert v. Caffey* was decided shows the wisdom of making the absence of Presidential proclamation or Congressional resolution conclusive. But the significance of the dissent in *Ruppert v. Caffey* is much more startling. By the narrow margin of a single vote the court has repudiated a doctrine which, applied, might make an error of the justices in prophesying the outcome of an armistice result in irreparable disaster.

“MOVABLE EFFECTS” AND STATUTORY INTERPRETATION. — The American courts have given but little conscious recognition to the competing methods of statutory interpretation which have called forth much controversy on the continent of Europe in recent years.¹ Rarely, indeed, is recognition given to the view that different modes of interpretation may lead to diverse conclusions in the decision of a particular case. Owing, perhaps, to the fact that the courts are unwilling to recognize that judicial interpretation of statutes involves, by and large, a certain amount of judicial law-making, the theory of statutory interpretation in American law has not received the critical and systematic treatment which has been given to other parts of the law.

The case of *Estate of Castle*² is a recent example. Here the court was

⁹ In *Martin v. Mott*, 12 Wheat. (U. S.) 19 (1827), it was held that, under an act of Congress passed under its constitutional power to provide for the calling forth of the militia, giving the President power to call forth the militia in an emergency, not only was the action of the President in calling it out not reviewable, but the avowry was not defective in not stating that the emergency existed.

¹⁰ “The Congress shall have power to declare war . . . to raise and support armies, . . . to provide and maintain a navy . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” Art. I, Section 8, of the Constitution.

¹ See Roscoe Pound, “Enforcement of Law,” 20 GREEN BAG, 401. For more extended discussions of the subject, see GENY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, 2 ed., Paris, 1919; SCIENCE OF LEGAL METHOD (The Modern Legal Philosophy Series, Vol. IX), Boston, 1917, Part I.

² 25 Hawaii, 38 (1919).

called upon to determine whether insurance policies procured by a married man upon his life, payable to his personal representatives, were a part of his "movable effects, in possession or reducible to possession, at the time of his death," under a Hawaiian statute giving the widow dower.³ The case raises several interesting questions:

(1) Were these policies of insurance a part of the husband's "effects"? The court intimates that they were not, in the following language: "The right to the amount due upon the policy does not come into existence until after the death of the insured. The money belongs to the insurer who is charged with the duty created by the contract to pay the beneficiaries. The only thing which the insured can grant is an interest in the contract."⁴ The modern conception of a "right" is that it is a legally protected interest.⁵ That the insured has such an interest in the contract of insurance (at least, where it is payable to his estate or his personal representative) is shown by the fact that the policy may be subjected to the payment of his debts,⁶ and will pass to his assignee in bankruptcy.⁷ While the insured does not ordinarily obtain the face amount of a straight life or limited payment policy, because the amount is not payable until after his death, yet in exceptional cases he may claim the full amount.⁸ It seems difficult to contend, then, that the insured in the principal case did not have a chose in action which was a part of his property⁹ and of his "effects."¹⁰

(2) Was the insurance policy a part of his "movable effects"? The method of statutory interpretation adopted by the court is predominantly "analytical."¹¹ That is, the court treats the statute as an expression of the will of the legislature which created law as of the date of its enactment, and the only function which the court assumes is that of ascertaining by a purely logical process the legislative will so expressed.

³ The statute (REVISED LAWS OF HAWAII, 1915, § 2977) reads: "Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for a term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts."

⁴ 25 Hawaii, 41 (1919).

⁵ See Roscoe Pound, "Legal Rights," INT. JOUR. ETHICS, October, 1915, pp. 92-116; BEALE, A TREATISE ON THE CONFLICT OF LAWS, § 139.

⁶ See RICHARDS, INSURANCE, 3 ed., §§ 71, 72.

⁷ United States Bankruptcy Act of 1898 (30 STAT. AT L. 566), § 70a, 1 FED. STAT. ANN., 2 ed., 1196; *Hiscock v. Mertens*, 205 U. S. 202 (1906). See JOYCE, INSURANCE, 2 ed., § 2341.

⁸ Thus, in *People v. The Knickerbocker Life Insurance Co.*, 40 Hun (N. Y.), 44 (1886), the insurer became insolvent, and the insured being so aged and afflicted as to make it impossible for him to procure other insurance, the court held that the referee properly allowed his claim as for a death claim.

⁹ See Williston, "Can an Insolvent Debtor Insure his Life for the Benefit of his Wife?" 25 AM. L. REV. 185, 187; RICHARDS, note 6, *supra*.

¹⁰ See 1 BOUVIER'S LAW DICTIONARY, Rawle's ed., 975. In *Schondler v. Wace*, 1 Camp. 487, 488 (1808), Lord Ellenborough held that an insurance policy was a part of a bankrupt's "effects" within the meaning of the English bankruptcy statute.

¹¹ See Pound, "Enforcement of Law," 20 GREEN BAG, 404. See JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW, 1909, § 370, for a statement of the fundamental misconception of this method of interpretation. Cf. 2 AUSTIN, JURISPRUDENCE, 4 ed., 1023-1036.

The question is as to the meaning of the word "movable" at that date. The "common law of England, as ascertained by English and American decisions," is adopted as the common law of the Territory of Hawaii.¹² It seems clear that neither "movable" nor "movables" is a "word of art" in Anglo-American common law.¹³ The classic division of property in our law is that into "real" and "personal." Probably this distinction originated historically in the "physical difference between immovable land or tenements and movable articles or chattels" which "was at the bottom of Bracton's test for the classification of actions,"¹⁴ but the modern terms "real" and "personal" do not coincide with "immovable" and "movable," respectively.¹⁵ Is an insurance policy a "movable" in the ordinary sense? It may be noted that the written policy is not a specialty,¹⁶ but is treated merely as evidence of the contract between the insured and the insurer.¹⁷ Hence, the insured's property was not in the written document but in the chose in action of which it was evidence. Several ingenious arguments have been advanced to show that choses in action are to be classed as "movables" in the ordinary sense of the term. Thus, it has been argued that since the right is immediately against a person and since persons are movable and can change their residences at will, the right itself is "movable."¹⁸ A sufficient answer to this reasoning is, that not all persons are "movable" (e. g., municipal corporations), and that, moreover, the immediate object of a right in *personam* is not the person of the obligor.¹⁹ Another line of reasoning is that the object of the right is the will or act of the person obliged,²⁰ and that obligations which involve the doing or not doing of an act are, accordingly, "movable."²¹ In truth, however, the terms "movable" and "immovable" are strictly applicable, in their ordinary meanings, only to corporeal objects, not to abstract incorporeal rights, such as choses in action;²² and from the "analytical" point of view the decision in the principal case is correct.²³

The "historical" method of interpretation of statutes involves an inquiry into the previously existing law, of which the statute is regarded as a continuation and development.²⁴ The original provision as to dower

¹² See 1915 REV. LAWS, § 1: "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States or by the laws of the territory of Hawaii or fixed by Hawaiian judicial precedent or established by Hawaiian usage."

¹³ *Strong v. White*, 19 Conn. 238 (1848).

¹⁴ T. Cyprian Williams, "The Terms Real and Personal in English Law," 4 L. QUART. REV. 394, 407.

¹⁵ See Williams, note 14, *supra*. HOLLAND, JURISPRUDENCE, 10 ed., 100.

¹⁶ See 32 HARV. L. REV. 1, 10; 33 HARV. L. REV. 198, 200.

¹⁷ *Ibid.*

¹⁸ See I JOANNIS VOET, COMM. AD PAND., 1 ed., p. 8, § 21 (1698). The reference is to the fifth edition, 1827.

¹⁹ See I WÄCHTER, PANDEKTEN 285, note (1880).

²⁰ *Ibid.*

²¹ See I PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, 6 ed., No. 2232.

²² I PLANIOL, *supra*, No. 2195; I DERNBURG, PANDEKTEN, 7 ed., § 74.

²³ *Strong v. White*, *supra*, note 13; *Jackson v. Vandersprengle*, 2 Dall. (U. S. Sup. Ct. Pa.) 142 (1792) ("movable" in will; rule of *ejusdem generis* applied). But see *Pennington v. French*, 17 Pick. (Mass.) 404 (1835).

²⁴ See note 11, *supra*.

in Hawaii gave the widow a life estate in one third of the husband's "immovable and fixed property," and an absolute property in one third of his "movable effects."²⁵ This provision was a part of the compilation of laws made by John Ricord, a former member of the bar of New York, who was appointed Attorney-General of the kingdom in 1844.²⁶ Prior to its adoption the islands had no coherent body of law.²⁷ These statutes were translated into the native language by a clergyman, Rev. William Richards.²⁸ While the compilation is evidently based upon the English common law,²⁹ yet the courts were authorized to cite and adopt "the reasonings and analogies of the common law and of the civil law . . . so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom."³⁰ Whether or not the terms "immovable" and "movable"³¹ were consciously borrowed from the civil law³² or were adopted as a result of the exigencies of translation into the native language,³³ the court, adopting the analogy of the civil law, could readily have found that the term "movable effects" in the dower statute had a *technical* meaning which included choses in action. Thus, by the French Civil Code, the division of property into "immovables" (*immeubles*) and "movables" (*meubles*) is exhaustive, and the latter clearly embraces choses in action for a money payment;³⁴ and this classification is recognized in those states of the United States which have adopted codes derived in part from the French Code.³⁵ In nineteenth-century German law, too, the term "movable thing" (*bewegliche Sache*) included a chose in action.³⁶ When, therefore, in 1859 the dower

²⁵ See 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA (1846), § IV, p. 59.

²⁶ See JAMES JACKSON JARVES, HISTORY OF THE HAWAIIAN ISLANDS, 3 ed., 190.

²⁷ See JARVES, *supra*, 199.

²⁸ See 1 STATUTE LAWS, ETC., preface, 6.

²⁹ *Ibid.*, 7.

³⁰ 2 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III (1847), 5. (In Matter of Vida, 1 Haw. 63 (1852), the court refused to be bound by the English common-law definition of "immovable and fixed property" and held that a widow was entitled to dower in a leasehold. The English common law was not adopted until January 1, 1893. See LAWS OF 1892, chap. 57, § 5; Mossman v. Hawaiian Government, 10 Hawaii, 421, 436 (1896).)

³¹ In 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III (1846), § III, p. 58, the husband's marital property rights are defined in terms practically identical with those of the common law, except that "immovable" and "movable" are everywhere substituted for "real" and "personal."

³² American lawyers of the early nineteenth century were perhaps more familiar with the civil law than are those of to-day. See Pound, "The Philosophy of Law in America," 7 ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE, 385, 391.

³³ The terms "immovable" and "movable" may have been more readily translatable into the native language than such artificial terms as "real" and "personal." The conjecture is strengthened by the fact that in an opinion given in 1844, Attorney-General Ricord said: "The third part of the real property goes to the widow as a mere life estate, and the third part of the personal property goes to her absolutely." Matter of Vida, 1 Hawaii, 63, 64 (1852).

³⁴ See FRENCH CIVIL CODE, Arts. 527, 529; 1 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, 6 ed., No. 2249; 1 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 12 ed., Nos. 1271, 1304.

³⁵ See CIVIL CODE OF LOUISIANA, Art. 474 (466); CALIFORNIA CIVIL CODE, §§ 657, 663; NORTH DAKOTA COMPILED LAWS, 1913, §§ 5248, 5253; SOUTH DAKOTA CIVIL CODE, §§ 185, 190. In reference to the three last named, cf. DAVID DUDLEY FIELD'S DRAFT CIVIL CODE FOR NEW YORK, § 162.

³⁶ ARNDTS, LEHRBUCH DER PANDEKTEN, 10 ed., § 50; 1 WINDSCHEID, LEHRBUCH

statute was given its present form by the substitution of common-law terms for "immovable and fixed property,"³⁷ the term "movable effects" continued to have its original meaning; nor was this changed by implication when the Anglo-American common law was adopted in 1893.³⁸

A third method, or rather tendency, in statutory interpretation, called the "equitable," "conceives of the legislative rule as a general guide to the judge, leading him toward the just result,"³⁹ but insists that within wide limits he shall use his discretion in bringing about such a result. Thus, one representative of this school or tendency has argued that in case the judge has to choose between two competing interpretations, he should choose that one which is most in accordance with the "social ideals of the epoch."⁴⁰ One needs no argument to prove that the extension of married women's property rights is an ideal of the modern epoch, and the court in the principal case should therefore have adopted the more extensive interpretation. Or, if one dislikes the flavor of novelty in this suggestion, one can resort to no more modern a person than Lord Coke for the principle that "three things be favored in law: life, liberty and dower"⁴¹—a maxim approved by the Hawaiian court in an earlier case.⁴²

(3) The words "in possession, or reducible to possession," in the statute do not exclude the possibility of its extending to choses in action; rather they are indicative of a survival of the primitive conception of a chose in action as a proprietary right. The early English law treated the action of debt as proprietary; the defendant was conceived of as having in his possession something belonging to the plaintiff which he ought to surrender.⁴³ The abstract idea of a chose in action as a *vinculum juris* comes from the Roman law, and in Blackstone's time had hardly ousted the primitive concept from English legal parlance.⁴⁴ The Hawaiian Court in 1893 defined a chose in action as "a right not reduced to possession."⁴⁵ Here again the analytical method of interpretation seems inferior to the historical.

It is submitted, therefore, that the decision in the principal case is not well grounded.

AGENT'S LIABILITY ON CONTRACTS MADE FOR UNDISCLOSED PRINCIPAL. — It is always easy for an agent in making a simple contract to avoid liability. He may do so by signifying that he is not to be held,¹ or,

DES PANDEKTENRECHTS, 6 ed., § 139, note 5. The terms *res immobiles* and *res mobiles* in the Roman law probably extended only to corporeal things. See the last two citations and PLANIOL, *supra*, No. 2195.

³⁷ See CIVIL CODE OF THE HAWAIIAN ISLANDS, 1859, § 1299.

³⁸ See note 30, *supra*.

³⁹ See Pound, "Enforcement of Law," 20 GREEN BAG, 495.

⁴⁰ See Stammler, "Wesen des Rechts und der Rechtswissenschaft," in SYSTEMATISCHE RECHTSWISSENSCHAFT (1913), 1-65, especially 44-45 and 56-57.

⁴¹ See 2 COKE UPON LITTLETON, c. 11, 124*b*.

⁴² Matter of Vida, 1 Hawaii, 63, 65 (1852).

⁴³ See AMES, LECTURES ON LEGAL HISTORY, 88.

⁴⁴ 2 COMM. 397.

⁴⁵ *In re Kealiiahonui*, 9 Hawaii, 1, 6 (1893), quoting ANDERSON'S LAW DICTIONARY. Similar language is used in 2 BOUVIER'S DICTIONARY 2265 (1914).

¹ See 1 WILLISTON, CONTRACTS, § 285.

if acting within his authority, by merely revealing the fact of agency and the identity of his principal.² Where the principal is disclosed, reliance is ordinarily placed upon his credit alone, and the agent will not be held liable to the other contracting party unless clear proof is shown of an intent to substitute or add³ the agent's liability for or to that of the principal.⁴

A willing agent who conceals the name of his principal or the entire fact of agency while making a contract is likely to find himself later in court answering personally for non-performance and unable to shield himself by showing that he acted within the scope of his employment. Thus, in a recent New York case⁵ the action was on a written contract in which the defendant described himself as "Louis N. Shour, manufacturers' selling agent," and signed "L. N. Shour." The agent acted for an undisclosed principal and was held in damages for nondelivery under the contract. This result reached by the courts in cases of such contracts, written or oral, is substantially the same whether the principal was partly undisclosed⁶ (his identity not revealed) or wholly undisclosed⁷ (fact of agency also concealed⁸). But, on examination, the reasons appear to be different.

² *Owen v. Gooch*, 2 Esp. 567 (1797); *Whitney v. Wyman*, 101 U. S. 392 (1879). See 2 KENT, COMM., Lect. XLI, p. 630.

³ *McCarthy v. Hughes*, 36 R. I. 66, 88 Atl. 984 (1913).

⁴ See *Gerloff v. Carleton*, 121 N. Y. Supp. 338, 339 (1910).

In every case in the light of its circumstances the question must be considered as to where reliance was placed by the contracting party, whether on the agent, or on the principal, or on both. *Graham v. Stamper*, 2 Vern. 146 (1690); *Goodenough v. Thayer*, 132 Mass. 152 (1882). See *Boyd Grain Co. v. Thomas*, 142 S. W. (Ark.) 1150 (1912). See also STORY, AGENCY, § 263.

An exception was early made in England in the case of a foreign principal, in which case the court presumed that, even though the foreign principal was named, reliance was placed upon the credit of the domestic agent. *Die Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313 (1873). See *Thomson v. Davenport*, 9 B. & C. 78, 86 (1829). This rule of presumption has been adopted only to a very slight extent among the United States. *Wawter v. Baker*, 23 Ind. 63 (1864); *McKenzie v. Nevius*, 22 Me. 138 (1842); *Merrick's Estate*, 5 W. & S. (Pa.) 9 (1842). See *Hochster v. Baruch*, 5 Daly (N. Y.), 440 (1874). The rule seems, moreover, to have been discredited in England of late. *Miller, etc. Co. v. Smith & Tyrer*, [1917] 2 K. B. 141. See *Reading, C. J.*, in *Brandt v. Morris*, [1917] 2 K. B. 784, 792.

⁵ *Levy v. Shour*, 178 N. Y. Supp. 227 (1919).

⁶ In the following American cases the agents of partly undisclosed principals were held liable on simple contracts, either oral or in writing: *Cooley v. Ksir* (oral), 105 Ark. 307, 151 S. W. 254 (1912); *McClure v. Central Trust Co.* (written), 165 N. Y. 108, 58 N. E. 777 (1900); *Davenport v. Riley* (oral), 2 McCord (S. C.) 198 (1822). Cf. *State v. Neelly*, 60 Ark. 66, 28 S. W. 800 (1894). Other cases are collected in 1 WILLISTON, CONTRACTS, § 285, note 90; 1 MECHEM, AGENCY, § 1411.

In a recent English case the Court of Appeals refused to hold the agent of a partly disclosed principal on a simple contract in writing. *Miller, etc. Co. v. Smith & Tyrer*, [1917] 2 K. B. 141. See also *Fleet v. Murton* L. R. 7 Q. B. 126, 129 (1871); *Pike v. Ongley*, 18 Q. B. D. 708, 712 (1887).

⁷ *Jones v. Littleedale* (written), 1 N. & P. 677 (1837); *Magee v. Atkinson* (written), 2 M. & W. 440 (1837); *Bartlett v. Raymond* (oral), 139 Mass. 275, 30 N. E. 91 (1885); *Meyer v. Redmond* (written), 205 N. Y. 478, 98 N. E. 906 (1912). See collections of cases in 1 WILLISTON, CONTRACTS, § 284; 1 MECHEM, AGENCY, § 1410.

⁸ Within this group fall cases where the agent in contracting has used no more than such phrases as "A, agent," or "A, broker." These words are regarded as mere *descriptio personae* and their use does not reveal the fact of agency. See 1 MECHEM, AGENCY, §§ 1408, 1410.

As the doctrine of the undisclosed principal has not been applied by the courts to sealed instruments⁹ or to negotiable paper,¹⁰ these two types of contracts will not be considered.

A, within the scope of his authority in fact, makes a simple contract with T, oral or in writing, expressly on behalf of his principal, but he does not name his principal P. In all common-law jurisdictions this partly undisclosed principal may be held,¹¹ and by American courts A is held.¹² However, little attention has been paid to the reason, if any, why both are responsible at T's election¹³ on one contract. Looking at the apparent, expressed intent of the parties, it is clear on principles of contract that the undertaking is between T and P. There is no difficulty in a man contracting with whatever individual, firm, or corporation A is representing, provided he seems to mean that, and by the wording of his contract in this case such appears to be T's intent.¹⁴ P, in our case, has authorized T to do exactly what he did. P's liability can thus be disposed of as contractual. But should A likewise be held at T's election? Unless there are circumstances which show that reliance was placed on A's credit and A thereby became a joint party to the contract, it is believed that there is no need at all for a rule that will hold A on such contracts.¹⁵ This is the English method of approach.¹⁶

But suppose an agent in contracting acts contrary to the exact letter of his principal's instructions, though within the scope of his apparent authority. As the law stands, the principal is liable,¹⁷ and doubtless the agent would be made to answer in contract by those courts in which he would have been held if he had acted within the exact terms of his authority. It is impossible on principles of contract to find an undertaking here between the third party and the principal, for there has been an entire lack of assent on the principal's part. We are forced to look elsewhere for the means of holding the latter; and, as we shall find in the following case of the wholly undisclosed principal, where contract doctrines by themselves fail to justify the result reached, a rule of agency well established by the cases points the way.

⁹ *Borcherling v. Katz*, 37 N. J. Eq. 150 (1883).

¹⁰ *Cragin v. Lovell*, 109 U. S. 194 (1883).

¹¹ *Thomson v. Davenport* (oral), 9 B. & C. 78 (1829); *Pentz v. Stanton* (oral), 10 Wend. (N. Y.) 271 (1833); *Isham v. Burgett* (written), 157 Mass. 546 (1893). Cf. *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805 (1886). See 1 WILLISTON, CONTRACTS, § 287; 2 MECHEM, AGENCY, § 1731.

¹² See note 6, *supra*.

¹³ As to what constitutes an election, see 2 WILLISTON, CONTRACTS, § 289; 2 MECHEM, AGENCY, §§ 1754-1762.

¹⁴ "But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party." Holmes, J., in *Rodliff v. Dallinger*, 141 Mass. 1, 5, 4 N. E. 805, 807 (1886).

¹⁵ The surprisingly small number of actions brought in the courts against agents supports this contention.

Where the agent acts as agent but for an unidentified and irresponsible principal the agent is held anyhow, since it is to be presumed that the agent and the third party intended to make a contract, and as the principal is irresponsible in law the agent is the only available contractor. See 1 MECHEM, AGENCY, § 1389 and cases there cited. Cf. *Lyon v. Williams*, 5 Gray (Mass.), 557 (1856).

¹⁶ See English cases cited in preceding notes.

¹⁷ *Brooks v. Shaw*, 197 Mass. 376, 84 N. E. 110 (1908); *Hubbard v. Tenbrook*, 124 Pa. St. 291, 16 Atl. 817 (1880); *Kinahan v. Parry*, [1910] 2 K. B. 389; *Watteau v. Fenwick* [1893], 1 Q. B. 346. See *Mechem*, 23 HARV. L. REV. 513, 590, 599.

A, within the scope of his actual and apparent authority, makes a contract with T, oral or in writing,¹⁸ in his own name but in fact on behalf of P, his wholly undisclosed principal. On the authorities either A¹⁹ or P²⁰ may be held at T's election. That the principal should be liable is obviously fair. In the commercial world it is just as "plain common-sense"²¹ that an undisclosed principal on discovery should be answerable as that a disclosed principal should be. It is his business back of the contract; his is the benefit and he should pay. Yet the well-settled rule of the cases which binds the wholly undisclosed principal has been proclaimed by eminent judges and writers to be an "anomaly" in our law.²² So it is worth noting how the doctrine has been evolved.

The wholly undisclosed principal was first allowed his action, it is believed, in 1709.²³ A century before that, however, it had been said that the master and servant are "fained to be all one person;"²⁴ and as early as 1305²⁵ the maxim "*qui facit per alium facit per se*" had taken root in our law. Throughout the intervening centuries has grown in its various phases the doctrine of agency by which one not answerable on principles of contract or tort is held, where in fairness he should be held, for the act of another, his agent. This doctrine of identity of principal and agent resolves itself, in the case that concerns us, to this, — that the act of the agent in making the contract will be considered the act of the principal.²⁶ It is therefore the principal's contract, and on it the courts hold him. It would seem that after this step by a court there is no room

¹⁸ In the case of a simple contract in writing made in the agent's name but in fact on behalf of a principal whose name or whose existence is not disclosed in the writing even though known to all parties, oral evidence is not admissible to relieve the agent of liability on the contract. *Jones v. Littledale*, 6 Ad. & El. 486 (1837); *Magee v. Atkinson*, 2 M. & W. 440 (1837); *Higgins v. Senior*, 8 M. & W. 834 (1841); *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28 (1893). But it is received to charge the principal. *Byington v. Simpson*, 134 Mass. 169 (1883). See *Higgins v. Senior*, *supra*, at p. 844; *Jones v. Littledale*, *supra*, at p. 490; *Ford v. Williams*, 21 How. (U. S.) 287, 289 (1858); *Wilson v. Hart*, 7 Taunt. 295, 304 (1817). See also 2 SMITH'S LEADING CASES, 11 ed., p. 403 ff., note to *Thomson v. Davenport*.

¹⁹ See note 7, *supra*.

²⁰ *Kayton v. Barnett* (oral), 116 N. Y. 625 (1889); *Lerned v. Johns* (written), 9 Allen (Mass.), 419 (1864); *Watteau v. Fenwick* (oral), *supra*. See long lists of cases in 1 WILLISTON, CONTRACTS, § 286; 2 MECHEM, AGENCY, § 1731.

²¹ Holmes, 5 HARV. L. REV. 1.

²² Lords Davey and Lindley in *Keighley v. Durant*, [1901] A. C. 240, 256, 261, 262; TIFFANY, AGENCY, 231, 232; HUFFCUT, AGENCY, § 118; Pollock, 3 L. QUART. REV. 359.

Professor Ames treats the rule as an anomaly but would justify the result as a short cut to allowing the third party to reach in the agent's hands the agent's asset in equity of the right to exoneration. Professor Ames was thus led to disagree with the case of *Watteau v. Fenwick*, *supra*. 18 YALE L. J. 443, reprinted in AMES, LECTURES ON LEGAL HISTORY, 453.

Professor Lewis in an interesting article suggests, to avoid the anomaly, the possibility of reaching the wholly undisclosed principal as a tortfeasor, or on quasi contractual grounds. 9 COL. L. REV. 116.

²³ *Garrat v. Cullum*, Buller, N. P. 42 (1709). Cf. *Whitecombe v. Jacob*, 1 Salk. 160 (T. 9 Anne). See Holmes, 5 HARV. L. REV. 1, 3 ff.

²⁴ WEST, SYMBOLEOGRAPHY, Part I, § 3 (1597?-1601).

²⁵ "*Qui per alium facit per se ipsum facere videtur*," Hengham, C. J., in Anonymous Case, Common Pleas, 1304-05, reported in FITZHERBERT'S ABRIDGMENT, *Annuite*, pl. 51.

²⁶ For the historical development of this whole matter see the very learned essay on "Agency" by Mr. Justice Holmes, 4 HARV. L. REV. 345, 5 HARV. L. REV. 1.

on the contract for the agent. As the third party intended to have only one person on the contract with him, unless he will be made to suffer by the adoption of the rule of agency that the principal will be regarded as that person, there seems no reason for giving the third party a windfall which logic and reason do not support.²⁷ But the courts, though there have been but few cases, do hold the agent on the undertaking,²⁸ thus in effect keeping him on the contract as an extra party, for good measure. Theoretically, the agent's liability in the extraordinary situations in which it is to the interest of the third party to pursue him instead of his principal should be in tort, or the result of an estoppel.

There may be some who have difficulty in recognizing that, when all arrangements are made by an agent possessed of an intellect and free will, a contract can be effected between a third party and a partly undisclosed, or even a wholly disclosed principal. For them it is suggested that the line of thought shown here in the case of the wholly undisclosed principal resting upon the doctrine of identity might be utilized to cover all three types of principals. The result then urged would be this, that the moment an agent enters the field of contracts, as when he enters the field of torts, the doctrine of *respondeat superior* accompanies him in his dealings and, by its strength alone, adds the responsibility of another party, the principal, to the responsibility already resting upon the agent in contract or tort.

SILENCE AS ACCEPTANCE IN THE FORMATION OF CONTRACTS. — "He who remains silent certainly does not speak; but nevertheless it is true that he does not deny."¹ The situation expressed by this truism has been the source of considerable confusion in our law of contracts. The decisions are almost as varied as the jurisdictions, and nowhere do we find an adequate analysis of the questions involved or the principles upon which they must be decided. Though acceptance of an offer is usually made by spoken or written words, quite often the offer may call for an act or authorize some other mode of acceptance. As the offeror is the "czar of his offer" such acts, when induced by the offer,² constitute an

²⁷ "The rule is probably the outcome of a kind of common-law equity, powerfully aided and extended by the fiction of the identity of principal and agent and the doctrine of reciprocity or mutuality of contractual obligations," HUFFCUT, AGENCY, § 120, speaking of the liability of the wholly undisclosed principal and of his right to sue.

²⁸ Of the cases in note 7, *supra*, *Jones v. Littledale* and *Magee v. Atkinson* were actions of *assumpsit*; *Bartlett v. Raymond* was "contract for goods sold and delivered." The action in *Meyer v. Redmond* brought under the New York Code is described by Haight, J., in the opening of his opinion at p. 480, as follows: "This action was brought to recover damages which the plaintiff is alleged to have suffered by reason of the failure of the defendants to perform their contract."

¹ Digest, L, 17, 142 (Paulus). See POUND, READINGS IN ROMAN LAW, 2d. ed., 25-26.

² If the act is performed in ignorance of the offer, as where a reward is offered for the capture of a felon, there is no contract. *Ball v. Newton*, 61 Mass. 599 (1851); *Fitch v. Snedaker*, 38 N. Y. 248 (1868); *Williams v. West Chicago St. Ry. Co.*, 191 Ill. 610, 61 N. E. 456 (1901). The English courts have entertained a contrary view. *Williams v. Carwardine*, 4 B & Ad. 621 (1833); *Gibbons v. Proctor*, 64 L. T. (N. S.) 594 (1891). Also, if the offeree expressly states that his acts are not performed in accept-

acceptance.³ In such cases there is something external by which to judge the intent of the parties. But where the mere passive conduct of the offeree is claimed to be an acceptance, the question is more difficult.

In considering this problem, some difficulty has arisen because of the failure of the courts to consider the difference between an offer for a unilateral and one for a bilateral contract and the difference in the situations produced thereby. In the case of the former the courts often have allowed recovery, purportedly on the basis of contract, which can be justified only on some other ground. If A sends goods to B under a contract which is later rescinded by agreement and A tells B that he must pay a certain sum in cash or return the goods, the mere retention of the goods by B⁴ does not constitute a contract.⁵ B has performed neither of the alternatives contained in the offer. True, he may be held liable because of his duty to return the goods, but such liability must be founded upon the conversion of the goods or in quasi contract for their value. Even from an objective standard, the contract does not comply with the terms of the offer. However, where the "acceptance" if effective would create a contract executory on both sides, we have presented the unavoidable question, May silence be construed as acceptance?⁶

The problem may arise with the offeree as the plaintiff. Where the offer authorizes an ambiguous act as acceptance, the performance of such an act with the intent to comply with the offer creates the contract.⁷ It is not sufficient to answer that the proof of intent is more or less within the arbitrary power of the offeree; the offeror must have understood the situation he was creating. Likewise, where the offer expressly or impliedly authorizes silence as acceptance, such passive conduct on the part of the offeree in compliance therewith should form a binding contract. But the courts seem willing to go only to this extent: That if the offeree chooses to make acceptance in the manner thus authorized, the offeror has but himself to blame if the situation is unsatisfactory, but that the offeror cannot by his own act put the offeree in the position

ance of the offer, there is no contract. *Lamson Consolidated Co. v. Weil*, 15 Daly, 498, 8 N. Y. Supp. 336 (1890).

³ *A. B. Dick Co. v. Fuller*, 213 Fed. 98 (1914); *Mooney v. Daily News Co.*, 116 Minn. 212, 133 N. W. 573 (1911); *De Wolf Co. v. Harvey*, 161 Wis. 535, 154 N. W. 688 (1915).

⁴ These were substantially the facts in *Wheeler v. Klaholt*, 178 Mass. 141 (1901). Yet the court held that there was a contract, *Holmes, C. J.*, saying: "A jury would be warranted in finding that a neglect of the duty to return imported an acceptance of the alternative offer to sell" (p. 145). This ignores the stipulation as to cash. It seems clear that the offeree could not, by mere retention of the goods, have effected a contract when the offer was for cash only.

⁵ A distinction must be made between promises "implied in fact" and those "implied by law." Thus, if A does work for B, with the latter's knowledge, but without any express request, and B accepts the work or its results, by pure inference of fact B's conduct is acceptance. But if B does not know of the work, the only basis of liability is in quasi contract upon the promise "implied by law" to prevent unjust enrichment. See *Day v. Caton*, 119 Mass. 513, 516 (1876).

⁶ Here recovery must be had, if at all, upon principles of contracts and may not well be confused with recovery in tort or in quasi contract.

⁷ Where the act is performed without intent to accept the known offer, there is no contract, as is illustrated by the "reward cases." *Hewitt v. Anderson*, 56 Cal. 476 (1880); *Vitty v. Eley*, 51 App. Div. (N. Y.) 44 (1900). Where similar acts are done with intent to accept, there is a contract. *Wentworth v. Day*, 44 Mass. 352 (1841); *Cummings v. Gann*, 52 Pa. St. 484 (1866).

where he must speak or by his silence create a contractual obligation.⁸ It will be noted that the tendency in this view is to make the situation one-sided. In practical effect, there is a contract only if the offeree chooses so to consider it. This puts one partly unfairly at the mercy of the other.

To remedy this injustice the common-law courts say that where the offeror is the plaintiff, silence by the offeree will constitute acceptance if there is a *duty* to speak, as distinguished from the mere right.⁹ But from what does this duty arise? An examination of the cases shows that the word is used, not in the sense of a legal obligation, but, morally, a duty of conscience.¹⁰ The theory seems to be something akin to estoppel. Thus, in a recent case¹¹ the offeree was held to have been under a duty to notify the offeror of his rejection of an offer which he had induced. It seems illogical and extremely unsatisfactory to consider that one can be estopped into a contract except in the general sense that the standard for the legal significance of all conduct is external. Estoppel in any other sense is the last refuge of a mind predetermined by a hard case and should have no place in the formation of contractual obligations.¹²

In the civil law, notwithstanding its usual subjective standard, conduct, which in the ordinary experience of life would be taken as acceptance, so is treated. Silence is acceptance when in honest and practical understanding it would be so considered.¹³ It is submitted that this test is more in accord with our objective standard than the test of moral duty. Further, it can be applied more easily and practicably to the individual situation. It would seem that this view is, in effect, supported by many decisions, though the principle is not clearly stated. Thus, an unbroken line of decisions¹⁴ holds that one who with knowledge re-

⁸ See *Felthouse v. Bindley*, 11 C. B. (N. S.) 869 (1862); *In re Empire Assurance Corp.*, L. R. 6 Ch. 266 (1871); *Prescott v. Jones*, 69 N. H. 305, 41 Atl. 352 (1898).

⁹ *Day v. Caton*, 119 Mass. 513 (1876); *Emery v. Cobbe*, 27 Neb. 621, 43 N. W. 410 (1889); *Robertson v. Tapley*, 48 Mo. App. 239 (1891). "It is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected unless he was subject to a duty of speech, which he neglected to the harm of the other party." *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6, 9, 12 Atl. 607 (1888).

¹⁰ "He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to be silent." *Nicholas v. Austin*, 82 Va. 817, 825, 1 S. E. 132, 137 (1887). "But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak." *Day v. Caton*, 119 Mass. 513, 515 (1876).

¹¹ *Cole-McIntyre Norfleet Co. v. Holloway*, 214 S. W. (Tenn.) 817 (1919). For a statement of this case, see RECENT CASES, *infra*, p. 614.

¹² "There is, indeed, in a case of this kind some reason for urging that the party making the revocation should be estopped to claim that his attempted withdrawal was not binding upon himself; but this could not be done without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act." *Brown, J.*, in *Patrick v. Bowman*, 149 U. S. 411, 424. For a discussion of the analogous question of estoppel in the case of rejection of an offer by mail see *Ashley*, "The Rejection of an Offer," 12 YALE L. J. 419, 423.

¹³ See 1 DERNBURG, PANDEKTEN, § 86 (2); POUND, READINGS IN ROMAN LAW, 2d ed., 26.

¹⁴ *Phila. & C. R. Co. v. Cowell*, 28 Pa. St. 329 (1857); *Foster v. Rockwell*, 104 Mass. 167, 171 (1870); *Heyn v. O'Hagen*, 60 Mich. 150, 157, 26 N. W. 861 (1886); *Coffin v. Planters' Cotton Co.*, 124 Ark. 360, 187 S. W. 309 (1916).

mains silent when another purports to make a contract as his authorized agent is liable on such contract. This seems logical. Theoretically, acceptance is but the expression of a condition of the mind and may be evidenced by passive as well as by active conduct of the offeree. If, under the circumstances, in the ordinary experience of life, the honest and practical understanding of the silence would be that it meant acceptance, there is a contract. If the transaction would be held a contract at the suit of the offeree, the result should be the same if the offeror is the plaintiff. There is no necessity for loose theories of estoppel and moral duty. Judged by the usual objective standard of our law, silence as acceptance presents no difficulty other than that of mode of proof.

WHEN SHOULD *CY-PRÈS* APPLICATION OF CHARITIES BE ALLOWED?¹

—When conditions have so materially changed that it is no longer possible or expedient to devote property to the particular charity for which it was given, the question arises as to the disposal to be made of the property. If a testator, dying before the adoption of the Thirteenth Amendment, had ordered that the income of a trust he created should be used in freeing American slaves, should his heirs have taken the funds on the abolition of American slavery,² or should the property have been devoted to some other charity? We must also consider whether any circumstance, other than impossibility of following the donor's directions, is sufficient to justify a deviation from the original use.

A trust for charitable purposes when once created, like any private trust, is clearly irrevocable.³ Nor does it appear that the creators of trusts or their representatives have any right, by agreement with the trustees or otherwise, to compel a different use of the trust funds or property,⁴ the right to alter differing only in degree from the right to revoke. Neither can those persons who happen to be beneficiaries at a particular time give a valid assent to an alteration of the charitable use, since those beneficiaries, from the very nature of a charitable trust, do not represent all those who are likely to be benefited in the future.⁵ Further, the attorney-general, though he be the general representative of the beneficiaries,⁶ does not seem to be the proper person to change the

¹ The doctrine of *cy-près* discussed here is to be distinguished from the doctrine of *cy-près* with respect to the construction of limitations of future estates. See GRAY, *RULE AGAINST PERPETUITIES*, 3 ed., §§ 643 *et seq.*

² *Jackson v. Phillips*, 14 All. (Mass.) 539 (1867).

³ *St. Joseph's Orphan Society v. Wolpert*, 80 Ky. 86, 89 (1882); *Mott v. Morris*, 249 Mo. 137, 155 S. W. 434 (1913); *Maxcy v. City of Oshkosh*, 144 Wis. 238, 256, 128 N. W. 899, 907 (1910).

⁴ *Christ Church v. Trustees*, 67 Conn. 554, 35 Atl. 552 (1896); *St. Paul's Church v. Attorney-General*, 164 Mass. 188, 41 N. E. 231 (1895). The courts readily infer an intent that the trust should be perpetual. See GRAY, *RULE AGAINST PERPETUITIES*, 3 ed., § 60. See also *College of St. Mary Magdalen v. Attorney-General*, 6 H. L. 189, 205 (1857); *Perin v. Carey*, 24 How. (U. S.) 465, 507 (1860); *Odell v. Odell*, 10 All. (Mass.) 1, 6 (1865).

⁵ The beneficiaries of a charity trust, as a whole, are indefinite. See *Re Lavelle*, [1914] 1 I. R. 194; *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371 (1900); *Re MacDowell's Will*, 217 N. Y. 454, 112 N. E. 177 (1916).

⁶ See *Re Foraker*, [1912] 2 Ch. 488, 492.

uses of a charitable trust.⁷ As to the trustees, mere administrators of the trust, it is clear that they are given no such right.⁸

Whatever power the British parliament may have to change the uses of a charitable trust,⁹ the Dartmouth College case¹⁰ seems to have settled in the United States that any attempt by the legislature solely on its own volition to change the use of a charitable trust would constitute a violation of the contract clause of the Constitution.¹¹ In that case the trustees were averse to the plan proposed by the legislature, but the same result has been reached in some cases even when the trustees assented to the legislative amendments.¹² Other cases, however, have upheld the right of the legislature, when fortified by the sanction of the trustees, to effect a change.¹³ It is submitted that these latter decisions represent the better view, for all parties whose interests may be affected by the change are represented when the trustees and the legislature act together, since the legislature represents the whole people, which includes the beneficiaries and the donors, and the trustees act for themselves. Granting, however, that the legislature should have this power, is it wise to confine this power solely to its will? Legislative action is always delayed and cumbersome, particularly when an exigency demands quick action. Again, the power to change is not granted as a matter of right, but rests purely within the discretion of the law-making body.

We may then inquire whether there rests any basis upon which the

⁷ No decisions have been found that the attorney-general may waive the rights of all subsequent beneficiaries. He is a proper party to file an information for the enforcement of a charity. See *Ironmongers Co. v. Attorney-General*, 2 Beav. 313, 328-332 (1840); *Attorney-General v. Magdalen College*, 18 Beav. 223, 241 (1854). And he is a necessary party to all suits in equity to carry out the provisions of a charitable trust. *Strickland v. Weldon*, 28 Ch. Div. 426 (1883); *Harvard College v. Society for Promoting Theological Education*, 3 Gray (Mass.), 280 (1855).

⁸ *Langdon v. Plymouth Congregational Society*, 12 Conn. 137 (1837); *Winthrop v. Attorney-General*, 128 Mass. 258 (1880); *Lakatong Lodge v. Franklin Board of Education*, 84 N. J. Eq. 112, 116, 92 Atl. 870, 871 (1915). See also *Re Campden Charities*, 18 Ch. Div. 310, 329-330 (1881).

⁹ For a discussion on the powers of the Charity Commissioners and Board of Education (educational charities) see: *Re Campden Charities*, *supra*, 331; *The King v. Board of Education*, [1910] 2 K. B. 165, 179.

¹⁰ 4 Wheat. (U. S.) 518 (1819).

¹¹ The court in that case was of the opinion that the New Hampshire legislature by the proposed changes would violate the contract comprised in the grant of the charter by the British Crown to the trustees, and also, it would seem, the contract between the donors of the property and the trustees. But the case has been of great influence in discussions of the question of the right of the legislature to change charitable trusts. See the cases cited in notes 13 and 14, *infra*.

¹² *State ex rel. Pittman v. Adams*, 44 Mo. 570 (1869). See also *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92 (1890); *Crawford v. Nies*, 220 Mass. 61, 65, 107 N. E. 382, 383 (1914). In *State ex rel. Pittman v. Adams*, *supra*, 582, the court said: "One may do what he will with his own, and if his benevolent instincts lead him to expend his fortune for the good of others, public policy certainly requires that he should be made to feel quite secure in his benevolence. This security he can never feel, if his gift shall be subject to the changing opinions of its future administrators with the frail check only of legislative consent."

¹³ *Visitors and Governors of St. John's College v. Comptroller and Treasurer*, 23 Md. 629 (1865). And see *Re St. Mary's Church*, 7 S. & R. (Pa.) 517 (1821). For the opinions of a committee, relative to a project to apply to the Rhode Island legislature for amendments of the charter of Brown University, see FINAL REPORT OF THE COMMITTEE TO CONSIDER POSSIBLE CHANGES IN THE CHARTER OF BROWN UNIVERSITY, June 16, 1910, pages 36 *et seq.*

judicial power may exercise the right in question. Donors may entirely fail to specify the particular charitable use, and in such case the English chancellor appoints a particular charity to take the gift.¹⁴ Or if a trustee to whose discretion the expenditure for charity has been entrusted dies without indicating the particular use, the chancellor in England and some American courts frame schemes whereby the property may be devoted to charity.¹⁵ In England the chancellor, in the exercise of royal prerogative as representative of the sovereign, under the sign-manual power, did take it upon himself to devote to a valid charity property given for one against public policy. For example, in an early case where a Jew made a testamentary gift for the advancement of the Jewish faith, which was at that time considered against public policy, the chancellor ordered the gift to be devoted to a charity under the patronage of the Church of England.¹⁶ Although the result reached might be far from what a reasonable person could infer to have been desired by the donor, the chancellor felt justified in changing the use, for a gift to charity, it was held, tended to reconcile the soul of the donor with God, and if the gift could not take effect one way, for the sake of the donor's soul it should be made effective in another.¹⁷ No American court has gone so far in attempts to reconcile sinners with Heaven.¹⁸

In the cases given above the chancellor and the courts of equity are not exercising a judicial function. While this power of devoting property to charity merely because the donor has indicated a general desire for such an application is often called the *cy-près* power, it must be distinguished from the true rule of *cy-près*, which is a rule of construction.¹⁹ In construing the instrument whereby the gift is made, the courts often

¹⁴ *Mills v. Farmer*, 1 Meriv. 55 (1815); *Anon.*, Freem. Ch. 261 (1702); *Attorney-General v. Syderfen*, 1 Vern. 224 (1683). And see *Re Pyne*, [1903] 1 Ch. 83.

¹⁵ *Attorney-General v. Berryman*, Dick. 168 (1755); *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839 (1889). *Contra*, *Fontain v. Ravenel*, 17 How. (U. S.) 359 (1854). And no scheme will be framed if discretion of the particular trustee was to have been an essential element of the charity. *Rogers v. Rea*, 98 Ohio 315, 120 N. E. 828 (1918).

¹⁶ *Da Costa v. De Pas*, 1 Amb. 228 (1754); *Cary v. Abbot*, 7 Ves. 490 (1802). Cf. *West v. Shuttleworth*, 2 Mylne & K. 684 (1835). See also 8 HARV. L. REV. 69.

¹⁷ *Attorney-General v. Downing*, Wilms. 1, 32 (1767).

¹⁸ *Robbins v. Hoover*, 50 Colo. 610, 115 Pac. 526 (1911); *Erskine v. Whitehead*, 84 Ind. 357, 364 (1882); *Bridges v. Pleasants*, 39 N. C. 26 (1845). But the legislature may exercise the sign-manual prerogative or authorize the courts to do so. *Mormon Church v. United States*, 136 U. S. 1 (1890).

¹⁹ In *Ironmongers Co. v. Attorney-General*, *supra*, 924, the court said: "We may look at his disposition in the will to see what his charitable inclinations were, and, having ascertained them, then we must provide something corresponding without opinion of these charitable inclinations. You cannot talk of his intention with respect to something he never contemplated. The true mode is to consider what he did and from what he did to collect what were his intentions." In *Jackson v. Phillips*, 14 All. (Mass.) 539, 580, 591 (1867), the court said: "It is . . . well settled . . . that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the Court of Chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible to carry out his general charitable intent. . . . The intention of the testator is the guide."

find that the donor had two intentions, — a general charitable intent and a particular intent to have his gift take effect in a particular mode. If the latter becomes impossible of execution, the courts conclude that the donor intended to have his general intent accomplished even if changes were necessary as to the manner specifically directed. The courts frame a scheme for the execution of this general intent which conforms as closely as possible to the mode prescribed by the donor.²⁰ A more troublesome question is whether the courts should ever allow a departure from the particular mode of disposal on the ground of expediency. The authorities agree that the expediency of an alteration must be so pressing that unless a change is made the general charitable intent will be less efficiently executed than a reasonable donor would have wished. The fact, however, that the court can devise a better plan is not sufficient to warrant an alteration.²¹ In the recent Massachusetts case of *Eliot v. Attwill*²² the charitable trust had been created for the erection near Trinity Church and the care of a statue by St. Gaudens of the late Bishop Brooks. The administrators of the trust sought permission of the court to substitute a statue by Bela Pratt in place of that made by St. Gaudens on the ground that the former piece of sculpture was artistically the superior. The court rightly decided that the better satisfaction of the artistic sense did not warrant a deviation from the original trust. If the inexpediency of the specific manner of disposal must have been apparent to the donor, it seems clear that his directions should be strictly followed.²³ If, however, the inexpediency is due to a change of circumstances after

²⁰ *Re Queen's School, Chester*, [1910] 1 Ch. 796; *Biscoe v. Johnson*, 35 Ch. Div. 460 (1887); *Ironmongers Co. v. Attorney-General*, 10 Cl. & F. 908 (1844); *Lewis v. Gaillard*, 61 Fla. 819, 56 So. 281 (1911); *Mason v. Bloomington Library Ass'n*, 237 Ill. 442, 86 N. E. 1044 (1909); *Kemmerer v. Kemmerer*, 233 Ill. 327, 84 N. E. 256 (1908); *Nichols v. Newark Hospital*, 71 N. J. E. 130, 63 Atl. 621 (1906); *Jackson v. Phillips*, 14 All. (Mass.) 539 (1867); *Read v. Willard Hospital*, 215 Mass. 132, 102 N. E. 95 (1913); *Richardson v. Mullery*, 200 Mass. 247, 86 N. E. 319 (1908); *Amory v. Attorney-General*, 179 Mass. 89, 60 N. E. 391 (1901); *Lynch, Trustee, v. So. Congregational Parish*, 109 Me. 32, 82 Atl. 432 (1912); *Women's Christian Association v. Kansas City*, 147 Mo. 103, 48 S. W. 960 (1898).

It should be noted that formerly the doctrine of *cy-près* did not exist in New York. See *Tilden v. Brown*, 130 N. Y. 29, 45, 28 N. E. 880, 882 (1891). But by the Laws of 1901, p. 751, c. 291, it was provided that if the use becomes impracticable, the trustees may, at least twenty-five years after the gift has been given, apply to the court for instructions. For cases arising in New York since this statute, see: *Sherman v. Richmond Hose Co. No. 2*, 186 App. Div. 417, 175 N. Y. Supp. 8 (1919); *Camp v. Presbyterian Soc.*, 105 Misc. 139, 173 N. Y. Supp. 581 (1918); *Trustees v. Carmody*, 158 App. Div. 738 (1913); *Loch v. Meyer*, 100 N. Y. Supp. 837 (1906).

In Wisconsin the existence of the *cy-près* doctrine seems uncertain. Cf. *McHugh v. McCole*, 97 Wis. 166, 72 N. W. 631 (1897), with *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345 (1900). And obviously the doctrine has no application in jurisdictions which do not allow or accept the doctrine of charitable uses. *Tilden v. Brown*, *supra*.

²¹ *Re Weir Hospital*, [1910] 2 Ch. 124, 140. "But neither the Court of Chancery, nor Board of Charity Commissioners, which has been entrusted by statute, in regard to application of charitable funds . . . is entitled to substitute a different scheme for the scheme which the donor has prescribed in the instrument which creates the charity, merely because a coldly wise intelligence, impervious to the special predilection which inspired his liberality, and untrammelled by his directions, would have dictated a different use of his money." See also *Winthrop v. Attorney-General*, *supra*.

²² 122 N. E. 648 (Mass.). For a statement of the facts, see RECENT CASES, 607 *infra*.

²³ *Re Weir Hospital*, *supra*, *Harvard College v. Attorney-General*, 228 Mass. 396, 117 N. E. 903 (1917).

the donor's death, the courts should presume that he, as a reasonable man, would prefer changes whereby his general intent would be more efficiently executed to strict obedience to his directions.²⁴ Moreover, equity does not enforce bequests subject to freakish conditions or uses, such as a gift to a school with a provision that the descendants of certain persons should be excluded therefrom for one hundred years,²⁵ or a devise of a house on trust with directions that it be bricked up for twenty years.²⁶ In refusing to enforce these, equity prevents needless economic waste. For the same reason equity should not insist upon literal obedience to the terms of a charitable trust when, with advancement in civilization, the wisdom of the particular manner of use prescribed is denied or seriously questioned, or when the execution of the particular intent becomes economically wasteful to a considerable degree.²⁷

DEDUCTION FOR BENEFITS RECEIVED BY THE PURCHASER ON RE-SCISSION FOR BREACH OF WARRANTY. — All courts agree that rescission will not be granted where any benefit that has been received under the contract cannot be restored.¹ The difficulty, however, lies in defining precisely what constitutes a sufficient benefit to bar rescission. In England the most nominal benefit has been held enough,² while the United States courts have given a less literal interpretation to the term.³ If this rule is strictly applied to the law of sales, it may be said that in every case where title has passed the purchaser must have received some

²⁴ In the following *cy-près* application was allowed, although literal obedience was still possible. *Attorney-General v. Haberdashers' Co.*, 3 Russ. 530 (1825); *Tincher v. Arnold*, 147 Fed. 665 (1906); *Norris v. Loomis*, 215 Mass. 344, 102 N. E. 419 (1913); *Ely v. Attorney-General*, 202 Mass. 545, 89 N. E. 166 (1909); *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414 (1899); *St. James's Church v. Wilson*, 82 N. J. Eq. 546, 89 Atl. 519 (1913); *McIntire v. Zanesville*, 17 Ohio, 352 (1848); *Avery v. Home for Orphans*, 228 Pa. 58, 77 Atl. 241 (1910); *Brown v. Meeting Street Baptist Soc.*, 9 R. I. 177 (1869). In the following *cy-près* application was not allowed on account of expediency: *Re Weir Hospital*, *supra*; *Harvard College v. Attorney-General*, *supra*. And in the following the trust was held to fail for lack of a general charitable intent: *Re Parker*, [1918] 1 Ch. 437; *Re Wilson*, [1913] 1 Ch. 314; *Bowden v. Brown*, 200 Mass. 269, 86 N. E. 351 (1908); *Teel v. Bishop of Derry*, 168 Mass. 341, 47 N. E. 422 (1897); *Morristown Trust Co. v. Morristown*, 82 N. J. Eq. 521, 91 Atl. 736 (1913). If the original gift is to take effect only on a condition precedent, which is not performed, the bequest fails wholly. *Re University of London Medical Funds*, [1909] 2 Ch. 1; *Cherry v. Mott*, 1 Mylne & C. 123 (1835).

²⁵ *Nourse v. Merriam*, 8 Cush. (Mass.) 11 (1851).

²⁶ *Brown v. Burdett*, 21 Ch. Div. 667 (1882). See also 65 U. P. LAW REV. 527, 632.

²⁷ An interesting analogy tending to uphold a more liberal use of *cy-près* is found in the fact that equity does not enforce a restrictive covenant if circumstances have so changed from the time the covenant was made that its enforcement would injure both the dominant and servient tenements. *Sayers v. Collyer*, 28 Ch. Div. 103 (1884); *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691 (1892).

¹ WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 342, 343.

² In *Hunt v. Silk*, 5 East 449 (1804), where the plaintiff was not allowed to rescind for the lessor's failure to repair, Lord Ellenborough said, "if the plaintiff might occupy the premises two days beyond the time . . . and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account." *Beed v. Blandford*, 2 Y. & J. 278 (1828).

³ *Ankeny v. Clark*, 148 U. S. 345 (1893); *Campbell Printing Press Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799 (1894). See note 6, *post*.

benefit, however brief his retention of the goods. This rigid application of the rule is one reason why rescission of an executed sale for breach of warranty is not allowed in England,⁴ the purchaser being restricted solely to his action for damages.⁵ In the United States, however, such temporary ownership and use of the property as is necessary to discover the defect is not considered a sufficient benefit to prevent rescission, and a majority of the states now permit this remedy for breach of warranty.⁶ The American law on this point seems to reach the more just result. Such a brief retention of the property seldom confers any actual benefit upon the purchaser, while to compel him to keep defective goods and allow him a recovery only in damages causes real hardship. All jurisdictions allow rescission of an executed sale induced by fraud.⁷ But whether the seller acted in good faith or bad faith, the purchaser is equally injured by the seller's breach.⁸ In view of this hardship upon the purchaser the English courts have sometimes gone to considerable lengths in order to allow rescission in effect by finding that the title never passed.⁹

But a real difficulty arises where the buyer has retained title to the goods for a substantial period of time and has received a substantial benefit before a latent defect could reasonably have been discovered. Even though the buyer has received some benefit, to forbid rescission would still cause considerable hardship. But in this case there is a new factor to be considered. Ordinarily the seller suffers no injustice by rescission, but under these circumstances there is an obvious hardship in requiring him to take back the property without any compensation for its use by the purchaser. Courts following the English doctrine would of course restrict the purchaser to his action for damages,¹⁰ while the American courts, even in this case, would probably allow the buyer to rescind and recover the whole purchase price.¹¹ Neither result accords with principles of justice. A recent Canadian case illustrates a more just solution of the difficulty — a compromise between these two opposite extremes. In *Cushman Motor Works, Ltd. v. Laing*¹² the company sold to the defendant what purported to be a twenty-five horse-power thresh-

⁴ *Street v. Blay*, 2 B. & Ad. 456 (1831). See SALES OF GOODS ACT, § 56 & 57 Vict., Chap. 71, § 11 (1). See also 15 HARV. L. REV. 148. In the case of a warranty a further ground for refusing rescission in England is that the warranty is said to be collateral to the principal contract. But the English law attempts to distinguish a condition from a warranty and, if the title has not passed, allow the purchaser to reject the goods for a breach of the former. "The essential thing . . . is whether the contract is executed or executory." See Samuel Williston, "Rescission for Breach of Warranty," 16 HARV. L. REV. 465.

⁵ See note 4, *supra*.

⁶ *Edson v. Mancebo*, 173 Pac. (Cal.) 484 (1918); *Roper v. Wells*, 182 Iowa 237, 165 N. W. 385 (1917); *Wilson v. Solberg*, 145 Wis. 573, 130 N. W. 472 (1911). For other cases on this point, see WILLISTON ON SALES, § 608, note 90. See UNIFORM SALES ACT, § 69 (1), (d).

⁷ See WILLISTON ON SALES, § 608, 647. See MECHEM ON SALES, § 932.

⁸ "A breach of warranty may be equally injurious to the buyer whether the vendor acted in good faith or bad faith." *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77 (1896).

⁹ *Varley v. Whipp*, [1900] 1 Q. B. 513.

¹⁰ See note 5, *supra*.

¹¹ See note 6, *supra*. In *Roper v. Wells*, *supra*, the purchaser was allowed to return the goods after three years' use without paying any part of the purchase price.

¹² 49 D. L. R. 1 (1919).

ing engine, which after two years' usage was discovered to have an actual capacity of only twenty-two horse-power. Upon suit by the plaintiff to recover the unpaid installments of the purchase price the defendant claimed the right to reject the engine and to recover the installments already paid. It was held that the defendant could recover the payments he had made, less \$204, upon return of the engine to the seller. It was evident that the variation in horse-power could not reasonably have been discovered before. But to avoid the harsh operation of the English rule the court was forced to strain the facts in order to find that the representation was a condition of the sale and that title had never passed. However, on the findings the decision reaches a just result. The interesting feature of the case is that the seller was allowed to retain part of the purchase price. Curiously, however, the Canadian court did not state the basis upon which this deduction was estimated. One possible measure of the deduction might be the deterioration in value of the engine, but there seems to be no authority for this basis of calculation.¹³ Probably the deduction was the estimated value of the benefit conferred upon the purchaser — a value based upon the principles of quasi-contract for unjust enrichment. This seems to be a more logical basis, and there is some authority to support such a deduction.¹⁴ The adoption of the solution offered by the Canadian court would afford a practical and just rule for every case of breach of warranty — the buyer should be allowed to rescind on condition that he compensate the seller for any actual benefit received. In England, if this rule were applied, an attempt to value the purchaser's title for a day would prove the futility of offering such a benefit as a bar to rescission. The adoption in the United States of this solution would remove any possibility of hardship upon the seller.

RECENT CASES

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — WRITTEN CONTRACT FOR UNDISCLOSED PRINCIPAL. — An action was brought against the agent for failure to deliver goods under a written contract in which he described himself as "manufacturers' selling agent" and signed his own name. No other evidence having been offered, the lower court dismissed the complaint. *Held*, that a new trial be granted. *Levy v. Shour*, 178 N. Y. Supp. 227.

For a discussion of the principles involved in this case, see NOTES, p. 591, *supra*.

¹³ In *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275 (1899), the court calculated the deduction either as the value of the benefit received by the purchaser or as the amount of the deterioration in the property.

¹⁴ *Todd v. Leach*, 100 Ga. 227, 28 S. E. 43 (1897); *Wilson v. Burks*, 71 Ga. 862 (1883); *Baston v. Clifford*, 68 Ill. 67 (1873); *Syck v. Hellier*, 140 Ky. 388, 131 S. W. 30 (1910); *Vanatter v. Marquardt*, 134 Mich. 99, 95 N. W. 977 (1903); *Todd v. McLaughlin*, 125 Mich. 268, 84 N. W. 146 (1900); *Johnson v. Northwestern Mutual Life Ins. Co.*, 56 Minn. 365, 59 N. W. 992 (1894); *Kicks v. State Bank of Lisbon*, 12 N. D. 576, 98 N. W. 408 (1904); *Hall v. Butterfield*, 59 N. H. 354 (1879); *Rice v. Butler*, *supra*; *Mason v. Lawing*, 10 Lea. (Tenn.) 264 (1882). See KEENER ON QUASI-CONTRACTS, 305, 306. See WOODWARD ON QUASI-CONTRACTS, § 266. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 343, 344. See Samuel Williston, "Repudiation of Contracts," 14 HARV. L. REV. 326-328. See 13 HARV. L. REV. 410.

ATTORNEYS — RELATION BETWEEN ATTORNEY AND CLIENT — LIABILITY FOR FAILURE TO BRING SUIT WITHIN PERIOD OF LIMITATIONS. — The plaintiff engaged the defendants, a firm of solicitors, to bring an action upon a claim. The obligor offered to settle, and the defendants transmitted the offer to the plaintiff. The latter delayed so long in answering that the defendants thought the offer was accepted. As a result, when suit was finally brought, the period of the Statute of Limitations (six months) had expired, and although the plaintiff contended that the obligor was estopped from setting up the statute, the judgment was against him. He then instituted this action for negligence in the performance of professional duties. The trial court found for the defendants. *Held*, that judgment be entered for the plaintiff. *Fletcher v. Jubb, Booth, & Hollwell*, 54 L. J. 411.

An attorney can be held to no higher standard than that of due care in the performance of legal work intrusted to him. *Godefroy v. Dalton*, 6 Bing. 460; *Malone v. Gerth*, 100 Wis. 166, 75 N. W. 972. But if he falls below that standard he is liable to the client for all damages proximately resulting therefrom to the latter. *Hart v. Frame*, 6 C. & F. 193; *Forrow v. Arnold*, 22 R. I. 305, 47 Atl. 693. Delay in the institution of proceedings, resulting in the barring of the action by the Statute of Limitations, has been held to be actionable negligence. *Hunter v. Caldwell*, 12 Jur. 285; *Oldham v. Sparks*, 28 Tex. 425. However, what constitutes negligence is a question to be decided, within the bounds of reason, by the trier of the facts. *Hunter v. Caldwell, supra*; *Pennington v. Yell*, 11 Ark. 212. Accordingly, it would seem that, in view of the complexity of the circumstances, the decision of the trial court should have been permitted to stand. Furthermore, in the trial against the obligor, the issue as to the Statute of Limitations involved a point of some nicety; and an attorney is not liable for an erroneous judgment on a reasonably doubtful legal question. *Kemp v. Burt*, 1 N. & M. 262; *Citizens' Loan Ass'n. v. Friedley*, 123 Ind. 143, 23 N. E. 1075.

CARRIERS — DUTY TO TRANSPORT AND DELIVER — APPROPRIATION BY CARRIER OF COMMERCIAL SHIPMENT OF COAL TO ITS OWN CONTRACT WITH THE CONSIGNOR. — A coal company, as consignor, in pursuance to its contract with the plaintiff, put coal on the defendant railroad's cars tagged to the plaintiff as consignee. The defendant had previously notified the coal company of its intention to refuse to accept the coal for shipment and to appropriate the coal to its own use under a previous contract between it and the company on which the latter was delinquent. The defendant carried out this intention and the plaintiff brought this action for the conversion of the coal. *Held*, that the defendant is not liable. *Springfield Light, Heat & Power Co. v. Norfolk & W. Ry. Co.* 260 Fed. 254 (Dist. Ct. S. D. Ohio).

The usual rule is that delivery by the shipper to the carrier vests title in the consignee. *Cox v. Andersen*, 194 Mass. 136, 80 N. E. 236; *Glauber Mfg. Co. v. Voter*, 70 N. H. 332, 47 Atl. 612. But this rule presupposes that the delivery is complete and with the consent of the carrier. *Sears, Roebuck & Co. v. Martin*, 145 Ala. 663, 39 So. 722; *Ward v. Taylor*, 56 Ill. 494. The principal case, then, might possibly be supported on the ground that the plaintiff was not the owner of the coal at the time of the alleged conversion and, therefore, not the proper party to sue; although an earlier case seems to indicate the contrary. See *Luhrig Coal Co. v. Jones & Adams Co.*, 141 Fed. 617, 624. The court, however, went further, and asserted a right of self-help by the carriers in cases of necessity to secure the performance of contractual obligations. It has been held that there is no right in a bailee in possession of another's property to appropriate it to an executory contract with the latter. *Atlantic Building Supply Co. v. Vulcanite Portland Cement Co.*, 203 N. Y. 133, 96 N. E. 370; *Newcomb-Buchanan Co. v. Baskett*, 4 Ky. L. Rep. 828. And a public service

company cannot refuse service solely because of past debts due it from the consumer. *Danaher v. Southwestern Telegraph Co.*, 94 Ark. 533, 127 S.W. 963; *Crumley v. Watauga Water Co.*, 99 Tenn. 420, 41 S. W. 1058; *State ex rel. Atwater v. Delaware L. & W. R. Co.*, 48 N. J. L. 55, 2 Atl. 803. If a carrier enjoys any rights of priority, it is only to the use of its own facilities for its own indispensable needs as a carrier. *Louisville & Nashville R. Co. v. Queen City Coal Co.*, 13 Ky. L. Rep. 832. See *Royal Coal & Coke Co. v. Southern Ry. Co.*, 13 Interst. Com. Comm. R. 440. In the instant case the carrier had no contract right to the specific coal and therefore could not get specific performance as to this coal even in equity. The virtual recognition by the court of a right of *angary* in public utilities, it is submitted, is without precedent and should not be followed. Its implications involve all the dangers of self-help. Even the power of eminent domain is no defense to a taking of property by self-help, which is certainly not due process. *City of Clinton v. Franklin*, 119 Ky. 143, 83 S. W. 140.

CARRIERS — DUTY TO TRANSPORT AND DELIVER — REFUSAL TO DELIVER WITHOUT PRODUCTION OF A LOST ORDER BILL OF LADING. — An interstate shipment of perishable goods was routed over connecting carriers, the initial carrier giving a through bill of lading to the shipper's order, notify a third party. The bill of lading was lost or delayed, and upon the arrival of the goods, the shipper's agent requested delivery. The terminal carrier refused to deliver without production of the bill of lading or a bond of indemnity. The initial carrier did not require a bond, and wired the terminal carrier to deliver. Several days elapsed after the receipt of this telegram before the terminal carrier made delivery, and in this period the goods were injured by frost. Suit was brought by the shipper against the initial carrier. The Carmack Amendment to the Interstate Commerce Act subjects the initial carrier to liability for "loss, damage or injury" caused goods by the default of a connecting carrier (34 U. S. STAT. AT L. 595, c. 3591, § 7). *Held*, that the shipper may recover. *McCotter v. Norfolk So. R. Co.*, 100 S. E. 326 (N. C.).

A carrier in delivering goods without requiring the production of an order bill of lading, does so at its peril, and in case of misdelivery is liable for a conversion to the person entitled to receive the goods. *Forbes v. Boston & Albany R. Co.*, 133 Mass. 154; *Ratzer v. Burlington, etc. R. Co.*, 64 Minn. 245, 66 N. W. 988. The same is true though the bill of lading contains a direction to notify a third person. *No. Pa. R. Co. v. Commercial Bank*, 123 U. S. 727; *Atlanta Nat. Bank v. So. R. Co.*, 106 Fed. 623; *Union Stock Yards Co. v. Westcott*, 47 Neb. 300, 66 N. W. 419. Accordingly, the carrier may, for its own protection, make the production of the bill of lading a condition to delivery. *Kaufman v. Seaboard Air Line R.*, 10 Ga. App. 248, 73 S. E. 592. That the consignor, to whose order the bill was taken, requests a delivery, should not alter the situation. See *Schlichting v. Chicago, etc. R. Co.*, 121 Ia. 502, 96 N. W. 959. If the goods are perishable, and the bill of lading has been lost or delayed, the law should not allow an *impasse*. It would seem proper to require that the carrier deliver in such case without receiving the bill of lading, if he is properly indemnified against possible loss by the party requesting delivery. In the principal case recovery was allowed as for a default of the terminal carrier. But as it does not appear that it was offered indemnity, or that it assented to deliver without such protection before the delivery was actually made, it seems questionable whether a breach of duty on the part of the terminal carrier has been made out. It is possible, however, that the initial carrier was itself in default in failing to take and offer to the terminal carrier the indemnity offered by the shipper.

CARRIERS — REGULATION OF RATES — GOOD FAITH IN RECEIVING A REBATE AS A DEFENSE TO THE SHIPPER UNDER THE ELKINS ACT. — The de-

fendant below, a shipper, was indicted, convicted, and fined for accepting rebates and concessions from the Central R. R. of New Jersey in violation of the Elkins Act as amended in 1906 (38 STAT. AT L. 584). The defendant had leased its own road to the railroad company in 1871, the lessee covenanting that all coal shipped from the lessor's mines should be transported at a rate from a certain point, about 14 per cent less than other shippers paid. After the passage of the Elkins Act, with each tariff filed was a footnote reciting that "in compliance with the tenth Covenant of the lease from the Lehigh Coal and Navigation Company . . . a lateral allowance is made out of the herein named rates to the Lehigh Coal and Navigation Company." The shipper offered evidence that he received this allowance, believing that this complied with the law. The court below rejected this evidence of good faith, but certified the question to the Supreme Court. *Held*, that the evidence should have been received. *Lehigh Coal & Navigation Co. v. United States*, U. S. Sup. Ct., October Term, 1919, No. 38.

The essential idea of the Interstate Commerce Acts is that the filed and published rates shall be a definite standard for all. See *New Haven R. R. v. I. C. C.*, 200 U. S. 361, 391, 398; *Lehigh Valley R. R. v. United States*, 243 U. S. 444, 446. Any device whereby one shipper's goods are carried for a lower rate, directly or indirectly, is prohibited. *United States v. Union Stockyards Transit Co.*, 226 U. S. 286; *Armour Packing Co. v. United States*, 209 U. S. 56. Discrimination is unnecessary. *Vandalia R. R. v. United States*, 226 Fed. 713. All prior contracts whereby special rates or favors were given are abrogated by the Act. *Louisville & Nashville R. R. v. Motley*, 219 U. S. 467; *Armour Packing Co. v. United States*, *supra*. Good faith in the sense of absence of an intent to violate the statute is immaterial. *C. St. P. M. & O. Ry. v. United States*, 162 Fed. 835, *certiorari* denied, 212 U. S. 579; *Armour Packing Co. v. United States*, *supra*. But see *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376. The court in the principal case apparently assumes and correctly so, that the filing of this clause of the lease did not satisfy the statute. See *Armour Packing Co. v. United States*, 209 U. S. 56, 81. *Cf. Boston & Maine R. R. v. Hooker*, 233 U. S. 97. It is difficult to regard good faith in believing that one has complied with the statute as of greater weight than good faith in the sense of absence of intent to evade the statute. The carrier involved in the principal case was indicted and convicted on the same facts and a writ of *certiorari* was denied by the Supreme Court. *Central R. R. of New Jersey v. United States*, 229 Fed. 501, *certiorari* denied, 241 U. S. 658. Although the cases are distinguishable on the point of procedure, the Act would seem to place carrier and shipper on the same footing, and what is a crime for one should be a crime for the other unless we adopt the too common theory that a railroad is *a fortiori* a criminal.

CHARITABLE USES AND TRUSTS — *CY-PRÈS* — WHETHER BETTER SATISFACTION OF ARTISTIC SENSE JUSTIFIES A CHANGE. — A church was the trustee of a fund that had been collected to procure and erect a statue of an ecclesiastic near the church. After the statue had been erected, the church sought permission to substitute another statue of the same ecclesiastic, purchased by authority of the court from the surplus funds on the ground that the latter was artistically the superior. *Held*, that the change cannot be allowed. *Eliot v. Attwill*, 122 N. E. 648 (Mass.).

For a discussion of this case, see NOTES, p. 598, *supra*.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: DELEGATION OF POWERS — INITIATIVE AND REFERENDUM IN CANADA. — The legislative assembly of Manitoba passed an act providing that laws might be made and repealed by direct vote of the electors. (6 GEO. V, c. 59, Manitoba.) The act

detracted from the powers of the Lieutenant-Governor as given by the British North America Act (30 VICT., c. 3, §§ 54, 56, 90). Provision is made by § 92 (1) of the latter act: "In each Province, the Legislature may exclusively make laws in relation to . . . the amendment, from time to time . . . of the Constitution of the Province, except as regards the office of Lieutenant-Governor." *Held*, that the Manitoba act is *ultra vires*. *In re the Initiative and Referendum Act*, [1919] A. C. 935 (Privy Council).

In the United States, it would seem that provision for the initiative and referendum may not be made by state statute, due to the constitutional principle that legislative power is delegated by the people to a definite legislative body, which cannot in turn pass its powers on. *Ex parte Wall*, 48 Cal. 279, 315; *C. W. & Z. R. R. v. Clinton County*, 1 Ohio St., 77, 87. See 16 HARV. L. REV. 241. Such legislative device may be secured, however, through constitutional provision or amendment, and does not contravene the Federal Constitution, which guarantees to the states a republican form of government. *Kadderly v. Portland*, 44 Ore. 118, 74 Pac. 710; *State v. Hutchinson*, 93 Kan. 405, 144 Pac. 241. See 24 HARV. L. REV. 141. In Canada the British North America Act constitutes the fundamental law, and is the charter by which the rights of the dominion and provincial governments are to be determined. *Mercer v. Attorney-General*, 5 Can. S. C. 538, 675. Within the limits prescribed by § 92 of that act, the provincial legislatures are deemed to have plenary authority — are not considered mere delegates of the Imperial Parliament. See LEFROY, CANADA'S FEDERAL SYSTEM, 64. Accordingly, they may seek the assistance of subordinate agencies for the enactment of local regulations, such as the licensing and control of taverns. *Hodge v. The Queen*, L. R. 9 A. C. 117, 132. And they may legislate conditionally; for example, by prescribing that an act shall come into operation only on the petition of a majority of electors. *Russell v. The Queen*, L. R. 7 A. C. 829, 835. It has also been suggested that, not being themselves delegates, they may endow a new and different legislative body with their powers. See LEFROY, CONSTITUTIONAL LAW OF CANADA, 69; CANADA'S FEDERAL SYSTEM, 65, 69. This problem was adverted to in the principal case, but no opinion was expressed, the court considering that the case was concluded on the short ground that the provincial legislature had, in taking from the powers of the Lieutenant-Governor, exceeded an express limitation.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: THE WAR POWER — WAR-TIME PROHIBITION. — On November 21, 1918, after the armistice with Germany had been signed, the War-Time Prohibition Act was approved, the act providing that after June 30, 1918, until the conclusion of the war and the termination of demobilization, the date to be proclaimed by the President, it should be unlawful to sell for beverage purposes any distilled spirits. Injunctions were asked against internal revenue collectors to restrain them from taking steps under the act. *Held*, that the act is constitutional. *Hamilton v. Kentucky Distilleries and Warehouse Co.*; *Dryfoos et al. v. Edwards*, U. S. Sup. Ct., Nos. 589 and 602, October Term, 1919.

On October 28, 1919, the Volstead Act was passed over the President's veto, providing that the words "beer, wine, or other intoxicating malt or vinous liquors" in the War-Time Prohibition Act should be construed to mean any liquors which contain in excess of one half of one per cent alcohol. Suit was brought to restrain the enforcement of the act. *Held*, that the act is constitutional. *McReynolds*, Day, Van Devanter, and Clarke, JJ., dissenting. *Ruppert v. Caffey*, U. S. Sup. Ct., No. 603, October Term, 1919.

For a discussion of these cases, see NOTES, p. 585, *supra*.

CONTRACTS — CONSTRUCTION — DURATION OF A CONTRACT IN THE ABSENCE OF A SPECIFIED TIME LIMIT. — The plaintiff, a liquor dealer, in sub-

scribing to stock in the defendant company contracted also to purchase from defendant "10 barrels of beer per week aggregating 520 barrels per year." No time was expressed limiting the duration of this contract. The plaintiff complied with it for three years and then refused to take any more beer, although he remained in the liquor business for four years thereafter. In a suit by the plaintiff for unpaid dividends on his stock the defendant claimed by way of set-off the damages resulting from the plaintiff's alleged breach of contract. *Held*, that the defendant recover. *Nolle v. Mutual Union Brewing Co.*, 108 Atl. 23 (Pa.).

Often the duration of a contract, though not specified, is implied in fact. *Pfiester v. Western Union Tel. Co.*, 282 Ill. 69, 118 N. E. 407. But how construe a contract wherein the parties neither expressly nor by implication of fact indicate their intent concerning its duration? It has been held that such contracts are terminable at will. *Barney v. Indiana Ry. Co.*, 157 Ind. 228, 61 N. E. 194; *Victoria Limestone Co. v. Hinton*, 156 Ky. 674, 161 S. W. 1109. This construction makes the mutual promises illusory and denies the existence of a bilateral contract, which is contrary to the business intent of parties entering into a bargain. The law, moreover, favors a construction of validity where not incompatible with the language of the contract. See *Hobbs v. McLean*, 117 U. S. 567, 576. We find also authority for the proposition that such contracts are presumptively of perpetual duration. *McKell v. Chesapeake R. Co.*, 175 Fed. 321. See *Western Union Tel. Co. v. Penna. Co.*, 129 Fed. 849, 861. In the vast majority of cases, however, perpetual obligation is not contemplated by the parties. A construction, moreover, imposing such obligation should, where possible, be avoided. *Texas & Pac. Ry. Co. v. City of Marshall*, 136 U. S. 393; *Maccalum Printing Co. v. Graphite Compendius Co.*, 150 Mo. App. 383, 130 S. W. 836. A third construction taken makes such contracts terminable by either party upon reasonable notice. *Stonega Coke & Coal Co. v. L. & N. Ry. Co.*, 106 Va. 223, 55 S. E. 551; *Dunham v. Orange Lumber Co.*, 59 Tex. Civ. App. 268, 125 S. W. 89. While this view probably accords with custom in contracts of employment, it is doubtful whether in contracts involving subject matter of a different type "terminable upon reasonable notice" is much better than "terminable at will." It is suggested that these contracts should be construed to extend over a reasonable period of time, considering the subject matter of the agreement and the situation of the parties at the time it was made. The principal case, while purporting to imply in fact a limit of time from the surrounding circumstances, is in effect adopting the last construction. *Cf. Suburban R. T. St. Ry. Co. v. Monongahela Natural Gas Co.*, 230 Pa. 109, 79 Atl. 252.

CRIMINAL LAW — SELF-DEFENSE — BURDEN OF PROOF. — Under a plea of not guilty to an indictment charging murder, the defendant admitted killing the deceased but claimed self-defense as a justification. *Held*, that the burden of establishing self-defense by a preponderance of evidence was upon the accused. *State v. Mellow*, 107 Atl. 871 (R. I.).

It is a general principle of criminal law that the burden of proving the guilt of a defendant beyond a reasonable doubt is always upon the prosecution. The absence of affirmative pleadings in criminal actions and the policy of the law to use the utmost precaution to prevent injustice to the accused seem to be the reasons for this doctrine. See 4 WIGMORE, EVIDENCE, § 2512. When self-defense is the justification offered under a plea of not guilty to a charge of murder, the great weight of authority follows the above rule. *People v. Downs*, 123 N. Y. 558, 25 N. E. 988; *Gravelly v. State*, 38 Neb. 871, 57 N. W. 751. On the other hand, a few courts go to the other extreme by holding that self-defense must be established by the defendant to the satisfaction of the jury. *State v. Byers*, 100 N. C. 512, 6 S. E. 420; *State v. Honey*, 65 Atl. 764. (Del.)

Such a rule clearly imposes too great a burden, even though it generally has been limited to cases where the killing was caused by a deadly weapon. But the advisability of adhering to the rule followed by the majority of courts seems questionable in an age when punishment for crime has lost its barbarous character and when unnecessary technicalities are being dispensed with to promote justice. Consequently, an increasing number of jurisdictions have adopted the doctrine of the principal case, that self-defense must be proved by the accused by a preponderance of the evidence. *State v. Dillard*, 59 W. Va. 197, 53 S. E. 117; *Szalkai v. State*, 96 Ohio St. 36, 117 N. E. 12. Since justification by way of self-defense admits the criminal act, such a rule places no unreasonable burden upon the accused. See 17 HARV. L. REV. 208.

DAMAGES — BREACH OF WARRANTY — DUTY OF BUYER TO MITIGATE CONSEQUENTIAL DAMAGES. — The plaintiff sold to the defendant a refrigerator. In an action for the balance of the purchase price the defendant counterclaimed for losses due to the failure of the refrigerator to fulfill the purpose for which it was bought and introduced evidence that he had lost thereby a large quantity of flowers. A verdict was rendered in favor of the defendant for affirmative damages. *Held*, that the evidence supported this verdict. *Buchbinder Bros. v. Valke*, 173 N. W. 947 (N. D.).

For breach of warranty a vendee is permitted to recover consequential damages resulting from the defect, in addition to the difference between the actual and the represented value of the goods. *Black v. Elliott*, 1 F. & F. 595; *French v. Vining*, 102 Mass. 132; *New York Mining Co. v. Fraser*, 130 U. S. 611. See WILLISTON ON SALES, § 614. The courts, indeed, have gone very far in cases of warranties in considering such indirect consequences as recoverable. See 33 HARV. L. REV. 475. But it is a general principle of the law of damages that the injured party cannot recover for losses which he could have avoided by the use of reasonable care. *Texas & Pacific Ry. Co. v. White*, 101 Fed. 928; *Gordon v. Brewster*, 7 Wis. 355. This principle applies to damages for breach of warranty. *Razey v. J. B. Colt Co.*, 106 N. Y. App. Div. 103, 94 N. Y. Supp. 59; *Mark v. Williams Cooperage Co.*, 204 Mo. 242, 103 S. W. 20. In the principal case the jury allowed a recovery for the loss of flowers repeatedly placed in the defective refrigerator furnished by the vendor. The minority of the court contended that evidence of these losses should not have been admitted. But it is for the jury to decide whether any of the damages claimed could have been avoided with due care. *Tatro v. Brower*, 118 Mich. 615, 77 N. W. 274; *Ford v. Illinois Refrigerating Construction Co.*, 40 Ill. App. 222. On this ground the case can be supported.

EQUITY — DAMAGES — AWARD OF SEPARATE DAMAGES TO EACH OF SEVERAL PLAINTIFFS IN ADDITION TO AN INJUNCTION. — The defendant's factory constituted a nuisance to neighboring landowners who joined in a bill in equity asking for an injunction and damages for the injuries suffered by each. The Georgia Code provides that where there is one common right to be established by several persons against another, they may join in the same suit against him. (GA. CIVIL CODE, § 5419.) A demurrer on the ground of misjoinder of parties and causes of action was interposed by the defendant. *Held*, that the demurrer be overruled. *Knox v. Reese*, 100 S. E. 371 (Ga.).

That equity has jurisdiction to enjoin a permanent or continuing nuisance is clear. *Wood v. Conway Corporation*, [1914] 2 Ch. 47; *Nixon v. Bolling*, 145 Ala. 277, 40 So. 210. Where several landowners are injured by the same nuisance, equity permits them, for the purpose of avoiding a multiplicity of suits, to join in a single bill for an injunction. *Cadigan v. Brown*, 120 Mass. 493; *Murray v. Hay*, 1 Barb. Ch. (N. Y.) 59. *Contra*, *Fogg v. Nevada C. O. Ry. Co.*, 20 Nev. 429, 23 Pac. 840. See 1 POMEROY, EQ. JUR., 4 ed., § 257. It is axiomatic that

once having acquired jurisdiction for any purpose, equity may proceed and give complete relief; and accordingly, where a plaintiff establishes his right to a permanent injunction, he may also have damages for past injury. *Keppel v. Lehigh Coal, etc. Co.*, 200 Pa. 649, 50 Atl. 302. See 1 AMES, CASES, EQUITY, 571, note; 1 POMEROY, EQ. JUR., 4 ed., § 237. If damages had been the only remedy sought by the several plaintiffs, the jurisdiction of equity having been invoked solely to avoid a multiplicity of suits, it could be said, with some show of reason, that there was a misjoinder of causes of action, — that each action should be tried separately at law. *Ducktown Sulphur, etc. Co. v. Fain*, 109 Tenn. 56, 70 S. W. 813; *Tribette v. Ill. Cent. R. Co.*, 70 Miss. 182, 12 So. 32; *Roanoke Guano Co. v. Saunders*, 173 Ala. 347, 56 So. 108. But *cf. Guess v. Stone, etc. Ry. Co.*, 67 Ga. 215. But where several plaintiffs are permitted to join in a bill for an injunction, there seems to be no reason why equity should not award separate damages to each, as was done in the principal case. However, owing to the former hostility of the common-law courts, equity has, in such a situation, been reluctant to give the characteristically legal remedy of money damages even by way of complete relief. *Murray v. Hay, supra*; *City of Paducah v. Allen*, 49 S. W. (Ky.) 343. See *Grant v. Schmidt*, 22 Minn. 1, 3. The tendency represented by the principal case is a wholesome one.

HOMICIDE — INTENT — INTENT TO KILL NOT COINCIDENT WITH KILLING. — The accused struck his wife with a plowshare. Under a reasonable belief that she was dead, the accused then hung her to a beam, so that it might be thought she had committed suicide. In fact, it was the hanging and not the blow that caused death. *Held*, that the accused is not guilty of murder under the Indian Penal Code. *In re Palani Goundan*, 26 Madras L. T. R. 68.

At common law it is clear that the hanging, of itself, would not make the accused guilty of murder because of the lack of a guilty mind, since the intent of an accused must depend on the facts as he reasonably conceived them. *Shorter v. People*, 2 Comst. (N. Y.) 193; *Reg. v. Rose*, 15 Cox. c.c. 540. And obviously the blow with the plowshare, of itself, would not make him guilty even of manslaughter, because it did not kill. But the hanging having been done to conceal the effects of the blow, the two may be regarded as so bound together that whatever intent the accused had at the time he struck the blow may be attributed to him at the time of the hanging. *Cf. Jackson v. Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091. Similarly, in other parts of the criminal law it is held that the intent outlives the technical completion of the offense. On such reasoning, if A and B commit a burglary in common, and during their escape A kills a man, B is guilty of murder. *Starks v. State*, 137 Ala. 9, 34 So. 687. Under this view of the principal case the defendant would, at common law, be guilty of either murder or manslaughter, according to the nature of the original assault. *Jackson v. Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091. But this theory is not wholly satisfactory, because it operates as a conclusive presumption that at the time of his second act the accused had a certain mental state, which it is quite possible he did not have in fact. It is suggested that the difficulty could be overcome by regarding the blow as the proximate cause of death, either on the ground that it directly caused the hanging, or that the hanging was done in an attempt to lessen the danger (to himself) caused by the blow. Both these theories are equally applicable under the Indian Code. See INDIAN PENAL CODE, § 299.

ILLEGAL CONTRACTS — CONTRACT AGAINST PUBLIC POLICY — MEMBER OF LEGISLATURE ACTING AS LAND AGENT BETWEEN VENDOR AND GOVERNMENT. — The defendant employed the plaintiff's agent, A, who was a member of the legislative assembly, to sell the defendant's land to the government. The legislative assembly had the power to advise the board and minister charged

with the purchase of the land and finally to review their decision. The plaintiff sues on the contract for commission for the services rendered by him, through A, to the defendant in the sale of the land. *Held*, that the contract is unenforceable. *Horne v. Barber*, [1919] V. L. R. 553.

In determining whether a contract is against public policy, its tendency, and not simply the actual result, must be considered. *McMullen v. Hoffman*, 174 U. S. 639; *Sherman v. Burton*, 165 Mich. 293, 130 N. W. 667; *Egerton v. Brownlow*, 4 H. L. C. 1. Agreements between private individuals to influence official action by such methods as may substitute private interests in the place of the public welfare are illegal. *Hare v. Phaup*, 23 Okla. 575, 101 Pac. 1050; *Drake v. Lauer*, 93 N. Y. App. Div. 86, 86 N. Y. Supp. 986. The same is true of contracts to agitate popular action for individual motives. *Metz v. Woodward-Brown Realty Co.*, 182 N. Y. App. Div. 60, 169 N. Y. Supp. 299; *Stirtan v. Blethen*, 79 Wash. 10, 139 Pac. 618. By the better view, contracts for a contingent commission upon a sale to the government do not come within this principle because the corrupting tendency is too remote. *Kerr v. American Pneumatic Service Co.*, 188 Mass. 27, 73 N. E. 857. But public officers are barred from having a private interest in the contracts of the body which they represent. *Goodyear v. Brown*, 155 Pa. St. 514, 26 Atl. 665; *Brennan v. Purington Paving Brick Co.*, 171 Ill. App. 276. There can be no doubt that the instant case falls within the category of agreements tending to create a corrupting conflict between public duty and private interest and is therefore against public policy. *Cf. Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261; *Montefiore v. Mendenay Motor Components Co.*, [1918] 2 K. B. 241.

INSANE PERSONS — CONFLICTING ADJUDICATIONS AS TO COMPETENCY — CAPACITY TO SUE. — In an action for libel in a federal court in New York, the defendant set up a New York court's adjudication of the plaintiff's insanity to establish his incapacity to sue. The New York code provides that a party may prosecute or defend a civil action "unless he has been judicially declared to be incompetent to manage his affairs" (CODE CIV. PRO., § 55). The plaintiff proved a subsequent adjudication of sanity by a foreign court of competent jurisdiction. *Held*, that he was competent to sue. *Chaloner v. New York Evening Post Co.*, 260 Fed. 335 (Dist. Ct. S. D. N. Y.).

Since the competency of parties is a procedural question, the federal courts should generally follow local practice on this subject. See U. S. REV. STAT., § 914. Accordingly, the plaintiff could not have successfully maintained, in a federal court in New York, any action for the return of his property held by a New York commission, or for the commission's refusal to deliver it, which he could not have maintained in the state court. *Gasquet v. Fenner*, 247 U. S. 16; *Chaloner v. Sherman*, 242 U. S. 455. The foreign adjudication could have no extraterritorial effect on the plaintiff's right to property in the custody of the New York commission. *Gasquet v. Fenner*, *supra*. Here, however, the plaintiff simply offered the foreign adjudication to establish his competency, under the New York code, to appear in court as a party plaintiff. As the court said, the gist of the code disqualification is the mental incapacity, not the fact of a judicial declaration of insanity. An adjudication of lunacy is not conclusive as to subsequent mental capacity. *Lucas v. Parsons*, 23 Ga. 267. See BUSWELL, LAW OF INSANITY, §§ 194 *et seq.* Accordingly, in passing on the plaintiff's capacity to sue, controlling weight was correctly given to the most recent determination of that issue.

INTERNATIONAL LAW — WAR — COSTS AND DAMAGES REFUSED FOR A VIOLATION OF NEUTRALITY WHERE UNINTENTIONAL. — A British war vessel captured a German merchant ship inside Norwegian territorial waters. The British commander had miscalculated his position and had no intention to

violate Norwegian neutrality. In a suit to condemn the captured vessel the Norwegian government comes in as claimant. *Held*, that restitution will be decreed, but without damages or costs. *The Düsseldorf*, [1919] P. 245.

When a vessel is illegally captured on the high seas the owner is entitled to restitution with costs and damages. *The Glen*, Blatchf. Prize Cas. 375; *The Fortuna*, 2 Jur. (N. S.) 71. See *The Zamora*, [1916] 2 A. C. 77, 111. But costs and damages are not awarded where there was probable cause for the seizure. *The Sir William Peel*, 5 Wall. (U. S.) 517; *The City of Mexico*, 25 Fed. 924. However, there is no real analogy between the case of wrongful seizure on the high seas and that of the capture of a lawful prize in neutral waters. In the latter case the owners of the captured vessel have no claim against the capturing power; the sole controversy is between the sovereign whose neutrality has been violated and the power which has violated it. *The Lilla*, 2 Sprague, 177; *The Adela*, 6 Wall. (U. S.) 266; *The Bangor*, [1916] P. 181. See 7 MOORE, DIG. INT. L., § 1211. The neutral power is entitled to restitution of the vessel and, if the infringement of its neutrality was deliberate, to damages and costs. *The Anna*, 5 Rob. 373. See 7 MOORE, DIG. INT. L., § 1334. But where the infringement was not intentional, the little authority which exists holds, with the principal case, that damages will not be awarded. *The Twee Gebroeders*, 3 Rob. 162. See *The Vrow Anna Catharina*, 5 Rob. 15, 16. The reason for this is not clear. The common law does not excuse trespass because of mistake. *Mishler Lumber Co. v. Craig*, 112 Mo. App. 454, 87 S. W. 41; *Chase v. Clearfield Lumber Co.*, 209 Pa. St. 422, 58 Atl. 813. The rule is the same in the civil law and the Roman law. See GRUEBER, *THE LEX AQUILA*, 222; 2 BAUDRY LACANTINERIE, *PRÉCIS DE DROIT CIVIL*, 948. There seems to be no valid reason for a different principle for international trespasses. But see 1 OPPENHEIM, INT. L., § 154; 2 *Id.*, § 359. And the civil law writers do not recognize the principle laid down here by the British Admiralty Court. See 1 HAUTEFEUILLE, *DES DROITS ET DES DEVOIRS DES NATIONS NEUTRES*, 294.

NUISANCE — WHAT CONSTITUTES NUISANCE — UNDERTAKING ESTABLISHMENT AND MORGUE IN RESIDENTIAL DISTRICT. — The defendants opened an undertaking establishment and morgue in a dwelling-house in a purely residential district. The plaintiffs, neighboring property owners, seek to enjoin the maintenance of the business, alleging it to be a nuisance. The Washington Code defines a nuisance as anything such "as to essentially interfere with the comfortable enjoyment of life and property." (1915 REM. CODE, § 943.) *Held*, that the injunction be granted. *Goodrich v. Starrett*, 184 Pac. 220 (Wash.).

An undertaking business is clearly not a nuisance *per se*. *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490. See *Densmore v. Evergreen Camp*, 61 Wash. 230, 231, 112 Pac. 255. However, many establishments which are not nuisances *per se* have been held to be such when conducted in residential districts so as to interfere with the comfort, well-being, and property-rights of the inhabitants of the vicinity. *Barth v. Psychopathic Hospital*, 196 Mich. 642, 163 N. W. 62 (insane asylum); *Rodenhausen v. Craven*, 141 Pa. 546, 21 Atl. 774 (carpet-cleaning shop); *Whitney v. Bartholomew*, 21 Conn. 213 (carriage factory). The law will not take cognizance of slight discomforts and inconveniences. *Lane v. Concord*, 70 N. H. 485; 49 Atl. 687; *Rhodes v. Dunbar*, 57 Pa. 274. But if the annoyance is such as to make the adjoining property less habitable by persons of ordinary sensibilities — thus decreasing the value of the property — it will be considered a nuisance. *Lowe v. Prospect Hill Cemetery*, 58 Neb. 94, 78 N. W. 488; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900. Accordingly, an undertaking establishment and morgue with the morose succession of funeral services, the hysteria of mourners, the dread of contagion, and the annoyance from escaping deodorants, may well be held a nuisance, if

located in a purely residential section of the community. *Saier v. Joy*, 198 Mich. 295, 164 N. W. 507; *Densmore v. Evergreen Camp*, *supra*. But in any case it is a question of applying the legal standard to the particular facts of a given situation — to attempt to lay down detailed rules as to what constitutes a nuisance is futile.

OFFER AND ACCEPTANCE — BILATERAL CONTRACTS — SILENCE AS ACCEPTANCE. — A traveling salesman of the defendant corporation solicited and obtained from the plaintiff an order for certain goods which he was authorized to handle. The plaintiff heard nothing more from the order until he directed shipment two months later under the terms of the order. The defendant denied any acceptance. In the meanwhile the price of the goods had advanced considerably. The plaintiff sued for breach of contract and obtained judgment in the lower court. *Held*, that the judgment be affirmed. *Cole-McIntyre-Norfleet Co. v. Holloway*, 214 S. W. 817 (Tenn.).

For a discussion of this case, see NOTES, *supra*, p. 595.

PLEADING — PARTIES — JOINDER — COUNTERCLAIM AGAINST THE PLAINTIFF AND ANOTHER IN THE ALTERNATIVE UNDER THE JUDICATURE ACT. — In an action for goods sold and delivered, the defendant pleaded as a defense and also by way of counterclaim that the plaintiff committed a breach of an implied term of the contract by failing to pack the goods in such a way as to make them reasonably fit to stand the ordinary risks of transit by rail. In the counterclaim he joined the carrier, alleging against it that the goods had been so treated in transit that on their arrival they were in bad condition. The Judicature Act of 1873 provides that the courts shall have power to grant to any defendant "all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not . . . as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose" (36 & 37 VICT., c. 66, § 24 (3)). From an order refusing to strike out the counterclaim in so far as it joined the carrier as a defendant to the counterclaim, the plaintiff appealed. *Held*, that the order be affirmed. *Smith v. Buskell*, [1919] 2 K. B. 362.

Under the Judicature Act of 1873 and the Supreme Court of Judicature Rules, Order XVI, Rule 7, a plaintiff who is in doubt as to the person from whom he is entitled to redress may join two or more defendants in order to determine which, if any, of the defendants is liable. See 31 HARV. L. REV. 1034. The principal case is the converse of this proposition. A defendant who wishes to set up a counterclaim to a cause of action growing out of the same transaction as that which formed the basis of the plaintiff's cause of action, but who is in doubt as to whether the plaintiff or some third party connected with the transaction is liable, may join both as defendants to the counterclaim. See SUPREME COURT OF JUDICATURE RULES, Order XIX, Rule 3; Order XXI, Rules 11 and 15. The result is a logical development from the previous English decisions, and the case shows a willingness by the English Court effectively to carry out the purpose of procedural reform legislation; an attitude which has unfortunately not always been taken by the American courts.

PUBLIC SERVICE COMPANIES — FRANCHISES — PROTECTION OF PUBLIC SERVICE ENTERPRISES FROM COMPETITION. — A metropolitan street railway system had been established, under a general law providing that no two railroad corporations should occupy and use the same street or track for a greater distance than five blocks, and the franchise contained a similar provision. It sought an injunction to prevent the city from constructing a parallel system in

the same streets and on either side of its tracks as authorized by a subsequent statute and an amendment to the state constitution. *Held*, that the injunction be denied. *United Railroads of San Francisco v. City and County of San Francisco*, 249 U. S. 517.

For a discussion of the principles involved in this case see NOTES, p. 576, *supra*.

RESCISSION — FOR BREACH OF WARRANTY — DEDUCTION FOR BENEFITS RECEIVED. The plaintiff sold a twenty-five horse-power threshing engine to the defendant. In answer to the defendant's constant complaints that the engine was unsatisfactory, the plaintiff promised to make it work properly. After the defendant had used it for two years, the plaintiff sued for the balance of the purchase price. The defendant then discovered that the engine had a capacity of only twenty-two horse-power and claimed the right to reject the engine and recover the purchase installments already paid. The lower court found that the representation that the engine had a capacity of twenty-five horse-power was a condition of the sale and that its failure to develop twenty-five horse-power was the main cause of the engine's unsatisfactory performance. *Held*, that the defendant should recover the purchase installments less \$204. *Cushman Motor Works, Ltd. v. Laing*, 49 D. L. R. 1 (Alberta).

For a discussion of this case, see NOTES, p. 602, *supra*.

STATUTES — INTERPRETATION — EFFECT OF PRIOR REPEALED STATUTES COVERING THE SAME SUBJECT. — The defendant was indicted under a statute making it unlawful to deal in liquors, which were defined as "all combinations . . . of drinks and drinkable liquids which are intoxicating; and any liquor which contains more than 2½% of proof spirits shall be conclusively deemed to be intoxicating." (1916 6 GEO. V, c. 112, § 20). On proof that the defendant had in his possession a patent medicine which contained more than 2½% of alcohol but which also contained drugs the effect of which would be to cause sickness before intoxication, he was convicted. *Held*, that the conviction be quashed. *Rex v. Dojacek*, 49 D. L. R. 36 (Manitoba).

In determining the uncertain meaning of the word "drinkable," the court looked at the words and policy of a prior repealed statute which provided for local option. See 1913 REV. STAT. MANITOBA, c. 117. Statutes *in pari materia*, though passed at different times and not referring to one another, are generally considered as one system of legislation and are construed as explanatory one of another. See *Rex v. Loxdale*, 1 Burt. 445, 447; *Goldsmiths Co. v. Wyatt*, 76 L. J. K. B. (N. S.) 166, 169. See also ENDLICH, INTERPRETATION OF STATUTES, § 43. This is done upon the assumption that the legislature is familiar with the earlier statutes and by use of similar words has intended to preserve similar meanings. See *Town of Benton v. Willis*, 76 Ark. 443, 446, 88 S. W. 1000, 1001; *Robbins v. Omnibus R. Co.* 32 Cal. 472, 474. Earlier acts may explain the meaning of later acts. *Patterson v. Winn*, 11 Wheat. 380; *Powers v. Shepard*, 48 N. Y. 540. And *vice versa*, later acts may explain earlier ones. *Clark v. Powell*, 4 B. & Ad. 846; *United States v. Freeman*, 3 How. 556. Even repealed or expired statutes should be taken into consideration as instructive steps in the development of the existing system of legislation upon a subject. *Ex parte Crow Dog*, 109 U. S. 556; *Wellsburg, etc. R. Co. v. Panhandle Traction Co.*, 56 W. Va. 18, 48 S. E. 746. The instant case is an illustration of a situation where the application of this principle is helpful.

STATUTES — INTERPRETATION — INSURANCE POLICY AS "MOVABLE EFFECTS" WITHIN STATUTORY DOWER. — A married man procured policies of insurance upon his life, payable to his executors, administrators, or assigns. By the provisions of the policy he reserved the power of changing the bene-

ficiary at any time provided the policy was not then assigned. Under a statute which provides that the widow "shall be entitled, by way of dower, to an absolute property in the one-third part of all" her husband's "movable effects in possession, or reducible to possession, at the time of his death," his widow claimed one-third of the proceeds of these policies in the hands of the executors. (1915 HAWAIIAN REV. LAWS, § 2977.) *Held*, that the widow is not entitled to any part of the insurance money. *Estate of Castle*, 25 Hawaii, 38.

For a discussion of principles involved, see NOTES, page 587.

SUNDAY LAWS — SUNDAY CONTRACTS — EFFECT OF DELIVERY ON WEEK-DAY. — A contract for the sale of hay was entered into on Sunday in violation of a statute making such contracts void (1909, REV. STAT. SASKATCHEWAN, c. 69, § 3). On a week day following, the vendor delivered the hay and the purchaser accepted and resold it. The vendor brought an action upon the contract made on Sunday, and in the alternative, for goods sold and delivered. *Held*, that on amending his pleading the plaintiff is entitled to have the defendant account for the proceeds of the resale. *Schuman v. Drab*, 49 D. L. R. 59 (Saskatchewan).

Since the Sunday contract was declared void by statute, obviously no rights could be enforced under it. Nor would it be validated by a subsequent recognition on a week day. *Riddle v. Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Day v. McAllister*, 15 Gray (Mass.) 433; *Acme, etc. Adv. Co. v. Van Derbeck*, 127 Mich. 341, 86 N. W. 786. Had the property been delivered on Sunday, title would not have passed to the purchaser and the vendor would be entitled to maintain replevin or trover. *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. 906; *Adams v. Gay*, 19 Vt. 358. See 15 HARV. L. REV. 317. But the parties can make a new valid contract on a subsequent week day with reference to the same subject matter. *Sherry v. Madler*, 123 Wis. 621, 101 N. W. 1095. This new contract may be implied from dealings with each other's property. *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787. In the principal case, the subsequent delivery and acceptance is strong evidence of such a new contract. *Bradley v. Rea*, 103 Mass. 188. Hence it would seem that the vendor should have recovered on the count for goods sold and delivered. The majority, however, seem to proceed on the theory that there is no evidence of a new contract, and hence that title remained in the vendor and that the sale by the purchaser was a conversion. This view of the facts seems hardly tenable.

TAXATION — CONSTITUTIONAL RESTRICTIONS — RATE IN INHERITANCE TAXATION AFFECTED BY FOREIGN PROPERTY. — The inheritance tax laws of New Jersey provide that the transfer of property within the State owned by non-resident decedents shall be taxed (1909 N. J. LAWS, 325 as amended 1914 N. J. LAWS, 267). This tax is computed by figuring the amount which would be due if the decedent had died a resident with all his property within the State. The actual tax bears the same ratio to this hypothetical tax as the property within the state bears to all the property. A graduated tax is imposed on larger bequests in the case of resident decedents. Suits were brought to test the constitutionality of this method by the representatives of wealthy non-resident decedents. *Held*, that the tax is valid. *Maxwell v. Bugbee*, U. S. Sup. Ct., Nos. 43 and 238, October, term, 1919.

For a discussion of this case, see NOTES, p. 582, *supra*.

TAXATION — PARTICULAR FORMS OF TAXATION — INHERITANCE TAX — WHEN A NONRESIDENT IS DOING BUSINESS — WITHIN THE STATE. — Section 220 (1) of the New York Tax Law provides for a succession tax "... when the transfer is by will or intestate law of capital invested in business in the state

by a nonresident of the state doing business in the state. . . ." The decedent, Hetty Green, had large sums of money invested in the state, the income of which she usually reinvested there. She also changed her investments from time to time, but she maintained no office for the transaction of business, nor did she hold herself out to the public as a banker, broker, or money-lender. *Held*, that the capital so invested is not taxable under this statute. *In re Green's Estate*, 178 N. Y. Supp. 353.

A prior decision by the same court that this capital was not "invested in business in the state by a nonresident doing business in the state," was reversed and remitted for further inquiry. *In re Green*, 184 App. Div. 376, 171 N. Y. Supp. 494. In a scholarly opinion, the court has now reasserted its earlier decision. As it points out, the term, "business" is not a word of art at common law. See *The People ex rel. The Parker Mills v. The Commissioners of Taxes*, 23 N. Y. 242; *Smith v. Anderson*, 15 Ch. Div. 247, 258. Its indefinite connotation in ordinary speech, it likewise points out, and there seems to be no judicial interpretation of any similar statute. The judicial definition of the term in construing statutes dealing with corporations is not binding, since what is not business when done by an individual may often be business when done by a corporation organized for that express purpose. See *Smith v. Anderson*, *supra*, 260. Statutes imposing liability upon married women for contracts made while engaged in business are more nearly *in pari materia* with the statute in the principal case, and these were strictly construed. *Nash v. Mitchell*, 71 N. Y. 199; *Wheeler v. Raymond*, 130 Mass. 247. It is a well-recognized rule that statutes imposing taxes are to be construed strictly against the state. *Crocker v. Malley*, 249 U. S. 223; *Gould v. Gould*, 245 U. S. 151. In this situation, the decision displays a spirit of fairness and moderation which unfortunately has not always characterized the policy of legislatures and of courts in dealing with the taxation of estates of nonresidents.

UNFAIR COMPETITION — TRADE-MARKS AND TRADE NAMES — "PASSING OFF" BY USE OF DESCRIPTIVE WORD HAVING SECONDARY MEANING. — The plaintiff while holding patents for brushes set in rubber used exclusively the word "Rubberset" in selling its brushes. At the expiration of the patent, the defendant commenced manufacturing brushes set in rubber and sold them with the word "Rubberset" stamped on the handle together with its name as manufacturer. The plaintiff seeks to enjoin the use of the word. The court found that there was no likelihood of purchasers being misled as to whose goods they were buying. *Held*, that the injunction be denied. *Rubberset Co. v. Boeckh Bros. Co., Ltd.*, 49 D. L. R. 13.

The plaintiff could have no property in a word which was purely descriptive of his product. *In re Swan & Finch Co.*, 259 Fed. 990 and 991. See 12 HARV. L. REV. 349. Nevertheless, words which are merely descriptive often come to have for the purchasing public a secondary meaning, as indicating the product of a particular manufacturer. In such cases, the manufacturer will be, to a certain extent, protected against the use of the word by others. *Shaver v. Heller & Merz Co.*, 108 Fed. 821; *Saalfeld Pub. Co. v. Merriam Co.*, 238 Fed. 1. But the protection is given, not to any property in the word, but to the good will of the business. *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608; *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 Fed. 299. Consequently, for relief to be granted, it is essential that the public be deceived or confused as to whose wares are being purchased. *Goodyear's India Rubber Glove Manufacturing Company v. Goodyear Rubber Co.*, 128 U. S. 598; *M. Werk Co. v. Grosberg*, 250 Fed. 968. Conceding the facts found by the court in the principal case, its result follows. But it may well be doubted whether there was not in fact sufficient danger of deception to justify a court in at least compelling the defendants to take active precaution against possible confusion. Cf. *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 Fed. 960.

WASTE — TENANT FOR LIFE WITHOUT IMPEACHMENT OF WASTE — WHETHER ENTITLED TO PROCEEDS FROM ORNAMENTAL TREES TAKEN BY THE GOVERNMENT. — The will of the testator created a tenancy for life without impeachment of waste with successive remainders over. During the possession of the life tenant ornamental trees were cut and taken by the government. Compensation was duly made to the trustees under the will. The trustees took out a summons to ascertain the disposition of the money. *Held*, that it be invested and held to the uses created by the will. *Gage v. Piggot*, 53 Ir. L. T. R. 33.

A tenant for life, although at law unimpeachable for waste, will nevertheless be restrained in equity from doing certain acts, termed equitable waste. *Vane v. Lord Barnard*, 2 Vernon, 738; *Dincombe v. Felt*, 81 Mich. 332, 45 N. W. 1004. See *Chapman v. Epperson*, 101 Ill. App. 161. To permit the retention of profits arising from an act which would have been enjoined would plainly be bad policy. Accordingly it has been held that an account of the proceeds of such acts will be ordered. *Garth v. Colton*, 1 Ves. 523; *Ormonde v. Kynersley*, 5 Madd. 369. A reversioner under such circumstances has even been allowed an action on the case, with the aid of a statute substituting such action for the old action of waste. *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205. But see *Belt v. Simkins*, 113 Ga. 894, 39 S. E. 430. It would seem, then, that a tenant for life unimpeachable for waste is in equity treated, in regard to equitable waste, much the same as is an ordinary life tenant in regard to legal waste. See *Honywood v. Honynwood*, L. R. 18 Eq. 306, 311. The proceeds of timber which the former kind of tenant might rightfully cut may be retained by him. *Baker v. Sebright*, 13 Ch. Div. 179. If, on the other hand, he cuts timber which could not have been cut rightfully by such a tenant, — *e. g.* ornamental timber — he cannot have the proceeds. *Honywood v. Honynwood*, *supra*. The fact that a trespasser cuts the timber will not change his rights. See *Anonymous*, Moseley, 237. The result will be the same where the timber is felled by accident or an act of nature. *In re Harrison's Trusts*, 28 Ch. Div. 220. The principal case logically applies the same rules when the government cuts under eminent domain. The same interests should be allowed to enjoy the proceeds as would have enjoyed the property; the accident of the cutting should not increase or lessen their interests. *In re Harrison's Trusts*, *supra*. The case is not without importance in the United States, since a tenant in fee subject to an executory devise is treated like a tenant for life without impeachment of waste. *Turner v. Wright*, 2 De G. F. & J. 234; *Gannon v. Peterson*, 193 Ill. 372, 62 N. E. 210.

WILLS — CONSTRUCTION — DISINHERITANCE BY EXPRESS CLAUSE IN WILL WITHOUT AFFIRMATIVE DISPOSITION TO ANOTHER. — A will which purported to dispose of all of the testator's property contained the provision that the testator's brother A "is not to have one penny" for a stated reason. Upon the lapse of certain legacies, A claimed as next of kin his share of the residue thus resulting. *Held*, that he may take. *Muir v. Archdall*, 19 New South Wales, 10.

According to the orthodox view, an heir cannot be excluded from taking by descent his share of the testator's estate except by a complete disposition of the property by will. *Duff v. Duff's Ex'rs*, 146 Ky. 201, 142 S. W. 242; *Bradford v. Leake*, 124 Tenn. 312, 137 S. W. 96. See 1 JARMAN ON WILLS, 6 ed., 335. This rule proceeds upon the theory that the testamentary power is merely a matter of statutory privilege, in derogation of the common law of descent and inheritance; and accordingly, that the testator has no greater powers than those granted by the statutes, which in terms refer only to affirmative disposition. See *Coffman v. Coffman*, 85 Va. 459, 461. See PAGE ON WILLS, § 21. This doctrine is applied where there is a partial intestacy due to the invalidity of testamentary dispositions. *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606. Another view holds that the exclusion of one or several of the next of kin might be regarded as a gift to the others by implication, so that in final effect

there is a complete disposition by will. *Bund v. Green*, 12 Ch. Div. 819; *Tabor v. McIntire*, 79 Ky. 505. This doctrine seeks to give effect to the testator's intention and yet to keep within the reason of the older view. As a matter of construction, the result of the orthodox view might often, but not always, be reached by the aid of the presumption in favor of heirs as in the principal case. *In re Plumly's Estate*, 261 Pa. 432, 104 Atl. 670; *Young v. Quimby*, 98 Me. 167, 56 Atl. 656. On principle, the intention of the testator should control, and negative words alone, even without positive disposition to others, should be sufficient to disinherit.

WILLS — CONSTRUCTION — WHETHER LIFE ESTATE OR ABSOLUTE INTEREST. — The testator by his will gave to his wife "all my property, both real and personal, to have hold and use for her own exclusive benefit so long as she shall live." The executor was the only other person named in the will. *Held*, that the widow took an absolute interest in the entire estate. *Gilham v. Walker*, 12 Queens. L. R. 9.

The absence of words of inheritance in a devise will not deprive the devisee of the fee in realty where it appears from the whole will that the testator intended to give an absolute interest. *Richardson v. Noyes*, 2 Mass. 56; *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505. In the principal case, however, the language would seem to point clearly to a life estate only. It is true that words similar in tenor to "have hold and use for her own exclusive benefit" have been construed to give the devisee power to alienate the fee. *McGuire v. Gallagher*, 99 Me. 334, 59 Atl. 445; *Newlin v. Phillips*, 60 Atl. 1068 (D. Ch.). But a life estate in real property, expressly created, will not — at least, if remaindermen are designated — be enhanced into a fee by reason of its being accompanied by an unlimited power of disposition. *Archer v. Palmer*, 112 Ark. 527, 167 S. W. 99; *Mansfield v. Shelton*, 67 Conn. 390, 35 Atl. 271. To distinguish these cases the fact may be seized upon that, in the principal case, no remaindermen are named; for such a designation is an indication of the intention of the testator that the first named beneficiary is to have a life estate only. *Hill v. Gianelli*, 221 Ill. 286, 77 N. E. 458. Nevertheless, the decision seems to be an extreme illustration of a mechanical application of rules of construction.

WILLS — HOLOGRAPHIC WILLS — REQUISITES — SUFFICIENCY OF DATE. — An illiterate man, ill in a hospital, wrote a letter on one sheet of paper, which, after corrections in spelling, was as follows: "4/12/17th. Maude Clarke, 351 Jones Street, Brookfield Apartments, Apartment 201. I leave her \$2,000.00 more, cash money. Jack Olssen. My mind is clear. I leave her all. Jack Olssen." The lower court admitted this letter to probate as a holographic will, holding the dating to be sufficient, and admitting the testimony of the nurse that the entire letter was written at one time, and that it was delivered to the proponent for safe-keeping. *Held*, that there was no error. *In re Olssen's Estate*, 184 Pac. 22 (Cal.).

In a number of states a testamentary paper wholly in the handwriting of the testator is a valid will without attesting and subscribing witnesses. But the statutes controlling such holographic wills vary in some particulars. California, Louisiana, and Montana specifically require that such a will be dated. See 1915 CIV. CODE OF CAL., § 1277; 1912 REV. CIV. CODE OF LOUISIANA, Art. 1588; 1907 REV. CODE OF MONTANA, § 4727. To constitute a good date, the month, the day of the month, and the year must be given. *In re Anthony's Estate*, 21 Cal. App. 157, 131 Pac. 96; *Heffner v. Heffner*, 48 La. Ann. 1088, 20 So. 281. Place of execution is not part of the date. *Stead v. Curtis*, 191 Fed. 529. Usual abbreviations are valid. *In re Chevallier's Estate*, 159 Cal. 161, 113 Pac. 130; *In re Lakemeyer's Estate*, 135 Cal. 28, 66 Pac. 961. But the omission

of any element of the date is fatal. *In re Carpenter's Estate*, 172 Cal. 268, 156 Pac. 464; *In re Vance's Estate*, 174 Cal. 122, 162 Pac. 103; *In re Noyes' Estate*, 40 Mont. 190, 105 Pac. 1017. If the paper is properly dated it is presumed that the entire paper was written at one time. *La Grave v. Merle*, 5 La. Ann. 278. Arkansas and Tennessee require that the handwriting of the testator be proved by three disinterested witnesses in the case of realty and two such witnesses in the case of personalty. *Ex parte Hoerner*, 27 Ark. 443. See 1917 SHANNON'S CODE OF TENN., § 3896. The usual provision as to the custody of a holographic will is that it must be found among the valuable papers or effects of the testator or lodged in the hands of any person for safe-keeping. The beneficiary is a proper person. *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15. While it would be desirable not to allow holographic wills, or, if they are sanctioned, to have strict requirements rigidly enforced, the instant decision is correct under the California statute.

WILLS — PROBATE — DOCUMENTS AND STATEMENTS ENTITLED TO PROBATE. — A soldier *in expeditione* indicated, in a letter to his wife, certain desired changes in his will, and requested that his solicitor be notified to alter it accordingly. The soldier died before such alteration was made. The letter was offered as a testamentary document. *Held, obiter*, that it should be received. *Godman v. Godman*, [1919] 2 P. 229, 233.

The authorities are divided as to the legal effect of such expressions indicating the decedent's desires as to the *post-mortem* disposition of his property. Testamentary character has been ascribed to them when the deceased had no opportunity to execute the contemplated will or codicil. *Gathward v. Knee*, [1902] P. 99; *McBride v. McBride*, 26 Gratt. (Va.) 476, 482. Such expressions, though unaccompanied by an intent that they should themselves operate in a testamentary capacity, have been admitted to probate. *Toebbe v. Williams*, 80 Ky. 661; *Alston v. Davis*, 118 N. C. 202, 24 S. E. 15; *Mulligan v. Leonard*, 46 Iowa, 692. But other courts require that the statement indicate, on its face, an intent to make it a testamentary one. *Waller v. Waller*, 1 Gratt. (Va.) 454. Similarly, a death-bed utterance was considered inadmissible, as a nuncupative will, since the deceased was unaware that the law ascribed a testamentary character to it. See *Campbell v. Campbell*, 21 Mich. 438, 444. Probate has also been refused to memoranda of intended testamentary dispositions, despite full compliance with the formal requisites of a will. *Hocker v. Hocker*, 4 Gratt. (Va.) 277; *Popple v. Cunison*, 1 Add. Eccl. 377. But see *contra*, *Haberfield v. Browning*, 4 Ves. Jr. 200, note; *Scott's Estate*, 29 W. N. C. (Pa.) 176; *Barwick v. Mullings*, 2 Hagg. Eccl. 225. But the true test seems to be neither the legal knowledge of the deceased nor the technical wording of his statement, but the one formulated in the principal case: whether, assuming the necessary formalities to have been observed, his statement was a deliberately expressed desire as to the disposition of his property to be made after his death. Authority, as well as principle, supports the adoption of this test. *Bartholomew v. Henley*, 3 Phillim. Eccl. 317; *Barney v. Hayes*, 11 Mont. 571, 29 Pac. 282; *Dalrymple v. Campbell*, [1919] P. 7.

WILLS — REVOCATION — DEPENDENT RELATIVE REVOCATION BY WRITTEN INSTRUMENT. — The testator made a valid will. Later he obtained a printed form on which these words among others appeared: "I hereby revoke all wills by me at any time heretofore made." This blank form was duly executed, and afterwards various devises and bequests were written in by the testator, but the complete instrument was never executed. *Held*, that the revoking clause is inoperative. *In Goods of Irvine*, 53 Ir. L. T. R. 143.

An act of revocation, such as tearing or canceling, will not be given effect where the intent to revoke was dependent upon some later event which never

happened, as, for example, the valid execution of a new will. *Dixon v. Solicitor to the Treasury*, [1905] P. 42; *Strong's Appeal*, 79 Conn. 123, 63 Atl. 1089. The courts treat revocations by duly executed written instruments in the same manner. *Rudy v. Ulrich*, 69 Pa. St. 177; *Security Co. v. Snow*, 70 Conn. 288, 39 Atl. 153. Unless the condition is expressed in the writing this would seem contrary to the parol evidence rule. See *Sewell v. Slingluff*, 57 Md. 537, 549. If, however, in these cases we regard the courts as setting aside a legally binding revocation upon the equitable ground of mistake, this objection is removed, but we meet the difficulty that the mistake is usually one of law, and often, as in the principal case, a mistake as to the future, not as to existing facts. The American authorities, while treating such written revocations as conditional, lay down the rule that, if the condition fail because of something "*dehors* the will," the revocation is binding. *In re Melville's Estate*, 245 Pa. St. 318, 91 Atl. 679; *Blakeman v. Sears*, 74 Conn. 516, 51 Atl. 517. But in the principal case we find the condition fails because of faulty execution — something within the will so far as anything can be — and so the revocation would be ineffective. The principal case may be supported upon the further ground that the evidence may not have shown that the testator when he signed had the necessary *animus revocandi*. See *Estate of Meyer*, [1908] P. 353; *Fleming v. Morrison*, 187 Mass. 120, 72 N. E. 499.

BOOK REVIEWS

JUSTICE AND THE POOR. A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal their Position before the Law, with Particular Reference to Legal Aid Work in the United States. By Reginald Heber Smith of the Boston Bar. Published for the Carnegie Foundation for the Advancement of Teaching. New York: Charles Scribner's Sons. 1919. pp. xiv. 271.

In this admirable study of the administration of justice as it affects the poor in the American city of to-day we have an example of the change which has taken place in legal thought in the present generation. Not long ago judges were telling us that an act requiring employees to be paid in cash and not in orders on a company store placed the laborer "under guardianship," were asking "what right has the legislature to *assume* that one class has the need of protection against another,"¹ and were asserting that "*theoretically* there is among our citizens no inferior class."² To-day we are not satisfied with abstract conceptions divorced from actual life, but seek to know the concrete situation and the actual effect of legal rules and of the judicial administration of justice thereon. Where a generation ago we were content to consider only the abstract justice of the abstract rule, to-day we insist on looking at law functionally. The question is what it does and how it does it, and abstract justice of the content is no longer held to justify concrete injustice in application. Lawyers more than others still cling to the nineteenth-century faith in the abstract justice of an abstract universal rule as something valuable in itself, be the results what they may. Hence it is significant of a happy change in the professional attitude that lawyers have given us the two concrete studies which must be consulted above everything else by

¹ *State v. Haun*, 61 Kan. 146, 161.

² *People v. Frorer*, 141 Ill. 171, 186-187.

sociologists, social workers, and legislators, as well as by members of the bar who are desirous of improving the law.

Mr. Smith's book will stand with Judge Parry's "Law and the Poor" as an indispensable storehouse of information and source of ideas. But valuable as the book will be for the nonlegal worker in the social sciences, we are here concerned primarily with its interest for the lawyer. And at the outset we may insist on the service of this presentation of facts from actual first-hand knowledge in shaking the ideas which lawyers have been wont to acquire through habits of abstract and *a priori* handling of legal questions. Their habit of working out all possible difficulties by a purely logical process and their instinctive fear that something may open a way for magisterial caprice have made them much more critical of projects for improving the law than fertile in devising them. Hence the most effective agencies of to-day have been worked out by laymen and are in the hands of administrative rather than judicial officers. Such institutions as workmen's compensation, in which the statute is framed with reference to the end rather than solely with reference to the abstract justice of the means, may teach us much as to matters which are still within the domain of judicial justice.

Few have been in a position to perceive how our legal system has been functioning and is functioning with respect to the interests of the mass of inhabitants of the modern city. Lawyers need to realize that in practice the poor are not merely without protection but the law itself is often made an affirmative engine for oppressing them (p. 9). Lay writers, who have been too prone to interpret such phenomena in terms of class interest or class struggle, need to learn that this is not at all a matter of rich and poor or employer and employee; that the state of our procedure and the organization of our tribunals enable the poor to despoil one another and permit "the shrewd immigrant of a few years' residence to defraud his recently arrived countrymen" (p. 9). Much of the prejudice which the mere title of the book has excited in some quarters may be dispelled when it is found that Mr. Smith's investigation discloses, not a class line, but the old-time cleavage between the honest and the dishonest. The poor man is the prey of a host of petty swindlers who have learned how to use the powerful and ruthless weapon of the law. Businesses exist and flourish by unscrupulous exploiting of a state of things in which "as against the poor the law can be violated with impunity because redress is beyond their reach" (p. 10). Lawyers should reflect seriously upon this use of law as an engine of extortion and upon the failure of abstractly good laws because learned and well-intentioned courts have too often made remedial legislation nugatory by construing statutes in the light of the common law instead of in the light of the social situation back of them (p. 14). Here again the vice of our purely abstract methods becomes apparent. As we habitually argue such questions in court, the tribunal is seldom in a position to appreciate the concrete social facts to which a statute is to be applied. Many good lawyers even now take offense at the means devised by Mr. Justice Brandeis while at the bar to assist the courts in reaching a juster and more complete view of what may have been before the legislator and behind his enactment. But Mr. Smith furnishes us convincing evidence that the classical criterion of old law, mischief and remedy, when applied only from the materials furnished by

the law books and the general knowledge of the bench, will not suffice to make such legislation meet the ends of the law, and adds weight to the demand for better means of informing courts upon the extra-legal conditions material to application and interpretation of law, which has often been urged on general grounds.³

On other points, on which lawyers have been better informed of recent years, Mr. Smith reinforces by direct evidence conclusions which are coming to be held more or less widely in the profession. The inadequacy of our procedural and administrative machinery to make the substantive law effective for its purpose has come to be generally conceded. It is gratifying to note that much if not all that agitators have attributed to class dominance, that exponents of the economic interpretation have traced to the self-interest of employers, and that the muckrakers of a decade ago explained by bad men in judicial office and sinister influences behind courts, is shown to be merely the result of a rapid development of urban conditions to which the judicial organization and legal procedure of the rural pioneer America of the past was unsuited (p. 15). But the lawyer's duty goes beyond recognition of the one proposition and establishment of the other. He is called to discover and to employ the scientific means of improvement which only the expert may know or may wield effectively. And in this connection the thoughtful lawyer may learn much from this book. For one thing, it is full of illustrations of the need of a ministry of justice (or its equivalent) in our several commonwealths. When all legislative improvement in law is left to the private initiative of those who have a pecuniary interest in change, we may expect that while automobile associations and hotel keepers' associations and lumber dealers' associations give our judiciary committees plenty of occupation, it will be no one's business to make legal procedure a better engine of justice in the general run of cases, and that practical justice to the bulk of our urban population will be overlooked. If it were some one's business to study the matter and to push with authority the measures which his study showed to be needed, many parts of the substantive law could be made more efficacious exactly as has been done in the case of workmen's compensation (p. 87). Must we wait for the inevitable demagogue to organize a political agitation in support of some crude but specious remedy, and then confine ourselves to criticism?⁴

Even the common law suffers from a system or want of system wherein questions of grave import to large numbers of people are only brought before our highest courts when some individual litigant is able and willing to spend time and money in an appeal, and are either left undecided or are presented and argued by one side only. This situation has been too common under workmen's compensation acts, where only the insurance companies could afford to go to the ultimate court of appeal (pp. 27, 207) and in connection with the law of landlord and tenant as applied to tenancies at will or periodical tenancies in cities (p. 207). As Mr. Smith says

³ Willcox, "The Need of Social Statistics as an Aid to the Courts," 47 *AMER. L. REV.* 259; Palfrey, "The Constitution and the Courts," 26 *HARV. L. REV.* 507. See also 2 GENY, *MÉTHODE D'INTERPRÉTATION*, 2 ed., § 185.

⁴ On this matter reference should be made to the report of the English *MACHINERY OF GOVERNMENT COMMITTEE*, 63-78 (1918). Lord Haldane was chairman of this committee. See also 1 NASH, *LIFE OF LORD WESTBURY*, 191 ff.

justly, "one-sided argument inevitably tends to produce a one-sided construction of the law" (p. 27).

Again, we should reflect seriously upon the increasing use of the criminal law to secure the interests of the poor in cases that ought to be dealt with on the civil side of our courts (pp. 75, 97). It is a reproach to the administration of justice that harsh and summary measures, at best involving hardships and in practice often involving much more, should afford the only assured remedy in large classes of cases involving wages or domestic relations. Even more we should reflect upon the increasing resort to administrative officials — not tribunals — doing summary justice by administrative action, to do the work that falls in theory upon courts and lawyers (pp. 94-97). The powers of the labor commissioner in Massachusetts (p. 97), of the supervisor of small loans in Massachusetts (p. 95), and of the commissioner of agriculture in Virginia (p. 95) are significant of a reliance upon summary administrative methods wholly at variance with our common-law polity which the profession cannot afford to ignore. Here again a ministry of justice, charged with the duty of studying the situations that give rise to such legislative extensions of administrative power and devising effective legal remedies therefor, might give us better solutions and preserve our legal inheritance.

Bar associations almost everywhere are now awake to the need of better organization of courts. Much valuable material on this subject is afforded by Mr. Smith's investigations (pp. 54-55, 74). Another recognized item in recent programs of procedural reform is regulation of procedure by rules of court. Here also important new evidence is adduced. For instance, "there is no reason why a court summons should read . . . so that it is necessary to employ counsel to explain that the plain English words do not mean what they say," on pain of wasting time in futile attendance on courts (pp. 33-34). But such changes as are needed are not for the legislature. If courts had control of the form of process and the administrative side of the courts were well organized, a rule of court would speedily obviate a source of much expense and irritation. Indeed an impressive case is made for better organization and development of the administrative side of the courts. Such things as the simplification and standardization of complaints in some domestic relations courts so that a wife may make out all necessary papers herself with slight assistance from the clerk (p. 78), as the adjustment of the hours of sitting to meet the needs of a working population in other courts of this sort (p. 77), as the preparation of cases for trial by probation officers (p. 78), as the system of ascertaining who are available for assignment as counsel, worked out by legal aid societies in this country, but provided by the courts in Scotland and recently under rules of court in England (pp. 101-102) — these examples of what may be done when thought is given to the administrative organization of tribunals are full of lessons for our higher courts. Much as lawyers have discussed contingent fees, they have given little or no thought to the machinery that might take care of the many cases which cannot pay even a contingent fee (p. 38). The system of costs is well known to be full of anachronisms, and the traditional argument that costs deter rash and unfounded litigation proves to be only an *ex post facto* reason behind a mass of abuses. Costs "are too

low to deter the rich but high enough to prohibit the poor" (p. 23). Where courts have been given power to regulate costs by rules and to simplify procedure by rules so as to obviate them, no orgies of rash litigation have followed. On the contrary, "it is the general opinion that fewer and certainly no more fraudulent claims for personal injuries are presented to Industrial Accident Boards where there are no costs than were formerly brought to courts where fees obtained" (p. 20). We ought to learn from such cases what might be done in our higher courts were they well organized on the administrative side and were they given adequate powers of rule-making. This is brought out especially in connection with service of process by mail. Experience has amply refuted all the *a priori* objections which lawyers are fond of urging against this much-needed simplification of an expensive proceeding (p. 26). No doubt strong judges will be needed where this power is committed to the courts. But Mr. Smith has shown abundantly that strong judges are imperative in courts of summary procedure dealing with petty litigation (pp. 47-48, 66-67), and if we have been able to find strong judges for such courts it ought not to be impossible to find them for the higher courts.

If a large task lies before the profession in modernizing the organization, the administrative machinery, and the procedure of our higher courts, we may look forward to it with less apprehension when we read Mr. Smith's account, from the sources and from first-hand investigation, of the small claims courts, courts of conciliation, and domestic relations courts which have arisen in the past decade. Here we find examples of what to avoid as well as models to be followed. Thus, in the Kansas Small Debtors' Courts, with narrow jurisdictional limits, with their distinct organization, going back to the old policy of a new court for every new need, and their attempt to provide justice without trained judges and without law for the petty litigant, we find courts which "at the present time . . . are superior to the act which formed them" (p. 45), but which will hardly commend themselves as models. On the other hand, the Portland (Oregon) Small Claims Court (p. 47), the Chicago Small Claims Court (pp. 51-52), and above all the Cleveland Small Claims Court (pp. 49-50), afford examples of modern organization which deserve careful study. In all these courts, as well as in the Courts of Conciliation (pp. 60-65), the stock *a priori* objections to such tribunals have proved unfounded. If they have encouraged litigation, it has been just and proper litigation where hitherto justice had not been accessible. Instead of being flooded with cases by collection agencies, they have put an end to a situation which played into the hands of such agencies (p. 54). Mr. Smith's study of the collateral functions of these courts (pp. 56-59) is also full of meat for those who are chiefly interested in the higher courts.

What strikes one particularly as he reads of the Small Claims Courts, the Conciliation Courts, and the Domestic Relations Courts, is the great development of the administrative side of these tribunals, the giving over of the purely contentious conception of a judicial proceeding, and the doing by the court of what in our ordinary courts must be done for each party by or through an attorney (*e. g.*, in the Domestic Relations Courts (p. 78)). But it is in these very respects that the administrative tribunals, which continue to spring up on every hand, have found the decisive ad-

vantages that have made them so popular. In spite of the suspicion which these novel features must needs create in the mind of the common-law lawyer, the event is showing that judicial tribunals of this type can and do administer justice in accord with the substantive law and to the general satisfaction of litigants, and that the elimination of involved and detailed procedure is not in any way incompatible with the general security. Experience of these new judicial tribunals may well assure the bar upon this point and pave the way for like developments in the higher courts. Otherwise, rise of administrative tribunals and shifting of the administration of justice thereto may leave the common-law courts no more than the shadow of their old-time jurisdiction.

Lawyers will also be interested in the discussion of the Public Defender and the author's conclusion, which appears well warranted, that "as the probation branch is indispensable to every criminal court, the sounder line of development would seem to be to entrust this service to the probation officers rather than to duplicate the work and create new officials" (p. 127). As in so many other cases, we have sought to remedy ill effects of the want of modern organization by multiplying officers rather than by going to the root of the difficulty.

Finally, attention should be called to the chapter on Legal Aid and the Bar (pp. 226-239), which contains much that lawyers should take to heart.

In making Mr. Smith's investigations possible and publishing the results of his work the Carnegie Foundation has done a conspicuous service to the law.

ROSCOE POUND.

PRINCIPLES OF THE LAW OF CONTRACTS. By Sir William R. Anson. Fourteenth English edition, third American edition, with American notes by Arthur L. Corbin. New York: Oxford University Press. 1919. pp. v-568.

To the frequently repeated assertion that Anson on Contracts is the best book on the subject, I have for many years replied, "Possibly, but what a distressingly humiliating confession." We are now up to the third American edition. It is based either upon the fourteenth English edition, according to the title-page, or upon the twelfth, according to the preface. Immaterial. Plenty learning there is. Plenty industry. Plenty phraseologies which ought long ago to have been discarded. Some useful analysis. Little attempt at synthesis. No effort at the eradication of time-dishonored grotesqueries. The whimsies of the "authorities" (Authorities always impede progress) once more treated with uncritical adoration.

Quasi-contracts. — Certain heterogeneous classes of cases, which have in common conspicuously this, that they are *not* contracts, are huddled together, put into a class, and called *quasi-contracts* — by translation, *as-if-contracts* (sections 8, 271-273, 402, 475). The book tells us that the term is "convenient" (sec. 5). I call it stupid, or, at best, slipshod. Why we should group "a multifarious class of legal relations" (in none of which agreement is ever a constituent factor) under the word "contract" (from which agreement is never absent), or under the meaningless phrase "as-if contracts," is something beyond my comprehension. Do not refer me to bygone days when none of the terms was understood. I am speaking of the third American, based upon the twelfth or fourteenth English, edition of Anson on Contracts. Are ancient crudities entitled to greater respect than modern? Is not the ashpit the proper place for old and young alike?

Unilateral Contracts. — Another kind of contracts which do not exist (I plead the book) is unilateral contracts (sec. 24). A unilateral contract is as unthinkable as a unilateral elephant, or anything else which necessarily has two sides. Nobody would call a monologue a unilateral conversation, or a soprano solo a unilateral duet, or a lecture a unilateral debate. Then why call a promise a unilateral contract? The two things, promise and contract, have this in common, that in both the presence of two parties is necessary; but in a promise there is but one actor, while in contract there are always two actors. In other words, a promise is always unilateral, and a contract is always bilateral at least. The book tells us that in simple contracts there is an "act for a promise," a "promise for an act," or a "promise for a promise" — always two actors. How then can there be a unilateral contract?

One way, we are told, is by a "contract under seal," when one party makes a promise without receiving any consideration for it (sec. 23). But that is to call a promise a unilateral contract — which would be as sensible as calling a lonely run a unilateral foot race, or a single baby unilateral twins.

Another sort of unilateral contract, the book tells us, is a promissory note (sec. 24, note). But a promissory note is a promise, and is not in the least like a contract. Observe this: In consideration of the transfer of a horse, A agrees to hand to B, within three days, a promissory note for \$200 endorsed by, etc. That is a contract. There are two actors. The promissory note, when given, is not another contract; it is a promise. When the book indicates that a contract may consist of a "promise for a promise," one would not expect that a promise would itself be said to be a contract, whether unilateral or other. If I were to call two reciprocal promises a bilateral promise, instead of a contract, you would tell me that I was making a mess of my vocables. Ought I to be less frank when you call a single promise a unilateral contract, instead of what it is?

Agency from Necessity. — In section 444 the book tells us: "Circumstances operating upon the conduct of the parties may create in certain cases agency from necessity. . . . A husband is bound to maintain his wife: if therefore he wrongfully leave her without means of subsistence she becomes 'an agent of necessity to supply her wants upon his credit.' . . . In all these cases the legal relations between principal and agent do not arise from agreement; they are imposed by law on the parties without their consent in order to promote general welfare."

I presume that the "necessity" is that of ascertaining some legal basis upon which to found liability: No man can be made liable for what neither he nor his agent orders; the deserted wife was not an agent; therefore — What? — therefore the fact must be changed, and the wife must have been an agent. Can anything be more absurd? Why did not the writers question the validity of the major premise? Do not tell me that one hundred and seven years ago a judge spoke of "an agent of necessity." I know that. But the judge is dead, and the evil which he did ought to have been buried with his bones.

Why did the writers overlook such a glorious opportunity for the introduction of the "quasi" idea? Why not say that the wife was an "as-if" agent? That looks like burlesque; but *quasi-agent* is quite as respectable a conception as *quasi-contract*. Or why did not the writers declare that the wife was a "unilateral" agent? That would be, no doubt, to posit an agent without a principal. But unilateral bilateralism must always be somewhat anomalous (Pistol practice as a unilateral duel is a good example). And the conception is not a whit more objectionable than that of a unilateral contract. That two people can draw together (*con* together, + *trahere*, draw = contract) by one of them drawing by himself, is a notion that even Lord Dundreary's poor wit would have rejected. For, commenting on "Birds of a feather flock together," he said: "Of course they do. One of them could not go into a corner and flock

all alone." Might we say that the one in the corner was doing a unilateral flock?

Plainly the trouble lies in uncritical acceptance of the major premise above referred to. It is not true that a man cannot become liable except by action of himself or his agent. When, for example, by statute I am made liable to pay certain municipal taxes, and when the taxes are declared to be a lien upon my property, accompanied by a power of sale in case I fail to pay, nobody has ever based liability of me and my property upon a fictitious agency "from necessity" (What a mess!) of the municipality. It has been deemed sufficient to say that the law had declared that, without any act of mine or on my behalf, either by a voluntary or an imposed agent, I am liable to pay. Why, then, might not we say that under certain other circumstances I may be made liable for groceries purchased *without* my authority? That in the former case the law was embodied in a statute is, of course, immaterial. Our judge-made law has the same compelling force; and it, too, may some day go into a statutory code.

Agency by estoppel. — In 1900, in my book on Estoppel, I distinguished among the cases in which an unauthorized act bound the person on whose behalf it was done, as follows:

1. If an agent acts within what appears to be his authority, the principal is bound.
2. If an agent appears to be acting within his authority, the principal is bound (p. 501).

Some years ago the distinction was carried (without acknowledgment of source) into Halsbury's Laws of England. Anson and his editor are aware of the first of the propositions, but do not appear to have heard of the second. And yet, without it, scientific distribution of the cases cannot be made.

Again, in section 453 the book tells us: "It should be observed — indeed it follows from what has been said — that X cannot by private communications with A, limit the power which he has allowed A to assume." This is followed, as illustration, by a case in which it is said that "Jones, however, forbade Russell to draw and accept bills." Jones could not do it, but actually did it. What the writers meant to say was that although Jones could, and did, limit Russell's authority, yet he (Jones) was liable.

Ratification. — The book entirely ignores the fundamental difficulty about ratification (sec. 445). The usual "rules" are sufficiently stated, but the writers appear to be unaware of the objection to the whole doctrine. If A agrees to sell, and X, on behalf but without the authority of Y, agrees to purchase a horse for \$200, no contract has been created. A is not bound to sell, and Y is not bound to purchase. Nevertheless the book speaks of such a futility as "*a contract made without authority*" — which, like unilateral contracts, is a mere contradiction in terms. Commence with that, and you easily slip still farther — into such language as this, for example: "*a contract of insurance made by an agent without his principal's authority*" (p. 514); whereas, under such circumstances there is no agent, and no principal, and no contract.

The question which the book fails to notice is: If when the document above suggested was signed it was nothing at all (except a misrepresentation by X), how can it become a contract by the act of somebody who was not a party to it? If we call it a *contract* made by an *unauthorized agent*, we may drift into ratification. But if it was nothing, can Y treat it as an option in his favor, which he may exercise or not as he pleases? A did not intend to give an option. The doctrine of ratification declares that that is precisely what he did.

Burden of Proof. — In discussing the burden of proof (sec. 369), why is Professor Thayer's illuminating distinction between the burden of proof and the burden of going forward ignored?

Waiver. — Nowhere in the book is there a wider departure from sanity than in the sections relating to waiver (secs. 151, 365, 366, 412-414, 430). Criticism

here subsides into silent, suffering condemnation. The writers have seen my book on "Waiver distributed among the departments Election, Estoppel, Contract, and Release," but it has not been of the slightest service to either of them.

And so, to the frequently repeated assertion that Anson on Contracts is the best book on the subject, I am still constrained to say, "Possibly, but what a distressingly humiliating confession!"

JOHN S. EWART.

OTTAWA, CANADA.

CELEBRATION LEGAL ESSAYS. By Various Authors. To Mark the Twenty-fifth Year of Service of John H. Wigmore as Professor of Law in Northwestern University. Chicago: Northwestern University Press. 1919. pp. 602.

This collection of articles, first fittingly published in the *Illinois Law Review*, is now issued in a single volume, with a useful index. While *Festschriften* have not been common in this country — that presented by his colleagues to Professor Langdell being among the first — this occasion is well justified by Professor Wigmore's distinguished career.

His first professional appointment, in a Japanese university, naturally turned Wigmore's attention to the general principles, rather than the details, of the common law; and immediately upon his return to this country and his appointment to the Northwestern University he began to give us the results of his speculative thought. His legal masters were, like those of most of us in that day, Thayer and Ames; and it is significant that Wigmore's most fruitful work has been in their fields, Evidence and Torts. From Ames he acquired the power of legal generalization which he has so nobly used in his analysis of the law of Torts; from Thayer the historic method and the point of view which he has worked out in his monumental book on Evidence. But while he has individually and originally developed these suggestions of his masters, Wigmore's great achievement as a legal scholar, his chief claim to fame, above his marked originality of analysis and his incisive individuality in construction, is his patient, energetic massing of his materials, his thorough and lawyerlike presentation and consideration of his evidence, his open-minded dealing with theories and arguments. His "Evidence" is the last word on the subject, because it covers everything that can profitably be said about it; his remarkable collection of materials for the study of Torts gets its chief value from the fact that one need not step outside its covers to find what material one requires. A classmate delights to lay at Wigmore's feet this slight word of appreciation for the individuality, the originality, and the scholarship of his friend.

Are the articles worthy of their occasion? That could hardly be expected of all of them. *Inter arma leges* at least *minime dicunt*. Out of thirty-three articles it is a pleasure to find at least eight of adequate quality. If one were to be selected for special commendation, the reviewer would name the remarkable study on Liberty of Testation by Professor McMurray. The other twenty-five are for the most part slight, but none profitless. As a collection it is worthy of serious study.

JOSEPH H. BEALE.

THE GROTIUS SOCIETY: PROBLEMS OF THE WAR. Volume II. London: Sweet and Maxwell. 1917. pp. xxv, 178.

This is a collection of the papers read before the Grotius Society in 1916. The rules of that body say that "it shall be a British Society." As many of the opinions on international law expressed in the present war by citizens of belli-

gerent countries have been so partisan as to cast discredit both upon the authors and upon the science in which they have been supposed to be experts, the reader inevitably opens this volume with suspicion. Yet these papers are scientific and fair. This is extraordinary in view of the topics covered: "The Treatment of Enemy Aliens;" "The *Appam*;" "The Principles Underlying the Doctrine of Contraband and Blockade;" "War Crimes;" "The Nationality and Domicil of Trading Corporations;" "Neutrals and Belligerents in Territorial Waters;" "The Treatment of Civilians in Occupied Territories;" "War Treason;" etc.

For an American there are at least two papers of peculiar interest. The one entitled "The *Appam*" serves as a valuable commentary on the case eventually decided March 6, 1917, and reported in 243 U. S. 124, under the title "The Steamship *Appam*." The paper on "The Principles Underlying Contraband and Blockade" frankly objects to the American historic attitude regarding the rights of neutrals, and raises the suspicion that the author does not recognize the abnormalness of war and actually believes, after the fashion of militarists, in a duty of neutrals to give up their commerce or at least to modify their commerce in the interest of belligerents; but it is noticeable, and creditable, that the success of the author's contention would have been detrimental to the British, as the author well knew, for he said (p. 28) that "it is beside the mark to dwell on the fact that in the present desperate struggle Great Britain and the Cause of Right are vastly benefiting, in view of the British control of the sea."

An unfortunate mark left upon the papers by war is the evidence of haste, for the writers worked rapidly in view of special emergencies, and there was not time for thorough research. Thus in the paper on "The Treatment of Enemy Aliens," instead of beginning, as a man with leisure might begin, with the forty-first article of the Magna Charta of 1215, "the writer does not propose to go back to the times before the birth of International Law, but limits himself to the provisions of such treaties bearing on the position of enemy aliens on the outbreak of war as are accessible at the moment" (p. 2); and the result is that he begins with 1659, a date quite early enough for practical purposes. Indeed, perhaps it is wrong to suggest a regret that there are marks of haste, for the cause of those marks is also the cause of a certain sprightliness and shrewdness not always found in the work done by men of leisure. However that may be, it is certain that as yet there has appeared no more scholarly or comprehensive volume dealing with the international law problems of the World War, and also that the circumstances in which the papers were produced must cause them to be of permanent interest.

E. W.

A PRELIMINARY TREATISE ON THE LAW OF REAL PROPERTY. By Elliott Judd Northrup. Boston: Little, Brown and Company. pp. 414.

The author states in his preface that the book is intended to serve as a text for a short course on real property law, each chapter to serve as a lesson. In dealing with students beginning the study of law, there are some parts of the law of real property which it is better to cover, in the main, by mere exposition. These include rules which can be stated with a certainty approximating mathematical certainty, and which are part of the historical background of the modern law of real property. Professor Northrup's work contains an exposition of such matters as the feudal system and tenure, estates, forms of concurrent ownership, seisin and disseisin, reversionary interests, vested and contingent remainders, the rule in Shelley's case, descent, curtesy, dower, and methods of conveyancing at the common law and under the Statute of Uses. The exposition is careful, compact, and clear.

There are other portions of the work which are less satisfactory. Such topics

as fixtures, easements, natural rights, waste, covenants running with the land, and covenants for title readily lend themselves to, and require for their understanding, a study of specific cases. An exposition of general principles is not only inadequate but is dangerous, because it leads students to believe that they have a sufficient understanding of the topics when they have not. Further, there are some topics mentioned in the work which are so difficult that they plainly should not be dealt with by brief summaries; for example, it is submitted that it is a mistake to present to a student, beginning the study of law, an exposition in sixteen pages of restraints on alienation and rules against remoteness.

The work covers familiar ground; but the author has an intellectual conscience, and he has made no attempt to attract attention by inventing a new vocabulary, and elaborating the familiar in the terms of such vocabulary. The author modestly states that the book is intended only for the use of students, but any teacher of an introductory course on the law of real property will find that a careful reading of the work is repaid by the suggestions which are implicit in the author's arrangement and distribution of emphasis.

E. H. W.

GOVERNMENT ORGANIZATION IN WAR TIME AND AFTER. By William Franklin Willoughby, Director of the Institute for Government Research. With an Introduction by Frederick W. Keppel, Third Assistant Secretary of War. New York and London: D. Appleton & Company. 1919. pp. xix, 370.

BRITISH WAR ADMINISTRATION. By John A. Fairlie. New York: Oxford University Press. 1919. pp. x, 302.

The administrative methods by which the two great English-speaking democracies mobilized for war and carried on the operations of war were at once so similar and so characteristically dissimilar that upon the appearance of two books on the subject, one dealing with America and one with England, the inevitable preliminary suggestion is that they be read together.

The necessities of modern warfare in all its complexity in one respect affected both countries in the same way. Single administrative authority in America and unified administrative authority in England for the mass of hitherto unclassified war measures became accomplished facts almost without interference by the legislative bodies and with the aid of enabling legislation of a most sweeping character. In America the war was administered by the President as Commander-in-Chief of the Army and Navy, with added powers liberally conferred upon him by Congress. In England, with centuries of administrative experience to draw from, the war was administered by a Cabinet in its various forms, acting through Orders in Council by virtue of the royal prerogative, supplemented by many enabling acts passed by a willing Parliament, and by a procedure which reverted to the form of the Elizabethan Privy Council, but which operated through administrative agencies such as were forecast by the Parliamentary Government in the time of Pitt. The British War Cabinet eventually became a committee not of Parliament but of the Privy Council, and the heads of important ministries often were not members of Parliament at all.

As to the measures adopted by the ultimate administrative authorities in the respective countries, a comparison of substantive characteristics would lead too far afield even for casual reference. Once a substantive measure was determined upon, the administrative methods by which it was to be accomplished often differed materially in the two countries. In America public opinion was

mobilized to an extent nowhere else equalled. Indirect action through public opinion, semi-indirect action, as for instance in the control exercised through priority regulation, played an important part. Actual control was often accomplished with a minimum of organization by means of a license system. In cases of actual government operation a piece of operative machinery was devised which, if government ownership increases, will doubtless be heard of again as a means of escaping governmental inefficiency, namely, a corporation controlled by the Government, such as the War Finance Corporation and the United States Shipping Board — Emergency Fleet Corporation.

Through these American fields Mr. Willoughby leads us in a thorough and at the same time absorbing fashion. Space forbids pausing in any particular field. In each the growth was gradual, often through voluntary or semiofficial bodies, until the effective instrumentality was finally evolved. If in the mass of detail which he has accurately traced Mr. Willoughby has, from lack of record or for other cause, occasionally missed some step in an evolution, one can in fairness speak only in commendation of the success with which he has surmounted most of the inevitable difficulties of the current historian. If any criticism is permissible, it would be that Mr. Willoughby keeps the reader a little puzzled as to his point of view and the scope of his work. It is clearly not a critique of substantive measures. In reality it is not a critique at all, although the author occasionally permits himself a little critical discussion, sometimes of the conception of an administrative measure, sometimes of its administration, and sometimes of how it worked. The discussion, when indulged in, is intelligent, and because of it the book gains in interest even if it loses in point of view. Mr. Willoughby has given us not only a valuable handbook but a readable book.

Professor Fairlie's work on British War Administration is one of a series of Preliminary Economic Studies of the War edited by Professor David Kinley under the auspices of the Division of Economics and History of the Carnegie Endowment for International Peace. Professor Fairlie fixes his point of view logically and rarely departs from it. His first chapter draws in scholarly fashion the historical background of British War Administration. The rest of the book consists of a careful statement of the actual administrative measures adopted by the British Government throughout the Great War. The work is not a critique and does not purport to be, but it is none the less an important historical record.

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THE PROXIMATE CONSEQUENCES OF AN ACT

I

"*IN jure non remota causa sed proxima spectatur.* It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree."¹ The meaning of this maxim of Bacon is not clear. In medieval legal and philosophical Latin the word *causa* had four meanings: a thing or circumstance; a reason or excuse; a creative antecedent; a lawsuit. Of the examples given by Bacon to illustrate his maxim, not one is unmistakably a cause in the third sense; most of them are examples of the first meaning, and are to the effect that we do not look behind the immediate circumstances of an act to determine its nature. He allowed two exceptions: in case of "covenous acts" and of crimes. The former came before the chancellor, who was called upon by the terms of the bills to investigate precedent facts; and the example given of the latter was proof of the motive (a precedent cause in the second sense) to qualify the act.

Bacon was entirely familiar with the Aristotelian division of causes into four: the formal, the efficient, the material, and the final. He distinguishes these with respect to their importance.²

¹ BACON, MAXIMS, 1.

² 2 NOV. ORG. APHOR., 2.

The *final* cause, that is, the creative purpose, he says, "rather corrupts than advances the sciences, except such as have to do with the science of human action." The *formal*, that is, the result imaged by the creator, "is despaired of." There remain the *efficient*, that is, the active force, and the *material*, the passive condition upon which the active force works. These, he says, if they can be discovered only after investigation, are remote,³ and "contribute little, if anything, to true and active science."⁴

In both passages Bacon seems to have the same thing in mind. He is combating the metaphysical tendency to go behind everything, and to find labored explanations for matters in themselves most simple; and he says that the law, having found the immediate physical causation, will not use metaphysical subtlety to distribute this causation among obscure distant antecedents. To use a modern analogue, if the law finds a man committing murder it will hold him for it, without taking time to find whether heredity or environment may not be more to blame than himself. Thus explained, the maxim is evidently not concerned with the modern problems of proximity or remoteness of result.

That Bacon's First Maxim was not recognized by lawyers before his time is clear from his examples. That lawyers for two hundred years after his time were uninfluenced by it seems clear from the authorities. No title, *proximate cause*, is found in any of the abridgments or digests before the end of the eighteenth century, nor has any reference to the maxim been noticed in any case before that time.

Meanwhile, however, the courts had been forced to deal with the problem of "consequential damage." It was enough at first

³ "Quales quaeruntur et recipiuntur, remotae scilicet."

⁴ My learned colleague, Dean Pound, points out that Bacon was in this case combating the Aristotelian metaphysic, with its final cause; as Bacon says in another place, the physical causes are the efficient and material, the metaphysical are the formal and final causes. iii. DE AUG. SCI., 4. Fowler, Bacon's best and most sympathetic editor, points out his insistence upon the physical cause, 1 FOWLER'S BACON'S NOV. ORG., 2 ed., 65, note 40, and finds in his opposition to the "remote cause" an example of his opposition to the theological and metaphysical form of reasoning — in other words, of the modern rather than the medieval turn of his mind. 2 FOWLER'S BACON'S NOV. ORG., 2 ed., 2, note 13. Bacon's idea of the remote cause, therefore, was a purely physical idea; and he framed or found in the schools a maxim expressing the modern feeling, and asserted its truth in law; seeking for confirmatory examples in the Abridgments, and being perforce content with obscure, not to say remote, ones.

to say, as Lord Holt did in *Roswell v. Prior*,⁵ that "he that does the first wrong shall answer for all consequential damages." But it soon became evident that this responsibility must be somehow limited. The courts in laying down their limits were not agreed on the principle. While in *Ashley v. Harrison*⁶ Lord Kenyon had said "the injury complained of was too remote," we find the idea expressed a few years later by Lord Ellenborough in *Vicars v. Wilcocks*⁷ in the *dictum* that "the damage must be the legal and natural consequence of the words spoken." The first occurrence of the word "proximate" which has come to my attention — doubtless there were others earlier — was in the argument of counsel in *Ward v. Weeks*⁸ many years later, where Sergeant Wilde said, "a man is liable only for the natural and proximate consequence of his actions, and not for remote consequences resulting directly from some intermediate agent." Greenleaf in the early forties, in his "Evidence," first clearly stated this principle in America: "The damage to be recovered must always be the *natural and proximate consequence* of the act complained of."⁹

One or two points may be noted here. First, there is in these cases no reference to Bacon's maxim; the earliest reference to this maxim which the author happens to have seen in any decision (doubtless there were earlier ones) was in *Scott v. Hunter*.¹⁰ On the other hand, in many cases in which the subject was discussed at length the maxim was not mentioned.¹¹ It was reprinted in Broom's Maxims.¹² Second, that the court is here concerned with the

⁵ 12 Mod. 636, 639. "Every one who does an unlawful Act, is considered as the Doer of all that follows." De Grey, C. J., in *Scott v. Shepherd*, 2 W. Bl. 892, 899 (1773).

⁶ 1 Esp. 48 (1793).

⁷ 8 East, 1 (1806).

⁸ 7 Bing. 211, 212 (1830).

⁹ 2 Greenl. Ev., 1 ed., 258 (1848). In *Guille v. Swan*, 19 Johns. (N. Y.) 381, 383 (1822), the Supreme Court of New York said: "Now, if his descent . . . would, ordinarily and naturally, draw a crowd . . . all this he ought to have foreseen, and must be responsible for."

¹⁰ 46 Pa. 192 (1863).

¹¹ *Harrison v. Berkley*, 1 Strob. L. (S. C.) 525 (1847); *Denny v. New York Central R. R.*, 13 Gray (Mass.) 481 (1859); *Gilman v. Noyes*, 57 N. H. 627 (1876); *Clark v. Chambers*, 3 Q. B. D. 327 (1878).

¹² London, 1845; reprinted in Philadelphia in the widely used "Law Library." The fact that the earliest references in this country to the maxim are in Pennsylvania may perhaps be explained by the publication there of the American edition of Broom. According to Broom, the maxim had received no general application, but was "almost exclusively applied to" marine insurance.

consequences of an act, not with its cause; in very few cases up to the year 1900 is the proximity of the *cause* the subject of investigation. Third, that the courts do not use the word *proximate* alone, but in some combination, usually *natural and proximate*.

We have, then, to deal with a modern and gradually emerging principle that a person is responsible for the consequences of his act, but that responsibility is limited to such consequences as bear some sort of relation to the act. The serious study of this question by the courts has occurred only during the last fifty years; and by legal authors only very recently. The summing up of the doctrine theretofore developed by Judge Smith in an earlier volume of the HARVARD LAW REVIEW¹³ represents the most thorough examination of the subject yet made; and it is a rather striking fact that he ends where Bacon began: that the only "legal cause" is the efficient cause. It is submitted, however, that the matter cannot permanently be left there. Judge Smith himself did not regard his painstaking and scholarly work as final, but desired that his discussion should be the basis of further investigation. If it is true, as all agree, that the limitation of legal investigation to proximate cause or consequence is due to the impossibility of the court making a complete investigation and thus doing complete justice, the court, through some definite principle of law, should determine the general limits of proximity, and not leave it at large to the jury. It is the purpose of this article to suggest certain more definite principles of law by which the determination of proximity is to be regulated.

II

The natural method of applying Bacon's maxim would be, to start with the consequence and work back to the cause. But as the law has actually developed, the method is reversed: we start with the human act and trace its consequences into a cause of action, and then trace further its consequential damage. This is a much simpler task. The causes of an event are all the preceding circumstances which brought the event to pass; and they are myriad. The consequences of an event, however, which still remain "efficient" are very few, and may easily be handled in an investigation.

¹³ 25 HARV. L. REV. 103, 223, 303.

The starting-point of any investigation of legal liability is some act or some non-action of a human-being. But whereas an actor may always rightly be held to answer for the consequences of his act, since he has taken it upon himself to change the course of events, it is otherwise with a non-actor; he should be held responsible only if his failure to act was in itself a legal wrong, that is, if he had a duty to act. The non-action of one who has no legal duty to act is nothing. It does not alter the course of events, and therefore it has no consequences. It is true that the omission of a legal duty also does not alter the course of events; but the non-actor, having been obliged by law to change events, is rightly held responsible for the consequences of not doing so.

Starting with a human act, we must next find a causal relation between the act and the harmful result;¹⁴ for in our law — and, it is believed, in any civilized law — liability cannot be imputed to a man unless it is in some degree a result of his act. Imposition of liability, even that which seems most extreme, is yet based upon a causation by the defendant's act. Thus, liability of the owner for default of a pilot forced on him by a compulsory pilotage law is based ultimately upon the owner causing his vessel to enter port; liability for nuisance, however drastic, may be traced to the ownership of land; and liability of an employer under the Workmen's Compensation Act grows out of his carrying on the business.

Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words, did not cause it. Two typical applications of this principle may be given. In *Regina v. Dalloway*¹⁵ it appeared that while defendant was driving carelessly, with the reins out of his hands, a child ran in front of the horses and was killed. Erle, J., charged that if by the utmost care on his part he could not have prevented the accident he must be acquitted. So where it was the duty of defendants to fence a hole they had cut in the ice of a lake, and plaintiff's horses

¹⁴ *Chicago, R. I. & P. Ry. v. Guthridge*, 179 Pac. (Okla.) 590 (1919). This causal relation must be established by evidence, like any other part of the case. *Ross v. Smith*, 182 Pac. (Wash.) 582 (1919).

¹⁵ 2 Cox C. C. 273 (1847).

ran away and were drowned through the hole, it was held that if any fence which defendant was obliged to build would not have stopped the runaways the defendant's failure was not a cause of the accident.¹⁶

This principle is illustrated by several recent cases. In *Piqua v. Morris*,¹⁷ the embankment of defendant's reservoir broke away and the water injured plaintiff's land. The defendant had negligently failed to construct a sufficient spillway; but it appeared that the flood on this occasion was so extraordinarily great that a sufficient spillway would not have saved the embankment. The city's negligence was held not to be a cause of the loss. So in *Ford v. Trident Fisheries Co.*¹⁸ where Ford, the mate, fell from the defendant's vessel and never rose to the surface, and the ship's boat was negligently lashed to the deck so that it could not be seasonably launched and used, it was held that, in the absence of evidence of the possibility of saving Ford, causation by the defendant had not been proved. Similarly in *Gutman v. Bronx Borough Bank*,¹⁹ where plaintiff sent a check to her broker to keep good her margin on a falling stock, and defendant wrongfully refused to cash it, whereupon she was sold out, the court refused recovery unless it could be shown, by the course of the market, that otherwise she would not have lost both stock and check.²⁰

It has been seen that an act which in no degree contributed to the result in question cannot be a cause of it; but this, of course, does not mean that an event which *might* have happened in the same way though the defendant's act or omission had not occurred, is not a result of it. The question is not what would have happened, but what did happen. A murdered man would have died in time if the blow had not been given; yet the murderer's blow is a cause of his death. A man would have died from a small dose of poison; yet if he was given twice as much, the entire amount of poison given him was a cause of his death.

¹⁶ *Sowles v. Moore*, 65 Vt. 322, 26 Atl. 629 (1893).

¹⁷ 98 Ohio St. 42, 120 N. E. 300 (1918). See to the same effect *Montgomery L. & W. P. Co v. Charles*, 258 Fed. 723 (1919), where, however, the negligent act which was held not to have affected the result was one of commission.

¹⁸ 122 N. E. (Mass.) 389 (1919).

¹⁹ 188 App. Div. 664, 177 N. Y. Supp. 173 (1919).

²⁰ See also *McMahon v. Western Union Co.*, 171 N. W. (Ia.) 700 (1919); *Whitney v. Northwestern Pacific R. R.*, 178 Pac. (Cal.) 326 (1919).

Furthermore if two persons are active in bringing about a result, either by act or by wrongful omission, each act or omission is no less a cause of the result because the result might have happened exactly as it did though one of the persons had not acted, the cause attributable to the other having been sufficient to bring about the result. One might have caused the result, but in fact both did so. Thus where several persons, owning separate oil-wells, allowed oil to escape into a creek, where it became ignited and eventually burned plaintiff's building, each owner is a cause, and if the result is proximate all are equally liable.²¹

A result is none the less attributable to the defendant's act or omission because it was followed or accompanied by a wrongful omission on the part of some one else. Thus, if it is the duty of two persons to do a thing and neither does it, the resulting injury is attributable to either failure.

Defendant had a duty to ventilate a mine; it was another's duty to inform him of any need for ventilation. Plaintiff was injured by lack of ventilation; the injury was a result of defendant's failure.²²

Defendant was bound to supply a dry floor for workmen; another was employed to dry the floor by sanding. The floor being wet and not sanded, plaintiff slipped and was injured; this was the result of defendant's failure in duty.²³

Defendant was bound to transmit a telegram to H asking for information for plaintiff; H was under an independent obligation to send the information and did not do so. Plaintiff's failure to get the information was due to defendant's failure to transmit the telegram.²⁴

Defendant by his policy was responsible to plaintiff for loss of his vessel by perils of the sea. A seaman carelessly left a sea-cock open and the water coming in through it sank the vessel. The loss was by peril of the sea.²⁵

III

Granting that a certain event was the result of, that is was caused by, a human act, the court will not necessarily follow the

²¹ *Northup v. Eakes*, 178 Pac. (Okla.) 266 (1919); *Mummaw v. Southwestern Tel. & Tel. Co.*, 208 S. W. (Mo. App.) 476 (1918). The contrary decision in *Gay v. State*, 90 Tenn. 645, 18 S. W. 260 (1891), must be regarded as unsound.

²² *Reg. v. Haines*, 2 C. & K. 368 (1847).

²³ *Harwell v. Columbia Mills*, 98 S. E. (S. C.) 324 (1919).

²⁴ *Western Union Tel. Co. v. Huffman*, 208 S. W. (Tex. Civ. App.) 183 (1919).

²⁵ *Clarke v. Mannheim Ins. Co.*, 210 S. W. (Tex. Civ. App.) 528 (1919).

act into the result in question. The consequences of an act may be innumerable; to trace them would require infinite time and patience. Here, as in all affairs of life, it is necessary to reach a result which will secure to each interest the greatest amount of consideration which is compatible with an equal consideration to all other interests. To apply this principle to the question under discussion, the court can give to the tracing of the consequences of any particular act only its fair share of all the available time, considering the other acts which are waiting its attention. If, for instance, the court is called on to investigate the dropping of some substance, the court will watch it while it falls through the air; it will continue to watch it after it has fallen into an unstable or dangerous position; but as soon as it has reached a safe and stable rest the court will turn away to the investigation of some other act.²⁶ Its time is too short to spend in investigating apparently safe situations further. To use the common language in which this is expressed, the court will trace an act into its proximate but not into its remote consequences.

The rule that requires the exclusion of remote consequences is therefore a fundamental principle of law, based on the necessity of doing justice to all; and the question in any particular case, whether a given result is remote, is purely a question of law. This of course does not mean that the jury has no part in the determination of the question, which always involves the application of the law to facts, often quite complex. Particularly where the defendant's connection with the result is on the passive side the determination of the question involves the settlement of inferences of fact which are seldom so clear that the court can take the question away from the jury. But the rule of law which is to be applied to the facts must always be found by the court and given by it to the jury.

This question has proved a puzzling one to courts and lawyers. It has already been seen that it first presented itself as a question of the limitation of consequences allowed to be considered; it became later confused with Bacon's maxim concerning "the impulsion of cause on cause," and a more serious confusion with negligence has frequently been noticed. The series of articles by Judge Smith greatly simplified the problem; a study of the subject as developed

²⁶ *Rex v. Gill*, 1 Stra. 190 (1719).

in criminal as well as civil cases has thrown light on the subject; and a conclusion as to the principles of law may be suggested. It is purposed in this article to suggest such principles, and to illustrate them largely by the cases decided in the last year and a half; so that this article in fact concerns itself with "the progress of the law" in the subject under consideration.

The study of proximate causation will prove to be a study of activity of force or of risk. A result is usually created by the impulse of an active force upon a passive force; not necessarily, for it may be created by two active forces acting on each other, as by a head-on collision on a railway. Usually, however, but one active force is employed in bringing about a result. One active force at least is necessary, since nothing but an active force can bring about that change of conditions which we call a consequence. Furthermore, in so far as a passive force is traceable to a man it must be either (1) because that man caused it by an act which was an active force, the passive force being the spent form of the active force, or (2) because that man violated a duty to act upon it by an active force which he failed to apply. The whole problem may therefore be stated thus: when is one responsible for the operation (a) of an active force which he has created; (b) of an active force which acts upon a passive force which he created, or upon a passive force which he was legally bound to change. Each time one or more active causes operate on a condition to create a new condition, a new causal step is taken, ending with the given result. This result is the direct result of the active force or forces which last acted upon the immediately precedent condition, and is the indirect result of the earlier acting forces. The active force which brings about the result without the intervention — the subsequent coming into action — of any other force is a direct cause of the result. All other forces are indirect. Every condition of what might be called the set stage on which the last active force acted is a precedent force; and of course no precedent force can operate to make a subsequent force remote.

We may therefore begin our investigation with the assumption that the immediate result of an active force is primarily the proximate result; and that if the principle of proximity is discoverable, it must be by some method of relating the defendant's act to the final active force. This final active force must be *prima facie* the

"efficient" cause which Judge Smith in the article cited describes as proximate.

What, then, do we mean by proximity of result? Is the meaning a result that is physically direct, direct in time or place? Or is it logically direct, direct in causal sequence? There have been courts which urged the former view. The Court of Appeals in New York, in a series of cases dealing with the spread of fire, beginning with the Ryan case,²⁷ set a spacial limit to proximity of result. So eminent and sound a lawyer as Judge Cardozo felt obliged to assent to this view in a late case.²⁸ The case itself did not involve proximity of causation, but the interpretation of an insurance policy. In the course of his interpretation the learned judge discussed the earlier authorities in the state on the subject of causation, and added that the view of causation there expressed, and apparently accepted by him,

"shows how impossible it is to set aside as immaterial the element of proximity in space. The law solves these problems pragmatically. There is no use in arguing that distance ought not to count, if life and experience tell us that it does."

It is submitted, with great deference (for Judge Cardozo is one of the author's judicial idols), that there is no such pragmatic sanction for the law of proximate causation. The passage is spoken entirely *obiter*, since the question was, whether a certain loss was covered by a policy of fire insurance. If we look elsewhere than to New York, we find no support for the theory of spacial proximity. Thus in fire cases the doctrine of the Ryan case has been frequently repudiated;²⁹ and in no other class of cases has it even been suggested. In one case³⁰ a person sent poisoned candy by mail from California to Delaware, where it was eaten by the victim; no difficulty was felt in holding the California sender to be the cause of death, though cause and effect were a continent apart. The argument that there must be proximity in time has no greater force.

²⁷ Ryan v. New York Central R. R., 35 N. Y. 210 (1866).

²⁸ Bird v. St. Paul F. & M. Ins. Co., 224 N. Y. 47, 120 N. E. 86 (1918).

²⁹ Smith v. London & S. W. Ry., L. R. 6 C. P. 14 (1870); Kuhn v. Jewett, 32 N. J. Eq. 647 (1880); Hoyt v. Jeffers, 30 Mich. 181 (1874); Milwaukee & S. P. Ry. v. Kellogg, 94 U. S. 469 (1876).

³⁰ People v. Botkin, 132 Cal. 231, 64 Pac. 286 (1901).

Thus, in a late case³¹ it was held that under the statute of Pennsylvania an action for death could be maintained although the accident which caused the death happened ten years before it; the connection between act and result being otherwise uninterrupted. It must be clear that the proximity called for by the principle under discussion is proximity in causation; too many new causes must not intervene between the human act and the result under consideration.

What, then, is this proximity in causation? For understanding it, a little consideration of causal action may prove useful. Take a given situation: forces quiescent, forming a general condition of affairs, what might perhaps be called a set stage. Into this condition a new active force is interjected, creating a rearrangement of affairs, a change of condition, a new event, which we call a result. This is the first step in causation. If, then, a second active force comes upon the scene, causing a new result, this second result is the indirect, not the direct, result of the first active force considered. Or, to vary the case, suppose upon the set stage another active force is working, whether prior to or concurrently with the force we are dealing with, the latter active force operates together with the others in bringing about the result, which is still direct.

The connection of the defendant with the final active force may be sought in two ways. His connection with it may have been an active one; either by himself bringing it into existence, or by causing another person to do so. On the other hand, the defendant may have acted, and the force thereby loosed may have spent itself, coming to equilibrium in the form of a condition of forces which may or not be stable. If, then, this condition is unstable, if it is in appreciable danger of being acted upon by an oncoming force, the defendant who thus created a condition in the path of an oncoming force stands in a certain causal relation to the latter force, though the relation is worked out through the passive line. The same thing may be said if the defendant whose duty it was to change a condition which was in danger of such an oncoming force failed to remove the condition; in that case also he comes into a causal relation with the new force.

Our further discussion will accordingly fall into two heads: first, where the defendant's connection with the final active force con-

³¹ *Western Union Tel. Co. v. Preston*, 254 Fed. 229 (1918).

sisted in creating or causing it; second, where the defendant created a condition upon which the final force directly acted. To the consideration of the cases grouped in these two classes we now proceed.

IV

Since, as we have seen, the closest causal connection possible is that between an active force and its direct result, whatever consequences may be proximate certainly this one must be. It is well settled, therefore, that a direct result of an active force is always proximate. Several classes of cases illustrate this principle:

(a) Injury direct and immediate, but unforeseeable.

The defendant assaulted the victim; the victim had heart disease, and died of fright. Defendant is the direct and proximate cause of the death.³²

Fire against which defendant had insured short-circuited a machine, and thus caused such rapidity of action as to wreck the machine. The fire was a direct and proximate cause of the injury.³³

(b) Injury caused by direct transmission of defendant's force, as by one brick in a row being caused to fall upon the next until the last brick is thrown down.

Defendant with his tug wrongfully ran against a pile in the river; the force was transmitted through intervening piles until it threw out a brace to keep two piles apart, and plaintiff's leg was caught between these two piles. This was the direct and proximate result of defendant's act.³⁴

Defendant's automobile wrongfully collided with a pushcart and threw it against plaintiff, injuring her; the result is direct and proximate.³⁵

A negligent collision of defendant's car with another car threw a standing passenger against plaintiff and injured him; this was a direct and proximate result of the collision.³⁶

(c) Injury caused by the aggravation of a preëxisting disease or unhealthy condition.

Where a latent disease was aggravated by defendant's act, the act is the direct and proximate cause of the entire result.³⁷

³² *State v. O'Brien*, 81 Ia. 88, 46 N. W. 752 (1890).

³³ *Lynn G. & E. Co. v. Meriden Ins. Co.*, 158 Mass. 570, 33 N. E. 690 (1893).

³⁴ *Hill v. Winsor*, 118 Mass. 251 (1875).

³⁵ *Solomon v. Branfman*, 175 N. Y. Supp. (Misc.) 835 (1919).

³⁶ *Mathews v. Kansas City Railways*, 104 Kan. 92, 178 Pac. 252 (1919).

³⁷ *Vosburg v. Putney*, 80 Wis. 523, 50 N. W. 403 (1891); *Hahn v. Delaware, L. & W. R. R.*, 92 N. J. L. 277, 105 Atl. 459 (1918).

Where plaintiff was peculiarly susceptible to poisoning, his serious injury from poison to which his master's act illegally subjected him is the direct and proximate result of the master's act.³⁸

(d) Injury caused through the creation and later development of a septic or diseased condition.

Where the injury causes septic changes in the body, there being no new outside force concurring, the resulting harm is a direct and proximate consequence of the injury.³⁹

In one important class of cases, however, the courts seem to have held the opposite view. Where defendant negligently caused a physical injury, the immediate effect of which was the insanity of the injured person, who in a fit of insane mania committed suicide, the death is held not to be a proximate result of the injury.⁴⁰ This opinion seems hardly reconcilable with the current of authority on this subject.

(e) Injury caused through the subsequent action of already operating natural forces.

The defendant, a master of a vessel, carelessly missed stays in a high wind and flood tide, and the wind and tide carried his vessel against a sea wall and injured it; defendant's negligent act is proximate cause of the injury to the wall.⁴¹

It is to be noticed that the direct result of a *passive* cause is not necessarily proximate; proximity of result following primarily the active line. So where a train stood more than five minutes across a highway, in violation of law, and plaintiff's automobile driving along the highway collided with it, the position of the train was held not to be a proximate cause of the collision, but "only a condition."⁴²

Plaintiff through defendant's fault fell through a trestle and was rendered unconscious; while he was unconscious he contracted typhomalaria, there prevalent, and died of it. The court held defendant liable, but it would seem that his negligence was not direct but that other circumstances caused proximity.⁴³

³⁸ Louisville & N. R. R. v. Wright, 183 Ky. 634, 210 S. W. 184 (1919).

³⁹ Development of septicemia: Armstrong v. Montgomery St. Ry., 123 Ala. 233, 26 So. 349 (1899). Development of carbuncle followed by septic infection: Day v. Great E. C. Co., 104 Wash. 575, 177 Pac. 650 (1919). Development of tuberculosis: Pullman Co. v. McGowan, 210 S. W. (Tex. Civ. App.) 842 (1919). Development of tuberculosis: Clarke v. New A. C. Co., 179 Pac. (Cal.) 195 (1919).

⁴⁰ Scheffer v. Washington C. V. M. & Ct. S. R. R., 105 U. S. 249 (1881).

⁴¹ Romney Marsh v. Trinity House, L. R. 5 Ex. 204 (1870).

⁴² Gilman v. Central Vermont Ry., 107 Atl. (Vt.) 122 (1919).

⁴³ Terre Haute & I. R. R. v. Buck, 96 Ind. 346 (1884).

Though there is an active force intervening after defendant's act, the result will nevertheless be proximate if the defendant's act actively caused the intervening force. In such a case the defendant's force is really continuing in active operation, by means of the force it stimulated into activity.

(a) The simplest case of this sort would be an effective request to the intervening party to act, as in the typical case of A employing B to kill C, or of A commissioning B to make a contract with C. The defendant published a newspaper, in which he printed an advertisement of obscene literature for sale. X ordered the literature in response to the advertisement. Defendant is a proximate cause of the sale.⁴⁴

Defendant made a political speech in the street; persons crowding to hear him climbed upon a pile of paving-stones and injured them. Defendant was a proximate cause of the injury.⁴⁵

(b) Defendant may by his conduct so affect a person or an animal as to stir him to action; the result of such action is chargeable to defendant.

Defendant shot a dog in front of its owner's house; the dog ran frightened into the house and knocked down a woman. The injury to the woman was a proximate result of the defendant's act.⁴⁶

Defendant, driving a sleigh, ran into a horse attached to another sleigh; the horse bolted and struck the plaintiff. Defendant is a proximate cause of the injury to plaintiff.⁴⁷

Defendant by threats of violence drove his wife through the house until she jumped out of the window; he was a proximate cause of the injury thereby resulting to his wife.⁴⁸

Defendant while making a street speech violently abusing a certain form of religion, caused the adherents of that form of religion to make an attack upon him, in the course of which some of his auditors were hurt; his act was a proximate cause of the injury.⁴⁹

⁴⁴ *Rex v. De Marny*, [1907] 1 K. B. 388 (1906).

⁴⁵ *Fairbanks v. Kerr*, 70 Pa. 86 (1871).

⁴⁶ *Isham v. Dow*, 70 Vt. 588, 590, 41 Atl. 585 (1898). Rowell, J., said: "The law treats the act of the intestate as the proximate cause of the injury, whether the injury was, or could have been, foreseen or not, or was or not the probable consequence of the act, for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events."

⁴⁷ *McDonald v. Snelling*, 14 All. (Mass.) 290 (1867).

⁴⁸ *Reg. v. Halliday*, 61 L. T. R. 701, 702 (1889). Lord Coleridge, C. J., said: "If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result."

⁴⁹ *Wise v. Dunning*, [1902] 1 K. B. 167 (1901). Compare *Beatty v. Gillbanks*, 15

The defendant by his act may put some one in danger of loss (or of further loss), and that person may thus be caused to act defensively; the direct result of this defensive act is a proximate result of defendant's act. The intervening actor is usually the person whose rights are endangered by defendant's act.

Defendant threw a lighted squib into a crowd; as it was about to hit one in the crowd he threw it away from himself, and it exploded near plaintiff and put out his eye. Defendant was a proximate cause of plaintiff's injury.⁵⁰

Defendant negligently sent out a coach with insufficient harness; a rein broke, and the horses ran. Plaintiff, reasonably believing that the coach was about to capsize, jumped to the ground and was hurt. Defendant was a proximate cause of the injury.⁵¹

Defendant wrongfully took plaintiff's horse and wagon; plaintiff spent time and money in looking for his property. This expense was a proximate result of defendant's act.⁵²

Defendant wrongfully placed an obstruction across that part of a road used as a carriage-road; some one to clear the road removed the obstruction to the footpath; plaintiff, using the footpath in the dark, ran against the obstruction and was injured. This was a proximate result of defendant's act.⁵³

Defendant set fire to the grass; plaintiff's wife, in order to save the house, attempted to put the fire out and was burned to death. Her death was a proximate result of defendant's act.⁵⁴

Defendant, while driving a horse in the street, suddenly and negligently pulled around to avoid a coming vehicle; plaintiff, jumping out of the way of defendant's horse, got in the way of the other vehicle and was injured. This injury was a proximate result of defendant's act.⁵⁵

There are very few authorities in conflict with the mass of cases supporting this proposition. One or two may be noticed.

Cox C. C. 138 (1882), where in a similar case the praiseworthy motive of the actor seems to have protected him from punishment.

⁵⁰ *Scott v. Shepard*, 2 W. Bl. 892 (1773).

⁵¹ *Jones v. Boyce*, 1 Stark. 493, 495 (1816). Lord Ellenborough, C. J., said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

⁵² *Bennett v. Lockwood*, 20 Wend. (N. Y.) 223 (1838).

⁵³ *Clark v. Chambers*, 3 Q. B. D. 327 (1878).

⁵⁴ *Illinois Central R. R. v. Siler*, 229 Ill. 390, 82 N. E. 362 (1907).

⁵⁵ *Boggs v. Jewell Tea Co.*, 263 Pa. 413, 106 Atl. 781 (1919).

Defendant wrongfully erected a levee. A number of those whose land was flowed cut the levee, flooding plaintiff's land below. The court held the result remote.⁵⁶

Defendant started a prairie fire; plaintiff in attempting to put it out by a back-fire was burned. The injury was remote from defendant's act.⁵⁷ This was a decision by the notorious Robinson, J. His language on this point is worth quotation:

"When the fire was started, it was not subject to the control of any person, and it behooved all persons to keep out of its way. 'No man is responsible for that which no man can control.' Maxims (Comp. Laws 1913, § 7260). Even if defendant was negligent in permitting the fire to escape from his land, he was liable only for the proximate loss, and not for a death resulting from a person rushing into or in front of an onrushing flame. Such a loss is too remote."

Comment is unnecessary.

The intervening person may be a third person, acting either of his own motion or by employment of the person whose rights are in danger.

Defendant placed some one in danger of death; plaintiff was injured in an attempt to save him; the injury is a proximate consequence of defendant's act.⁵⁸

Defendant negligently set fire to a child's clothes; the child's mother burned her hands while extinguishing the flame. This was a proximate result of defendant's act.⁵⁹

Defendant wrongfully filled plaintiff's cellar with explosive illuminating gas; plaintiff sent a plumber into the cellar to find the leak. The plumber lit a match to find the leak, and the gas exploded, damaging plaintiff's house; this was a proximate result of defendant's act.⁶⁰

This is the basis of the responsibility of the person causing a personal injury for the act of a physician or surgeon in attempting to cure the wound.

⁵⁶ *Bentley v. Fischer L. & M. Co.*, 51 La. Ann. 451, 25 So. 262 (1899).

⁵⁷ *Hogan v. Bragg*, 170 N. W. (N. D.) 324 (1918).

⁵⁸ *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502 (1871); *Bond v. Baltimore & O. R. R.*, 96 S. E. (W. Va.) 932 (1918).

⁵⁹ *Wichita F. T. Co. v. Hibbs*, 211 S. W. (Tex. Civ. App.) 287 (1919).

⁶⁰ *Burrows v. March Gas Co.*, L. R. 5 Ex. 67 (1870).

Defendant wounds plaintiff, who calls a physician to cure him; the physician, whether carefully or negligently, does an act which injures plaintiff; this is a proximate result of the wound.⁶¹

It is to be noted that the defendant is responsible for the physician's act only if that act is *bonâ fide* intended as an attempt to cure the harm inflicted by defendant. If the physician should seize the opportunity to experiment, or maliciously to harm the victim, the defendant's act would not cause the physician's. In the Bush case⁶² the attending physician communicated scarlet fever to the defendant's victim. This was held not a proximate consequence of defendant's act. Nor is defendant responsible for a mistake of a nurse, employed to carry out the directions of the physician, who administers a wrong and harmful remedy.⁶³

The defendant by his attack upon another may cause the person attacked (or that person's husband) to act in defense, and thereby be the proximate cause of the direct result of such action.

An assured person made an attack upon a woman; her husband in her necessary defense killed him. The assured person caused his own death.⁶⁴

Defendant attacked a railroad train to rob it; defensive shots from the train killed a third person; defendant is a proximate cause of the death.⁶⁵

Defendant joined in an attack upon an armory; soldiers stationed in the armory fired defensively into the mob, and killed a bystander. Defendant upon this ground should have been held a proximate cause of the death; but the court, in a questionable decision, held that he was not so.⁶⁶ The decision was not *in banc*, but at the trial of the case.

There is one state, however, which seems not to have accepted the doctrine of the cases just considered. In Pennsylvania, in cases

⁶¹ *Com. v. Hackett*, 2 All. (Mass.) 136 (1861); *Purchase v. Seelye*, 231 Mass. 413, 121 N. E. (Mass.) 413 (1918); *Hooymann v. Reeve*, 168 Wis. 420, 170 N. W. 282 (1919).

⁶² *Bush v. Com.*, 78 Ky. 268 (1880).

⁶³ *Thompson v. Louisville & N. R. R.*, 91 Ala. 496, 8 So. 406 (1890).

⁶⁴ *Bloom v. Franklin L. I. Co.*, 97 Ind. 478 (1884).

⁶⁵ *Keaton v. State*, 41 Tex. Cr. R. 621, 57 S. W. 1125 (1900). Defendants were forcing this person to accompany them; but the court was willing to decide the case without relying upon that additional fact.

⁶⁶ *Com. v. Campbell*, 7 All. (Mass.) 541 (1863). The decision has unfortunately been followed. *Butler v. People*, 125 Ill. 641, 18 N. E. 338 (1888); *Com. v. Moore*, 121 Ky. 97, 88 S. W. 1085 (1905).

of every sort, the courts have usually refused to regard the direct result of an active force as proximate unless it is foreseeable.

An engine on defendant's railroad negligently hit a woman at a crossing and threw her body against plaintiff, injuring him; this was held to be a remote result of hitting the woman.⁶⁷

In one case, however, the Pennsylvania court has dealt with this subject as it would have been dealt with in states following the general rule.⁶⁸ The facts in that case were these: A spur track left the main track and joined it again a hundred feet farther on. The engineer of a small locomotive on the spur track carelessly ran into a passing passenger train. Just before the collision he reversed his engine, then closed the throttle and jumped out. The force of the collision threw the throttle open and the locomotive backed along the spur track and collided with the passenger train at the other end of the track, which the train had just reached, injuring plaintiff. The court held that the injury was a proximate consequence of the negligent collision. The court said:

"The engineer would be held to have foreseen whatever consequences might ensue from his negligence without the intervention of some other independent agency, and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable."

V

If the defendant's active force has come to rest, but in a dangerous position, creating a new or increasing an existing risk of loss, and the foreseen danger comes to pass, operating harmfully on the condition created by defendant and causing the risk of loss, we say that the injury thereby created is a proximate consequence of the defendant's act.

A sick seaman was sent aloft by the master of the vessel, it being apparent that he was in danger there; the seaman by reason of his weakness fell overboard. This was a proximate result of the master's act.⁶⁹

Defendant undertook to carry plaintiff to San Francisco by way of

⁶⁷ *Wood v. Pennsylvania R. R. Co.*, 177 Pa. 306, 35 Atl. 699 (1896).

⁶⁸ *Bunting v. Hogsett*, 139 Pa. 363, 21 Atl. 31, 33, 34 (1891).

⁶⁹ *United States v. Freeman*, 4 Mason (U. S.) 505 (1827).

the Isthmus, but delayed and finally abandoned transportation on the Isthmus, leaving plaintiff in an unhealthy climate. Plaintiff contracted fever. This was a proximate result of defendant carrying plaintiff to the Isthmus and no further.⁷⁰

Defendant wrongfully let down the bars of a pasture where plaintiff's sheep were kept; the sheep wandered out and were eaten by bears. If the jury found that the wandering of the sheep to where bears were was a danger of the situation, they should find for plaintiff.⁷¹

Defendant built an embankment across land of plaintiff with insufficient provision for carrying off the water of a river. In a flood the water was banked up against the embankment, and finally broke through and injured plaintiff's land below. This was a proximate result of building the insufficient embankment.⁷²

Defendant sent plaintiff into a tank filled with gasoline vapor; plaintiff was given an electric lamp on the end of a cord to light up the tank. The lamp was broken against the side of the tank, and the resulting spark exploded the vapor, injuring plaintiff. The court, finding that such an event should have been foreseen, held the result proximate.⁷³

Defendant sold and delivered a jug of sulphuric acid not labeled as poison; the purchaser put it where plaintiff drank it, believing it to be buttermilk, and was poisoned; defendant was a proximate cause.⁷⁴

A manufacturer sold a loaded rifle as unloaded; it was accidentally discharged and injured plaintiff; the injury was a proximate result of the manufacturer's act.⁷⁵

On the other hand, where defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from defendant's act.

Defendant threw a skin out of a window, and it came to rest upon the ground. A wind later lifted the skin from the ground, and it was thrown against plaintiff and injured him. The injury was not a proximate result of the defendant's act.⁷⁶

Defendant railroad put plaintiff, a passenger, off the train at the wrong station; she was forced to spend the night at a hotel there, and

⁷⁰ *Williams v. Vanderbilt*, 28 N. Y. 217 (1863).

⁷¹ *Gilman v. Noyes*, 57 N. H. 627 (1876).

⁷² *Zollman v. Baltimore & O. S. W. R.*, 121 N. E. (Ind. App.) 135 (1918).

⁷³ *Standard Oil Co. v. Allen*, 121 N. E. (Ind. App.) 329 (1918).

⁷⁴ *Burk v. Creamery P. M. Co.*, 126 Iowa, 730, 102 N. W. 793 (1905).

⁷⁵ *Herman v. Markham A. R. Co.*, 258 Fed. 475 (1918).

⁷⁶ *Rex v. Gill*, 1 Stra. 190 (1719).

was injured by the explosion of a lamp in her room. The injury was not proximate to defendant's act.⁷⁷

The form of rule above stated is believed really to state the true distinction, and the one actually enforced by the courts. The wording of it, however, is not that ordinarily used. The commonest phrase, probably, is that the injury shall be the natural and probable result of the act; a phrase which involves at least a misuse of both adjectives. A more accurate phrase, which is gaining in use, is that the intervening force, unless it is to make the result remote, must be foreseeable. This phrasing is not far from accurate; but it leads to a wrong result in one class of cases, soon to be considered.

It will be noticed that in cases of the sort under discussion the jury must usually be called upon to solve a difficult problem: whether a risk was created by the defendant, or, as it is usually phrased, whether the result (or more accurately, the intervening force) was foreseeable. In the cases heretofore considered, there was seldom a disputed fact to be left to the jury. Given the causation of the second force by the first, seldom a matter of doubt, the proximity was a mere question of law. In the cases now under examination, however, the question of risk is usually one of doubt, the answer to which must be found by the jury. Much, therefore, depends upon how the question comes up. Does it arise on a demurrer to the evidence, or an exception to the direction of a verdict or to the failure to direct one? The question then is, whether on the facts as given the jury could properly find a risk—not what the court would find. On the other hand, if the case has gone to the jury, the only question can be, Is there reason to disturb the verdict? In the first case the Appellate Court must reverse the proceedings if there is a case for the jury; in the second case, it must affirm proceedings. In neither case is the Appellate Court at liberty to express its own idea of the facts.

This distinction, as well as the general rule, may be illustrated by the following cases.

(a) Cases where the jury should have been allowed to find a verdict; a directed verdict, or a demurrer to the evidence, was set aside.

Defendant turned a stream of water on the sidewalk in freezing

⁷⁷ *Central of Georgia Ry. v. Price*, 106 Ga. 176, 32 S. E. 77 (1898).

weather; a passer-by slipped on the ice thereby caused, and was injured.⁷⁸

Defendant fails to light a staircase in a tenement house, as he was legally obliged to do; plaintiff, a tenant, fell down stairs in the dark and was injured. This is a proximate result of the defendant's breach of duty.⁷⁹

Defendant negligently left a service pipe with an open end under plaintiff's house and turned on odorless illuminating gas; plaintiff went under the house with a match to examine a supposed leak in a water pipe, and was injured by an explosion. This was held a proximate result of defendant's act.⁸⁰

In case of the creation of a dangerous situation by failure to protect a dangerous structure the jury should pass on the question. So of imperfect insulation of electric wire at a point where persons might come in contact with it;⁸¹ disrepair of a lever for stopping a machine dangerous to workmen;⁸² failure to keep wall of shooting-gallery tight enough to prevent glancing bullets;⁸³ failure to light a structure within a railroad right-of-way at night;⁸⁴ failure to place a light upon a pile of bricks near a sidewalk.⁸⁵

The defendant negligently struck the plaintiff, a police officer, and broke his leg; while convalescent and on crutches his crutch slipped, and he fell, breaking his leg a second time. The court held that the jury might find that his condition created a risk of this fall, or in the language of the court that the second fracture was a natural and probable result of the original injury.⁸⁶

On the other hand, a demurrer to the evidence was allowed by the Supreme Court of Canada in a case which might well have gone to the jury. The defendant, a telephone company, wrongly extended a "guy wire" from its pole, which stood on the highway line, about four feet into the highway. The place into which it was extended was a grassed

⁷⁸ *Cochran v. Barton*, 233 Mass. 147, 123 N. E. 505 (1919).

⁷⁹ *Tannenbaum v. Lindenberg*, 105 Misc. 307, 173 N. Y. Supp. 68 (1918).

⁸⁰ *Hahn v. Southwestern Gas Co.*, 82 So. (La.) 199 (1919).

⁸¹ *Olm v. New York & Q. E. L. & P. Co.*, 188 App. Div. 19, 176 N. Y. Supp. 370 (1919).

⁸² *P. Bannon P. L. Co. v. Page*, 183 Ky. 367, 209 S. W. 4 (1919).

⁸³ *Larson v. Calder's Park Co.*, 180 Pac. (Utah) 599 (1919).

⁸⁴ *Norfolk & W. Ry. v. Whitehurst*, 99 S. E. (Va.) 568 (1919).

⁸⁵ *Sutter v. Metropolitan St. Ry.*, 208 S. W. (Mo. App.) 851 (1918).

⁸⁶ *Hartnett v. Tripp*, 231 Mass. 382, 121 N. E. 17 (1918). The court did not mention the cases of *Wineberg v. Du Bois*, 209 Pa. 430, 58 Atl. 807 (1904), or *Snow v. New York, N. H. & H. R. R.*, 185 Mass. 321, 70 N. E. 205 (1904), in which the defendant was held not liable for consequences where a fall intervened. The latter case is probably distinguishable.

"bank" about six inches higher than the roadway. The plaintiff was driving along the road when his team became frightened and ran, swung up on the grass, caught the wheel on the wire, and threw out the plaintiff.⁸⁷ It is submitted that the case should have been given to the jury.

(b) But where the case is regarded as so clear that a jury could not be allowed to find a verdict for the plaintiff, the court has held it proper to direct a verdict for the defendant.

A workman attempted to alight from a slowly moving car, and his clothing was caught by a bolt on the car so that he was carried along against his will and struck and hurt a fellow workman who at his order had previously stepped out and was walking alongside the car. The court held that this was not a proximate result of the order to leave the car. Whether it was a proximate result of the defendant's attempt himself to leave the car is a closer question, though it would probably be decided in the same way.⁸⁸

Defendant blocked a public way by wrongfully leaving a wagon standing in it; plaintiff, driving through, was injured in attempting to get by the wagon; this is not a proximate result of defendant's act.⁸⁹

This principle is or may be relied upon in cases where the lack of safety device or protection required by statute or ordinance is a proximate cause of an injury by failure of the protection; since the requirement proves the danger to exist, and the finding of a jury is unnecessary.⁹⁰

(c) If the court itself passes on the facts, as it does in admiralty, this distinction is of course not applicable.

Defendant maintained a bridge with a swinging draw; a vessel gave the signal to pass through the draw; the persons employed to open the draw were unreasonably slow, so that it did not swing quite clear of the vessel, which hit the draw so as to increase its speed. The employees then failed to stop the draw at the proper place, so that it swung by and hit the vessel again as it was leaving the draw, injuring it. The court of Admiralty passed upon the whole question, drawing inferences of fact, and held that this injury was a proximate result of defendant's unreasonable delay in opening the draw, and of its failure to stop it.⁹¹

⁸⁷ *Eberhardt v. Glasgow M. T. Assoc.*, 91 Kan. 763, 139 Pac. 416 (1914).

⁸⁸ *Woodward Iron Co. v. Gamble*, 81 So. (Ala.) 810 (1919).

⁸⁹ *Davis v. Mellen*, 182 Pac. (Utah) 920 (1919).

⁹⁰ Fence around an excavation: *Johnson v. Denison*, 173 N. W. (Iowa) 46 (1919); *Fernald v. Eaton*, 180 Pac. (Cal. App.) 944 (1919). Fence around an area way (verdict directed for plaintiff): *Rose v. Gunn Fruit Co.*, 211 S. W. (Mo. App.) 85 (1919).

⁹¹ *New England F. & T. Co. v. Boston*, 257 Fed. 778 (1919).

It has been argued that the mere fact of the new force being foreseeable will not make the result proximate to defendant's act; it is so only where the risk of the new force was created or increased by the act. This is believed to be the rule upon which the courts actually proceed.

The application of the rule can best be studied in the actual decisions.

If the injury takes place by an active force which was threatening at the time of defendant's acting, the danger of which was not increased by defendant's action, in spite of the fact that he foresaw its operation, he has added no active danger to the situation and the loss does not result proximately from his act.

So where a railroad improperly delays carriage, and then starts it again, and in later crossing a flood-plain the goods are destroyed by a flood, the chance of which was as great at the time the goods should have been at the place as at the time they were there, the delay should not be regarded as a proximate cause of the flood.⁹²

These cases gave rise to a long controversy not yet settled; the authorities are still divided. They are collected in *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R.*⁹³

A little care in the analysis of the situation will make the above statement plain. The railroad has done two things, either of which might conceivably be the foundation of liability:

1. It has wrongfully ceased to carry; a failure to do what by law it ought to do. This, however, so far from causing the loss, would absolutely prevent it, unless the delay is itself in a dangerous place; if so, the carrier is liable for the danger overtaking it there.

2. It has started the goods on again after the delay, and kept them going. If at this time the foreseeable danger were greater than at the time the delay began, it is admitted that this would be a proximate cause of the loss; but if not, the danger was one that the carrier was bound to run in the carriage of the goods. In fact, under such circumstances (assuming he was justified at the beginning in receiving the goods to be carried, *i. e.*, that the danger was not a serious one and unknown to the shipper) the carrier

⁹² *Denny v. New York Central R. R.*, 13 Gray (Mass.) 481 (1859). *Contra*, *Michaels v. New York Central R. R.*, 30 N. Y. 564 (1864).

⁹³ 130 Iowa, 123, 106 N. W. 498 (1906); 1 SEDGWICK ON DAMAGES, 9 ed., §§ 119-119c.

would be violating its duty to the shipper if it did not carry the goods on.

If, however, there is no special danger at any particular point, but a constant risk of carriage which is necessarily increased by delay, the delay, since it causes the prolongation of the carriage, is a proximate cause of the loss due to the risk.⁹⁴

The doctrine of "attractive nuisance," so called, is one of the law of Torts no less than of Causation; but it involves a causative element. One who leaves a thing which attracts children to play with it, in a place where children can get it, thereby creates a situation of active danger; and if the act of the child brings about a catastrophe, it is a proximate result of leaving the thing about.

Defendant left an unlocked push-car near its railroad where children could get at it; a child pushed it on the track and was killed by a train. If the act of a child could have been foreseen, defendant is a proximate cause of the death.⁹⁵

This doctrine is the basis of the explosives cases. Defendant gives a child a pistol, explosive cap, or something which by exploding would cause injury, or leaves it in the child's way; he is a proximate cause of any injury the child may do with it, so long as it remains in his hands.⁹⁶

It is to be noticed that if the explosive gets into the hands of an adult the defendant's force has ceased to be an active danger; if the explosive thereafter gets into the hands of a child, defendant is not the proximate cause of anything this child may do with it.⁹⁷

⁹⁴ Risk of freezing in winter: *Fox v. Boston & Me. R. R.*, 148 Mass. 220, 19 N. E. 222 (1889); *O. J. Barnes Co. v. Northern Pac. Ry.*, 173 N. W. (N. D.) 943 (1919). Risk of forest fire in summer: *Bell Lumber Co. v. Bayfield T. Ry. Co.*, 172 N. W. (Wis.) 955 (1919). Risk of chilling live-stock: *Strother v. Atchison, T. & S. F. Ry.*, 212 S. W. (Mo. App.) 404 (1919); *Smart v. Oregon Short Line R. R.*, 183 Pac. (Utah) 320 (1919).

⁹⁵ *Follett v. Illinois Cent. R. R.*, 288 Ill. 506, 123 N. E. 592 (1919).

⁹⁶ *Binford v. Johnston*, 82 Ind. 426 (1882); *Chaddock v. Plummer*, 88 Mich. 225, 50 N. W. 135 (1891); *Anderson v. Newport Mining Co.*, 202 Mich. 204, 168 N. W. 523 (1918); *Lubbock v. Bagwell*, 206 S. W. (Tex. Civ. App.) 371 (1918). In *Hale v. Pacific Tel. & Tel. Co.*, 183 Pac. (Cal. App.) 280 (1918), the courts said that there was nothing in the evidence to show that the defendant could anticipate that a child would come upon its premises and get the explosive where it was kept; if there were such evidence, the jury might find the result proximate.

⁹⁷ *Chaddock v. Plummer*, 88 Mich. 225, 50 N. W. 135 (1891); *Pittsburg Reduction Co. v. Horton*, 87 Ark. 576, 113 S. W. 647 (1908).

It is often said that where a criminal, or as it is often put, an illegal act of another, intervenes after the defendant's act, the latter ceases to be a proximate cause.

Defendant wrongfully left open a gap in the plaintiff's basement wall: thieves entered and stole plaintiff's goods. Defendant was not a proximate cause.⁹⁸

Defendant wrongfully let a dangerous criminal escape; he was not a proximate cause of the injury done by the criminal, and foreseeable at the time of the escape.⁹⁹

This was a principal ground for holding the Cunard Steamship Company not liable for injuries suffered from the sinking of the *Lusitania*.¹⁰⁰

In spite, however of much authority to this effect, the statement must be regarded as exceedingly questionable. If an employee of a storage warehouse should leave a window open, it is submitted that the stealing of the goods would be a proximate result.

In all cases where the act or failure to act of the plaintiff himself was a factor, he might in a civil suit be barred of his recovery by his own contributory negligence. Where this is the case it has often been said that the result is remote. But so to say is to confuse two very different things. That there may be proximate causation, though the injured person is contributorily negligent, is shown in criminal cases, where contributory negligence of the injured person is no bar.

Defendant wounded X's finger; X refused to have the finger amputated, though the surgeon urged it, got lockjaw and died. The death was a proximate result of defendant's act.¹⁰¹

A neglect of this principle led to what is submitted is a wrong result. Defendant, a carrier by automobile for hire, negligently failed to stop at plaintiff's house, and plaintiff negligently jumped out of the moving car and was injured. The defense of contributory negligence had been abolished by statute. The court held the injury a remote consequence of defendant's failure to stop.¹⁰²

⁹⁸ *Andrews v. Kinsel*, 114 Ga. 390, 40 S. E. 300 (1901).

⁹⁹ *Hullinger v. Worrell*, 83 Ill. 220 (1876); *Henderson v. Dade Coal Co.*, 100 Ga. 568, 28 S. E. 251 (1897).

¹⁰⁰ *The Lusitania*, 251 Fed. 715 (1918).

¹⁰¹ *Reg. v. Holland*, 2 Moo. & Rob. 351 (1841).

¹⁰² *Dantzler S. & D. D. Co. v. Hurley*, 119 Miss. 473, 81 So. 163 (1919).

To sum up the requirements of proximity of result:

1. The defendant must have acted (or failed to act in violation of a duty).
2. The force thus created must (a) have remained active itself or created another *force* which remained active until it directly caused the result; or (b) have created a new active *risk* of being acted upon by the active force that caused the result.

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AMENDING THE CONSTITUTION OF THE
UNITED STATESA REPLY TO MR. MARBURY¹

THE provision for amending the Constitution is found in Article V. An examination of that article will disclose no purpose to draw any distinction between a proposed amendment that would take from the federal government some of its delegated powers and one which would take from the states some of their reserved powers. No effort was made to define the character of amendments that might be proposed and ratified. The outstanding features of Article V are these: No power was conferred upon the federal government to amend its Constitution. This power was reserved to the states themselves. The federal government had been created and clothed with powers surrendered or transferred by the states. These powers were not to be decreased or diminished except by the action of the states themselves. Naturally those administering the federal government would be in the best position to discover any defects or needed changes in the Constitution. The Congress of the United States was, therefore, authorized to propose amendments, but these were not to become effective unless made so by the states. An amendment, however, might be desired by states which would not be regarded as necessary by the Congress of the United States. And the states reserved to themselves a further power by providing that, upon the demand of the legislatures of two thirds of the states, Congress should call a convention for proposing amendments. Thus Congress was given the right to initiate amendments, but if it did not see fit to do so the states themselves reserved the right to initiate them.

The amendment of the Constitution, therefore, is distinctively an action by the several states, and not by the federal government. Every state in the Union is a party to the agreement that the Constitution may be amended in the manner provided in Article V. In entering into this agreement they might have stipulated that

¹ William L. Marbury, "The Limitations upon the Amending Power," 33 HARV. L. REV. 223.

no amendment should be made without unanimous consent, but, as suggested by Mr. Hamilton, there was no more reason why a small minority of the states should control in matters affecting the federal government than that a small minority of the people in any state should control in the affairs of that state. They might have agreed that the action of a majority of the states should make a proposed amendment effective, but the local interests of the various states were divergent, and were likely to become more so, and the states were, therefore, not willing to be bound, with respect to changes in the fundamental law of the land, by the action of a bare majority. As a compromise measure between these two extremes, it was accordingly agreed that ratification by three fourths of the states should be sufficient.

That the language used is equally applicable to an amendment which would restore to the states some of the powers previously delegated to the federal government, or to an amendment which would confer upon the federal government some of the powers previously reserved to the states, can scarcely be doubted.

The only security against the adoption of ill-advised or, if you please, revolutionary amendments is that, in the last analysis, the states themselves are the judges of the necessity for proposed amendments, and the action of three fourths of those states is required. No better security, however, could be devised. It is hardly conceivable that three fourths of the states will ever agree to a change in the fundamental law which will, to any essential extent, deprive a state of its sovereignty.

That the power to amend was intended to be as broad as above indicated, and to extend to every amendment regularly proposed which shall be ratified by the legislatures of three fourths of the states, is made even clearer when we examine the proviso to Article V. Section 9 of Article I contains two provisions which affected the subject of slavery. Slavery was even then a subject about which there were conflicting views. There were states particularly interested in seeing that it should not be disturbed by the new government which was being formed. The Constitution, in effect, treated it as a matter subject to state control, and therefore no power was conferred by which Congress could prohibit slavery in any of the states, but, under its power over imports and taxes, it could most seriously interfere with the institution of slavery.

The convention was not willing permanently to limit these powers of Congress, but, as a compromise, it was provided, in effect, that the importation of slaves should not be prohibited by Congress prior to the year 1808, and that no tax exceeding \$10 per slave should be imposed on such importation. And it was also provided that no capitation, or other direct tax, should be laid unless in proportion to a census under which only three fifths of the slaves should be counted. And when Article V, providing for amendments, was under consideration, a proviso was added to the effect that no amendment should be adopted prior to 1808 which would affect these provisions. With one exception, there was no other matter which might possibly be the subject of an amendment which was excluded from the immediate operation of Article V. The exception was that no state should ever, without its consent, be deprived of its equal suffrage in the Senate.

With this enumeration of the matters which the convention thought necessary to withdraw from the amending power, it would seem to be impossible to infer an intention that any other restrictions were intended to be placed upon the character of amendments that might be adopted.

The views above expressed have been challenged in an article entitled "The Limitations upon the Amending Power,"² recently published by William L. Marbury, of the Baltimore bar, who has advanced some ingenious arguments in support of the proposition that the prohibition amendment, recently adopted, and the proposed suffrage amendment are of such a nature as to be beyond the power to amend, and hence should be declared invalid by the court.

The Supreme Court has never said anything indicating the view that the courts could inquire into the validity of an amendment regularly proposed and ratified. Mr. Marbury frankly concedes that the objection he urges against the validity of the amendments now under consideration would, if seasonably made, have been equally effective against the Thirteenth and the Fifteenth Amendments. He thinks, however, that the court would not hold that, as an original proposition, the ratification by the legislatures of three fourths of the states made the Thirteenth and the Fifteenth Amendments a part of the Constitution, but that because no one

² 33 HARV. L. REV. 223.

saw fit to challenge their validity for forty-five years the court would be justified in treating this acquiescence by the people as the equivalent of a solemn action by a constitutional convention. In other words, while Congress has no power to propose, and the legislatures have no power to ratify, and their effort to do so is utterly void, yet their void acts will be given validity if some one does not challenge them in the courts for a long period of years. In short, void constitutional amendments become valid by prescription.

This theory introduces a startling innovation as to the means by which laws may be adopted. We have a government under which no act of Congress is valid or can have any effect unless authorized by the Constitution. The validity of every law must be tested by comparing it with the Constitution. The requirement that the Constitution shall be obeyed surely cannot be evaded by saying that a violation of constitutional provisions may become effective through the lapse of time.

As has been seen above, the Constitution committed to Congress, and not to the courts, the duty of determining what amendments were necessary. This was left expressly to the judgment of two thirds of the members of each house. The sole question, therefore, that could properly be submitted to any court is whether Congress has exercised its judgment in this regard. The power to do so is expressly committed to it, and the courts cannot inquire into the wisdom with which it has exerted this power. To say that the courts may strike down an amendment proposed and ratified in the regular way upon the ground that the amendment is unnecessary, unwise, or not one contemplated by the framers of the Constitution, would be to add to the provisions of Article V and make it read that an amendment proposed by Congress and ratified by three fourths of the states should be valid, provided it should be approved by the Supreme Court. In other words, it would be to substitute the judgment of the courts on a question of policy or expediency for the judgment of Congress and the legislatures of the states to whom the Constitution commits the matter. This would be wholly contrary to the entire theory upon which the powers of our government are distributed among coördinate branches. When the Court determines, as it must, that the power exists in Congress to propose any amendments which two thirds of the

members of each house deem necessary, judicial inquiry into the matter must terminate.

It is said that the power to amend the Constitution was not intended to include the power to destroy it, or to destroy the states composing the Union. But the federal government derives all its powers from the agreement of the states to surrender certain of the powers which they would have severally possessed if the Union had not been formed. The surrender of certain other powers, which experience has shown that it is desirable for the federal government to possess, is no more a destruction of the states than was the adoption of the original Constitution. Moreover, the question of whether a proposed amendment will destroy the states is one the authority to determine which must be vested somewhere, and, wherever vested, it will be subject to abuse.

From the standpoint of the states, then, the authority to determine such questions was placed where it would be less likely to be abused. The rights of the states would certainly be safer in the hands of three fourths of the states themselves than in the hands of any branch of the federal government. For this reason the states have not agreed that the federal courts may pass judgment upon what amendments may be adopted, but have reserved the ultimate authority in this matter to themselves. It is difficult to see how any safer plan for safeguarding the states against destruction through constitutional amendments could have been devised.

It is also said that if by successive amendments a state could be deprived of its legislative powers, it would cease to be the state which is guaranteed, by a limitation upon the amending power, equal representation in the Senate. In other words, if, by amendments, all the legislative power of the states should be taken away and the states destroyed, there would be no state to have equal representation in the Senate. Sufficient answer would seem to be that if the time should ever come when three fourths of the states would be willing to commit suicide by surrendering all of their legislative power, a condition will have arisen in which the public sentiment of the nation will have demanded an entirely new Constitution and a new government. But surely the fact that such a condition would result from depriving the states of all their powers is no reason for saying that it was never contemplated

that they should not, when experience showed the necessity for it, confer upon the federal government additional powers which could be exerted to a better advantage by the federal government than by the state government. Any governmental power, if carried to its extreme, will lead to absurd and disastrous results. If this is an argument against the existence of one power it is equally an argument against vesting power anywhere.

Finally, it is said that Article V was never intended to confer upon Congress the power to enact ordinary legislation in the manner proposed by the prohibition amendment. It is difficult to comprehend the refinement involved in this argument. The idea seems to be that it would be competent for an amendment to be adopted which would confer upon Congress the power to prohibit the liquor traffic, but that this result cannot be accomplished by making prohibition a part of the Constitution itself. In other words, the authority which can delegate this power to Congress cannot itself exercise such a power.

That the regulation or prohibition of the liquor traffic is a legitimate governmental function is not now questioned anywhere, and it has been time and again determined that the states may exercise this function through constitutional provisions, as well as by acts of the legislature. If the states can make such a rule of law a part of their own constitutions, there would seem to be no sound reason for saying that they cannot delegate the same power to the federal government by making the same rule of law a part of the Federal Constitution. Moreover, this amendment is no more legislation than any other provision or prohibition in the Constitution. It is precisely like the Thirteenth Amendment, which makes slavery unlawful throughout the United States. It simply incorporates into the Constitution a fundamental rule, and then expressly confers upon Congress the power, by legislation, to enforce it. It leaves Congress and the states to deal with the liquor traffic, but establishes for their guidance the general principle that that traffic shall be unlawful.

There is a striking analogy between the reasons which led to the adoption of the Thirteenth and the Eighteenth Amendments. Originally both slavery and the liquor traffic were lawful in all of the states. They were both regarded as matters which should properly be kept within the powers of the state. The legislation

in various states, on both subjects, differed widely. Slavery became the subject of bitter political controversy. Some states prohibited it, while others regarded it as a cherished institution. The time came when a large number of states demanded its abolition, and as a result of the Civil War those states which entertained the other view found themselves powerless to resist the demand. As a result the legislatures of three fourths of the states ratified an amendment which made slavery unlawful. If an amendment, ratified under the stress of these circumstances, is valid, there can be no question of the validity of the Eighteenth Amendment.

Agitation against the liquor traffic has been going on for years. It began in the various states, and state after state adopted prohibition until the liquor traffic was unlawful in a majority of the states. From the beginning, however, separate action by the states was beset with difficulties. In the first place, because the states had no power to regulate interstate commerce, it was held that no state could prohibit the sale, in original packages, of liquor shipped from another state. As the prohibition sentiment grew the federal government was appealed to, and sought to alleviate the defects. Congress, in the Wilson Act, gave the states the right to regulate sales in original packages. Later it passed the Webb-Kenyon law, which withdrew from the protection of the interstate commerce clause liquors being transported for use contrary to the laws of the state into which they were being transported. Still later, by the Reed amendment, Congress made it unlawful to transport in interstate commerce liquors into a state whose laws prohibited their manufacture or sale for beverage purposes. In this condition it was not unnatural that the conclusion should be reached that the subject was one which could be best dealt with by the federal government, and this led to the proposing and ratifying of the Eighteenth Amendment.

Unless all our ideas as to the rights of three fourths of the states to amend the Constitution of the United States are to be revolutionized, and unless the opinion which has prevailed and governed the practices of our government since the beginning have been entirely erroneous, the legislatures of three fourths of the states are clothed with the final and absolute power of determining whether an amendment regularly proposed is wise, desirable, or necessary. When this power has been exerted, as in the case of

the Eighteenth Amendment, there is no power in our government to prevent the amendment from becoming a part of the Constitution.

It is said that if the courts cannot pass upon a question of this kind, then the framers of the Constitution have failed in their efforts to establish and secure to their posterity forever the benefits of a perpetual union, by failing to clothe the Supreme Court of the United States with the power necessary to insure that perpetuity by preserving the integrity of the states. But the framers of the Constitution evidently felt that there was less danger of such a result to be anticipated from placing the power with the legislatures of three fourths of the states rather than with any number of individuals who might constitute the Supreme Court of the United States. At any rate, the Supreme Court clearly was not clothed with any such power. The Eighteenth Amendment has been proposed in the regular way, has received the approval of those bodies to whom alone has been committed the right to approve or disapprove, and its validity as a part of the Constitution is therefore not open to question in any court.

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WASHINGTON, D. C.

LIABILITY FOR SUBSTANTIAL PHYSICAL
DAMAGE TO LAND BY BLASTING—
THE RULE OF THE FUTURE. II¹

"WHAT," it may be asked, "do you say as to the apparently overwhelming weight of authority which is generally understood as being opposed to your conclusions?"

An answer to this question involves the consideration of: (1) the so-called "historic reason"; (2) statements of legal text-writers, essayists, and annotators, purporting to be founded on actual decisions; (3) actual decisions which are often supposed to be based on the old rule of absolute liability.

So far as relates to cases where the blast throws tangible substances upon plaintiff's land or person, there is a so-called "historic reason" to be considered. We do not think it is now entitled to weight, but it still exerts influence in some decisions. In Hepburn's Cases on Torts,² the learned editor speaks of "the historic reason for the distinction taken, because of the technical trespass, in *Hay v. Cohoes Co.* and *Booth v. Railway Co.* . . ." And he quotes from the note in 27 HARVARD LAW REVIEW,³ where the annotator, after saying that "there seems no sufficient reason for distinguishing these two classes of cases," further says: "Probably the reason for the distinction is that the courts have felt themselves fettered by precedent in the case of the technical trespass, and yet have been unwilling to extend the doctrine to the vibration cases." Some courts are inclined to act (almost unconsciously, as it were) upon the untenable theory that the old law of procedure (the law which once was undeviatingly applied under the old forms of action) still exercises a controlling influence upon the substantive law of the present day.

Trespass was the form of action to recover for damage directly done by force. The law excluded "all consideration of the fault

¹ Continued from February Number, 33 HARV. L. REV. 542.

² Page 43, note.

³ Pages 188-189.

or negligence of the person who is held liable." No consideration was taken of the moral quality of the act which resulted in damage.

"The theory of trespass for many hundred years may be shortly summed up by saying that the conception of negligence is unknown to the law of trespass. . . . so far as the immediate consequences of a man's acts are concerned, he is civilly liable regardless of the state of his mind, and consequently the absence of an intent to do the harm or the absence of negligence is no defense. This proposition, taken with the qualification that civil liability is strictly limited to such consequences as are immediate, constitutes the original common-law theory of trespass."⁴

An action of trespass was the appropriate form of procedure in a case of entry upon real estate, and it was regarded as necessarily carrying with it the idea of absolute liability. The former (taken for granted) substantive law of absolute liability was treated as if it were an inseparable accompaniment to that form of action. Hence, if the remedy upon a given state of facts (if there *were* any remedy) was an action of trespass, it was supposed that the doctrine of absolute liability must necessarily be enforced therein. The court would merely have said "that the defendant was liable because he was guilty of a trespass and liability in trespass is absolute."⁵

This was the law in the days (not long gone by) when "The form of procedure was considered the principal thing, and the substantive law was viewed as a mere incident to procedure."⁶ "Formerly the law of procedure almost monopolized attention, so that questions of substantive law received very scant consideration. . . . The forms of action are given, the causes of action must be deduced therefrom."⁷ "So great is the ascendancy of the Law of Actions in the Infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure."⁸

And, "further, to a very considerable degree the substantive law administered in a given form of action" had "grown up independently of the law administered in other forms. Each pro-

⁴ See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 74-77.

⁵ *Ibid.*, 82-83.

⁶ 1 ENCYCLOPAEDIA LAWS OF ENGLAND, 2 ed., Pollock's Introduction, 4.

⁷ MAITLAND, EQUITY AND FORMS OF ACTIONS, 300.

⁸ MAINE, EARLY LAW AND CUSTOM, Eng. ed. 1883, 389.

cedural pigeon-hole" contained "its own rules of substantive law."⁹ The law of torts had "in fact been developed by a series of disconnected experiments with the various forms of action. . . ." ¹⁰ In 1886 Sir Frederick Pollock said that the "really scientific treatment of principles" in Torts "begins only with the decisions of the last fifty years."¹¹

But at the present day the former situation is reversed. Now substantive law is regarded as the principal thing, and procedure is viewed as a mere incident thereto.¹²

Professor Wigmore¹³ calls attention to "the necessity, every day drawing nearer, of adjusting the treatment of our substantive law to the abolition, already largely accomplished, of the forms of action and classes of writs in Tort . . ." But though substantive law *ought* no longer to be "controlled by the forms of procedure," courts are slow to adopt and act upon this obvious truth. The "ideas and phrases connected with old forms [of action] still exert an influence." Professor Salmond says:

"Forms of action are dead, but their ghosts still haunt the precincts of the law. . . . We are still called upon to observe distinctions and subtleties that have no substance or justification in them, but are nothing more than an evil inheritance from the days when forms of action and of pleading held the legal system in their clutches."¹⁴

At the present day, when the question before a court is, whether to retain or repudiate the old doctrine of holding a non-culpable defendant absolutely liable, it is erroneous to argue that the old doctrine must be retained and enforced; because the defendant, *if liable at all*, would have been answerable in trespass, or because trespass would have been the proper form of action *if his conduct had been wrongful*. The primary question now is, whether he ought to be held liable at all in any form of action whatever.

Next, as to the statements of legal text-writers, essayists, and annotators.

⁹ MAITLAND, EQUITY AND FORMS OF ACTION, 298. Compare Professor Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415.

¹⁰ See Sir Frederick Pollock, 27 ENCYC. BRIT., 11 ed., 64.

¹¹ Introduction to first edition of POLLOCK ON TORTS, vii.

¹² See, quoted *ante*, MAITLAND ON EQUITY AND FORMS OF ACTION, 375.

¹³ "The Tripartite Division of Torts," 8 HARV. L. REV. 200, 209.

¹⁴ 21 L. QUART. REV. 43; see fuller quotation, 30 HARV. L. REV. 245.

By some of these writers, the application of the doctrine of absolute liability is certainly overstated. Take, for instance, the alleged rule of absolute liability in cases where blasting throws rocks (or other tangible substances) upon plaintiff's land or person. An excellent text-book asserts that the rule of absolute liability in such cases is "universal."¹⁵ Yet the application of the rule depends (*inter alia*) upon the locality. In the same state, where liability for blasting, resulting in such damage, if done in the midst of a populous city, is asserted to be absolute, it is held that liability for blasting in a secluded locality, far from human habitations, may be imposed only in case of negligence. As to this, compare with each other two cases in California: *Munro v. Pacific Coast Dredging, etc. Co.*,¹⁶ and *Houghton v. Loma Prieta Lumber Co.*¹⁷ Compare also with each other two Washington cases: *Freebury v. Chicago R. R.*,¹⁸ and *Kendall v. Johnson*.¹⁹

If a client asks the question, Is a defendant blasting on his own land liable for damage thereby done to the land or person of his neighbor? no good lawyer would undertake to answer without first having all attainable information on the specific case as to the locality of the blasting, and as to all the surrounding circumstances, including the quantity and quality of the explosives used, and the manner of operating the blast. If we look to isolated sentences in judicial opinions, we are liable to get seemingly contradictory answers to the above abstract question, presented as it were *in vacuo*. These seeming contradictions must be construed in the light of the specific facts before the court in the respective cases.

Good lawyers sometimes state the law in the literal language of judicial opinions, without analyzing the underlying reasons, which are often unexpressed by the court. See, for example, Professor Ames "Cases on Torts," page 76, note 1.²⁰

In 30 HARVARD LAW REVIEW²¹ the present writer said, as to the liability for blasting, "when substances are thereby thrown on the

¹⁵ 3 SHEARMAN & REDFIELD ON NEGLIGENCE, 6 ed., § 688 a.

¹⁶ 84 Cal. 515, 527, 24 Pac. 303 (1890).

¹⁷ 152 Cal. 500, 504, 506, 93 Pac. 82 (1907).

¹⁸ 77 Wash. 464, 467, 137 Pac. 1044 (1914).

¹⁹ 51 Wash. 477, 99 Pac. 310 (1909). See also Sanborn, J., in *Cary Bros. v. Morrison*, 129 Fed. 177, 180 (1904).

²⁰ 3 ed., 1910.

²¹ Page 330.

land of plaintiff": "In such a case the great weight of authority imposes absolute liability." But it will be noticed that this statement does not assert that such result is correct on principle; nor does it assert that the conclusion said to be reached by authority is to be regarded as a permanent and final rule. On the contrary, the writer, later on in the same article, indicates his view as to "the possibility, not to say the probability," and (*semble*) the desirability, of a change in the law as to this matter.²²

The assertion — that the rule of absolute liability, where blasting throws tangible substances upon plaintiff's land is "universal" — is in conflict with the decision in *Klepsch v. Donald*.²³ In that case, by defendant's blasting, a rock was thrown crashing through the roof of Klepsch's house and fatally wounding him. The rock was thrown between nine hundred and forty and twelve hundred feet. The distance was "the very extreme of distances to which rocks could be thrown in that manner, being more than three times the distance to which they were usually thrown."²⁴ Upon the first trial, the judge took the question of negligence from the jury, instructing them to find for plaintiff if the rock came from the defendant's blast. A verdict for plaintiff was set aside, the court holding that there was no evidence that it was unreasonable or negligent for the defendant to attempt to blast at that particular place, in case the operation was properly conducted. Upon a second trial, the court, holding that there was evidence sufficient to justify the jury in finding that the blasting operation was carelessly conducted, left the question of negligence to the jury. A verdict was found for plaintiff on this question, and judgment was rendered thereon.²⁵

In 1 Bohlen's Cases on Torts,²⁶ Professor Bohlen, after stating the rule in *Hay v. Cohoes Co.*, — that one who, by blasting, casts *débris* upon the land of another, is liable irrespective of negligence, — says: "*In Klepsch v. Donald*, 4 Wash. 436 (1892), it is held this only applies where the *débris* is cast upon nearby property . . ." In 19 Cyclopædia of Law and Procedure,²⁷ after stating the rule of

²² See 30 HARV. L. REV. 420, 424.

²³ 4 Wash. 436, 30 Pac. 991 (1892).

²⁴ See 8 Wash. 162, 165, 35 Pac. 621 (1894).

²⁵ *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621 (1894).

²⁶ Page 611, note 2.

²⁷ Page 7.

absolute liability in cases like *Hay v. Cohoes Co.*, the editor refers to *Klepsch v. Donald*, "where, although this doctrine was not repudiated, the circumstances of the case took it without the rule."

A more important question remains. "How do you deal with the formidable list of *actual decisions* which are generally supposed to adopt (and, indeed, sometimes do, in literal terms, adopt) the old rule of absolute liability?"²⁸

To this question there are two answers:

First: In a large proportion of these cases the decision is, in reality, founded on the existence of negligence.

Second: In most of the cases where the decision in favor of plaintiff does not appear to have been based on the existence of negligence; yet it could have been based on that ground; and such a view would not bring about a different result from that which was actually reached.

Here, to avoid confusion, it is necessary to distinguish between two kinds or descriptions of negligence.²⁹ We have previously said³⁰ that the negligence which involves liability "may consist (1) in making an attempt to blast at all, at the time and place in question; or it may consist (2) in negligently conducting blasting operations when undertaken at a proper time and place." For convenience of reference, (1) may be called negligence of the first description, and (2) may be called negligence of the second description.

This distinction has already been stated by more than one writer; and it is so important that we here quote their language.

"Section 765. DECISIONS WHICH PROCEED UPON THE PRINCIPLE OF NEGLIGENCE. — An examination of the decisions where damages have been claimed for injuries sustained by blasting, will show that by far the greater number of them proceed upon the inquiry whether there was negligence either (1) in doing the work at all, in the place where and at

²⁸ This list includes not only most of the cases where tangible objects have been thrown upon the premises, but also many of the recent cases where the damage is done by vibration or concussion.

²⁹ Perhaps it would be more accurate to speak of distinguishing between two different subject matters as to which negligence is alleged to exist.

³⁰ 33 HARV. L. REV. 549.

the time when it was done, — that is to say, whether the work was a nuisance, and consequently in theory of law negligence *per se*; (2) whether, although not a nuisance *per se* or negligence *per se*, it was done in a negligent manner, — that is to say, without taking those precautions necessary to safeguard the persons or property of third persons in the vicinity. It is obvious, upon a moment's reflection, that the work of blasting rocks, being absolutely necessary in excavating through beds of rock, in mining, in digging wells, in excavating foundations for buildings, in improving roads and streets, in digging canals, and in building railways, cannot under all circumstances be regarded as a nuisance *per se* and condemned as being negligent as matter of law. . . .”³¹

“ . . . if a person is guilty of a wrong in blasting in a particular locality, no degree of care in the actual conduct of the blast will excuse the primary tort. . . . The negligence may consist as much in blasting at all, as in failure to use due care in operating the blast. For the person must use due care in determining whether the locality is a proper place for blasting, as well as in the actual blasting itself.”³²

In other words: It is no defense that the blasting operations “were *in themselves* carefully and skilfully performed, if, having regard to the danger thereby incurred by the plaintiff, it was a negligent act to undertake them at all.”³³

Confusion is sometimes caused by the failure of judges to notice these distinctions. A judge often speaks as if there were but one description of negligence, and as if that one were what we call the second description. When he says the plaintiff may, in a particular case, recover without proving negligence, he often means without proving negligence of the second description. And his real reason is found in the fact that the plaintiff has already proved negligence of the first description.

A good illustration is afforded by the following passage in 1 Thompson on Negligence:³⁴

“Where the work of blasting is done in a situation where it is necessarily dangerous to the public, as in a thickly settled portion of a city, whereby a person is killed or injured, damages are recoverable for such

³¹ 1 THOMPSON ON NEGLIGENCE, § 765. In note 43 various authorities are cited by the author as sustaining the above view.

³² E. B. THOMAS ON NEGLIGENCE, 2 ed., 2060.

³³ See language used by SALMOND ON TORTS, 4 ed., 280, note 10, as to disturbances of right of support of soil.

³⁴ § 764.

injury or death without proof of negligence, and notwithstanding proof that the person or corporation so firing the blast, employed skillful and experienced men and exercised the highest degree of care. The reason is that in such a case the work itself is so inherently dangerous that the doing of it, no matter how carefully, is of itself negligence; so that no amount of care in doing the negligent act will excuse the actor from the responsibility of the consequences which grow from it."

Here, when the author says that damages are recoverable "without proof of negligence," he obviously means — without proof of negligence of the second description. And his reason is that the plaintiff has already proved negligence of the first description, which clearly establishes his right to recover.

For a case where this distinction is recognized and stated in the opinion of the court, see Sears, J., in *Fitzsimons & Co. v. Braun*.³⁵

There are two recent blasting cases where the damage resulted solely from the vibration of the earth or the concussion of the atmosphere, and where negligence has been said not to be an element of an action. In one case it is said that negligence need not be alleged;³⁶ and in the other case it is said that negligence need not be proved.³⁷

In these cases, the court in thus using the term "negligence" seems to have in mind only what we have called negligence of the second description; *viz.*, want of care in conducting the blasting operation.

³⁵ 94 Ill. App. 533 (1900); decision affirmed in 199 Ill. 390, 65 N. E. 249 (1902). Sears, J., pages 535-536: "If, when the use is lawful, even though naturally dangerous in probable consequences, no liability can be predicated save upon a negligent manner of use, then this cause was submitted to the jury upon an erroneous theory of law. If, however, the contractor who makes use of a dangerous explosive in the ground near the property of another, and when a natural and probable, though not inevitable, result of such use is injury to such property, is liable for the resulting injury irrespective of the degree of care exercised in the handling or exploding of the substance, then the case was properly submitted and the recovery may be sustained." Sears, J., page 542: "We do not regard the evidence as insufficient to sustain the recovery under the allegations of the narr. It is true that it is alleged in each count that the defendant negligently used the explosive. But the charge is not confined to the manner of handling the explosive, but goes to the negligence of any use of it, however careful the particular method of handling, which naturally caused an injury to another. While there is no evidence to establish any negligence in the specific manner in which the explosive was handled, yet the evidence does establish that negligence which the law imputes to an act by which the property of another will naturally and probably be caused a consequential injury. We are of opinion that there is no variance."

³⁶ *Louden v. City of Cincinnati*, 90 Ohio St. 144, 106 N. E. 970 (1914).

³⁷ *Watson v. Mississippi River Power Co.*, 174 Iowa, 23, 156 N. W. 188 (1916).

In reality, the plaintiff in these cases has alleged and proved facts which show what we call negligence of the first description; *viz.*, blasting at a time and place when a man of average prudence ought to have foreseen the danger; and hence, if he acted in oblivion or disregard of it, he must often be regarded as having acted negligently. It makes no difference that the judges do not call such conduct by the name of negligence. They may describe it only by the general term "wrongful," without specifying the particular nature of the tort. Or they may say that the defendant, in blasting, has been making an unreasonable use of his land. But whatever names they employ, the conduct they are describing can fairly be classed under the general head of negligence.

This is apparent from the language used in the opinions.

Thus, in 174 Iowa,³⁸ Weaver J., after stating the pleadings in 90 Ohio State,³⁹ says:

"The court [meaning the Ohio court] states the question to be whether the owner of property may make use of powerful explosives on his own premises in the accomplishment of a lawful purpose, provided he uses due care, notwithstanding the fact that the necessary or natural or probable result thereof is to injure or destroy adjacent property. This, it will be seen, is precisely the proposition we have now before us."

Weaver, J.,⁴⁰ then quotes from the opinion of the Ohio court, sustaining the right of action. After referring to the maxim "*Sic utere tuo ut alienum non lœdas*" as established law, the Ohio court says:

"But it must be conceded that this is no longer the law, if the owner of a lot may employ such means in the improvement in the use of his property as will naturally and necessarily result in the destruction of adjoining property. . . . If the means employed will, in the very nature of things, injure and destroy his neighbor's property, notwithstanding the highest possible care is used in the handling of the destructive agency, the result to the adjoining property is just as disastrous as if negligence had intervened."

When the courts speak, as they do in some of the above cases, of damage as being the "necessary and probable and natural result"

³⁸ *Watson v. Mississippi River Power Co.*, 174 Iowa, 29, 156 N. W. 188 (1916).

³⁹ Page 144.

⁴⁰ 174 Iowa, 23, 29, 156 N. W. 188 (1916).

of defendant's conduct, they must generally be taken to mean that his conduct was negligent.⁴¹ It is implied that he foresaw, or ought to have foreseen, the consequences. If so, he would generally be liable for them.⁴² A "necessary result" cannot mean less than "a highly probable result." And the phrase "a natural result," although not literally meaning "a probable result," is not infrequently used in that sense.⁴³ Certainly, one who attempts blasting where "the necessary and natural and probable result" is the destruction of a neighbor's property, must generally be guilty of negligence of the first description.

The different impressions made upon legal readers by the decisions, as to liability for damage produced exclusively by vibration or concussion, are well brought out in the following conflicting passages, placed in parallel columns:

"The trend of the majority of the recent decisions on the question is toward the rule that person causing blasting to be done is liable for injuries to the property of another caused by the concussion or vibration resulting therefrom, irrespective of the question of negligence, and although there is no actual physical invasion of the property thus injured."⁴⁴

"Our study of the opinions of the different courts on this subject yields the belief that when trespass or continuous injury is absent, liability for injury due to an explosion occurring in the conduct of a business depends on negligence, and that most courts expressly or impliedly proceed on this theory, although occasionally they differ as to what is sufficient proof of negligence; and dispose of the case in a manner which disguises the fact that negligence is regarded as essential to a recovery."⁴⁵

⁴¹ For equivalent expressions, generally to be understood as meaning negligent conduct, see the following: "an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages . . . he ought to have known that by such an act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence." Foote, Com., in *Colton v. Onderdonk*, 69 Cal. 155, 158-159,

⁴² A defendant, who has only been making a reasonable use of his own land, may not be liable merely because he foresaw the damage which would thereby be caused to his neighbor. But, in most cases of serious damage done by blasting, the defendant has exceeded his right of reasonable user; and, if he foresaw, or ought to have foreseen, the damage, he will be adjudged negligent.

⁴³ See 25 HARV. L. REV. 115.

⁴⁴ From ANN. CAS., 1916 C, 1176, note.

⁴⁵ From 123 Am. St. Rep. 581, note.

We prefer the second passage to the first.

If, now, leaving on one side the cases where damage is produced exclusively by vibration or concussion, we take the case where blasting has thrown tangible substances upon the land or person of another, negligence will be found to exist in a very large majority of cases. The casting of tangible substances upon plaintiff's land or person will generally furnish evidence that defendant was negligent; either (1) in making an attempt to blast at all at the place in question, even though the blasting operation was conducted with care; or, (2) in carelessly conducting the operation. In most cases, plaintiff may fairly insist that defendant shall take one or the other horn of the following dilemma. If defendant admits, or if the jury find, that it was negligent to blast at all at the place, he is liable for the consequences. On the other hand, if defendant contends that it was proper to blast at that place if the operation was conducted with care, the result generally furnishes evidence to show that the operation was carelessly conducted; *e. g.*, using an excessively heavy charge of explosive, or failing properly to cover the blast. We think that the first supposition will prove well founded in a large proportion of instances; but that, if the first is not well founded, the second generally will be.

As cases of this kind have heretofore generally been disposed of on the theory of absolute liability, the question as to what would constitute evidence of negligence has not usually been considered. But in some instances, especially where a plaintiff, in his declaration, has made negligence the gist of his complaint, the courts, though deeming the allegation of negligence unnecessary, have considered the question as to what would be proof of negligence. And they have said that, if the blast has thrown *débris* upon plaintiff's land or person, that would generally be competent evidence to be submitted to the jury as sustaining the allegation of negligence (*i. e.* negligence of one or the other of the above descriptions). Authori-

10 Pac. 395 (1886). ". . . where such an explosion could not take place without strong probability of its injuring some one." Thornton, J., in *Munro v. Pacific Coast Dredging Co.*, 84 Cal. 515, 527, 24 Pac. 303 (1890). ". . . when the natural and probable, though not the inevitable, result of the explosion is injury to such property of the other . . ." Boggs, J., in *Fitzsimons v. Braun*, 199 Ill. 390, 393, 65 N. E. 249 (1902). ". . . when he makes use of such means as will naturally, necessarily or probably result in the destruction of property, . . ." Donahue, J., 90 Ohio St. 144, 153, 106 N. E. 970 (1914).

ties in favor of permitting recovery on the second ground are given in the note below.⁴⁶

⁴⁶ In *Ulrich v. McCabe*, 1 *Hilton* (N. Y. Com. Pleas), 251 (1856), "some stones were thrown upon the plaintiff's house." Brady, J., pp. 252-253: "It does not appear, however, that the blast was properly covered. . . . If the blast, indeed, had been properly covered, the damage sustained by the plaintiff, probably, would not have resulted. . . . In such a case, the fact of the accident raises a presumption that the blast was not properly covered."

In *Wiggins v. Hiawassee V. Ry.* 171 N. C. 773, 89 S. E. 18 (1916), "the force of the blast threw pieces of stone over on plaintiff's land and about his house." Damage was also done by shaking or jarring the house. Four grounds of negligence were alleged (including an excessively large charge of dynamite, and failure to take proper care against injury by the blast). Per Curiam, p. 775: "We are of opinion that there is abundant proof of negligence (even if proof of negligence be necessary where such a trespass is committed upon the property and rights of another) to justify the submission of the issues to the jury."

In *Rafferty v. Davis*, 260 Pa. St. 563, 103 Atl. 951 (1918), when plaintiff was sitting at the window of her house, a rock blown from defendant's premises crashed through the window and severely injured her. The specific negligence alleged against defendant was, use of an overcharge of powder and failure to use due care to safeguard the vicinity from flying pieces of rock. Potter, J., said (p. 565), that if the plaintiff's evidence was credited, "it was sufficient to justify an inference by the jury that the blast was the result of an overcharge, and to warrant a finding of negligence upon that ground." (See also pp. 566, 567.) In a later part of the opinion, pp. 567-568, Potter, J., said, that if the blast threw rock on plaintiff's land, defendant would be responsible irrespective of negligence, citing 253 Pa. St. 262, 264.

In 1 THOMPSON, NEGLIGENCE, § 770, it is said: "In conformity with the maxim *res ipsa loquitur*, it is generally held that the fact that damage is done by throwing rock or débris upon the premises of an adjacent owner by blasting, is of itself *prima facie* evidence of negligence, in not properly covering the blast, or in using explosives of unnecessary power, or in the manner of loading the blast. . . . Under the operation of this principle, the mere fact of the injury taking place by reason of the firing of the blast takes the question of negligence to the jury, and it is for them to say whether inference of negligence is repelled by the surrounding circumstances or by the defendant's evidence."

In *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991 (1892), and 8 Wash. 162, 35 Pac. 621 (1894), stated *ante*, p. 671, the blast threw rocks on plaintiff's land; the rocks being thrown "more than three times the distance to which they were usually thrown." The court declined to apply the doctrine of absolute liability, holding that there was no evidence that it was unreasonable or negligent for the defendant to attempt to blast at that particular place in case the operation was properly conducted. But the court held that there was evidence sufficient to justify the jury in finding that the operation was carelessly conducted; and, upon the second trial, left the question of negligence in this respect to the jury, who found for plaintiff. Stiles, J., 8 Wash. 165, said: "The very fact shown in the case that, in general, the rocks from defendant's blasts did not fly half as far as these particular rocks, certainly tended to show that there must have been an unusually heavy charge behind these rocks, or that some less than usually efficient means was taken to prevent their flight to such a prodigious distance." As to the application of the doctrine of *res ipsa loquitur*, see 4 Wash. 439, and 8 Wash. 163-165.

As to this case, Professor Bohlen, in 1 CASES ON TORTS, 611, note 2, after saying

Here we might consider the defense of necessity, or reasonable user, sustained by Andrews, C. J., in *Booth v. Railroad*,⁴⁷ and contrast his views with the comments made thereon by Rumsey, J., in the subsequent case of *Hill v. Schneider and Bradley*.⁴⁸

In *Hill v. Schneider and Bradley*,⁴⁹ plaintiff was tenant of a building belonging to Schneider. Bradley was a contractor, excavating for the erection of a large building by Schneider in the vicinity of the building tenanted by plaintiff. The house occupied by plaintiff had already been seriously damaged by defendant's blasting. Nothing had been thrown upon plaintiff's premises, but substantial damage had been done by jarring, etc. Defendant Bradley proposed to let off further blasts, which were almost certain to do similar damage to a greater extent. The court granted an injunction against Bradley.

Rumsey, J.:⁵⁰

"The course of work pursued by Bradley is not necessary to the making of the excavation, but it is easy to do it in a different way with the use of smaller blasts so as not to injure the wall of the plaintiff's building, although at perhaps a somewhat greater cost to the contractor, and such is the usual way of doing that work where there is danger of injuring a neighbor's premises. . . ." ⁵¹

In the *Booth* case, the defendant was a railroad corporation, authorized to construct a road. It obtained the consent of the municipal authorities to cross a street by a tunnel or cutting. It became necessary, in order to comply with the conditions imposed by the city authorities, that the defendant's roadbed at the crossing should be depressed fifteen feet below the surface of the street. The soil extended about ten feet below the surface, and underlying that was rock. The defendant company loosened the rock by blasting with gunpowder. In consequence of this blasting, the plaintiff's house on an adjoining lot was seriously damaged, the foundations being cracked, the beams and joists pulled apart, and the plaster

that the absolute liability rule of *Hay v. Cohoes Co.* "only applies where the debris is cast upon nearby property," adds: "where it is cast to an abnormal distance, while the liability depends on proof of negligence, this circumstance shows a *prima facie* case."

⁴⁷ 140 N. Y. 267, 35 N. E. 592 (1893).

⁴⁸ 13 N. Y. App. Div. 299, 43 N. Y. Supp. 1 (1897).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 304.

⁵¹ Compare *Bacon, V. C.*, in *Arnold v. Furness R. Co.*, 22 Weekly Rep. 613 (1874).

loosened. The jury found that the damages to the house from the blasting amounted to \$1750. No rocks or materials were thrown upon the plaintiff's lot or against his house. The inference was that the damage to the plaintiff's house was caused by the jarring of the ground or the concussion of the atmosphere created by the explosion, or by both causes combined. "It was substantially conceded,⁵² that the defendant exercised due care in conducting the blasting, and that it was necessary in order to remove the rock." From concessions it was assumed⁵³ "that blasting was the only mode of removing the rock practically available; that it was conducted with due care; and that it was necessary to enable the defendant to conform the roadbed to the established grade." The trial judge instructed the jury that the defendant in using powerful explosives in blasting the rock "used them at its peril," and that if the plaintiff's home was injured thereby, the defendant was liable for the damages occasioned and "that it made no difference whether the work was done carefully or negligently."

Exceptions were taken to these instructions. After verdict for plaintiff, a motion for a new trial was denied, and judgment was entered. On appeal by defendant at the General Term of the Supreme Court for the Fifth Department, three judges concurred in overruling the exceptions.⁵⁴ But upon appeal to the Court of Appeal, the exceptions were sustained, the judgment of the General Term was reversed, and a new trial ordered.⁵⁵

It appears that, on the argument of the Booth case, the defendant's counsel had substantially conceded that the blasting was "necessary" in order to remove the rock; and that it was "necessary" in order to enable defendant to adapt his premises to a lawful use. Andrews, C. J., appears to have argued that counsel, by making these concessions, had worked no harm to their client; because these positions, even if not conceded, would have been sustained by the court as effectual defenses. Portions of his opinion

⁵² 140 N. Y. 267, 269, 35 N. E. 592 (1893).

⁵³ *Ibid.*, 274.

⁵⁴ 44 N. Y. St. 9, 17 N. Y. Supp. 336 (1892).

⁵⁵ 140 N. Y. 267, 281, 35 N. E. 592 (1893).

One of the headnotes to this last decision in 1 ABBOTT'S NEW YORK CYCLOPÆDIC DIGEST, 210, § 23, is as follows: "An adjoining landowner improving his land is under obligation to do no unnecessary damage to his neighbor's dwelling, but he has the right to use all necessary and usual means to adapt his land to any lawful use, though the means may endanger his neighbor's house."

and of the subsequent criticisms of Rumsey, J., are given in the note below.⁵⁶

This defense, that the blasting was "necessary," is, in effect (and is so treated by Andrews, C. J.), a contention that defendant, in blasting on his own land, was only making a reasonable, and hence lawful, use of his land (was reasonably using his right of ownership in his land). And this contention is virtually sustained by Andrews, C. J.

⁵⁶ "The rocky surface of the upper part of Manhattan island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot, and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent or tend to prevent the improvement of property. The first occupant in building on his lot exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal rights in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there." (After citing authorities): "The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling; but it cannot, we think, exclude the former from using the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor."

Andrews, C. J., 140 N. Y. 267, 278, 35 N. E. 592 (1893).

In *Hill v. Schneider and Bradley*, 13 App. Div. 299, 305, 306, 43 N. Y. Supp. 1 (1897), after stating the special concessions made in the *Booth* case, and after saying that that case was decided upon these special facts, Rumsey, J., says:

"But the rule laid down in that case, while supposed by the court to be necessary for the protection of persons improving their land, ought not to be extended so as to give those persons the privilege of unnecessarily destroying the buildings of their neighbors. It is undoubtedly true, as stated in that case, that one is not to be prevented from improving his own premises because a building has been erected by his neighbor upon an adjoining lot. It is equally true that one who has a building upon his own premises is not to be punished for having improved his land by permitting his neighbor, who has not improved his lot, to shake down the building first built so that another one may be erected alongside of it. Such a rule of law would operate just as much to prevent the improvement of land as the rule which was repudiated in the case of *Booth v. R. W. & O. T. R. Co.* The true rule must be that, while any person is at liberty to improve his own land, yet in the doing of that he must use every practicable means to avoid injury to his neighbor, and he will not be permitted by the use of powerful explosives upon his own land to injure the house of his neighbor. Certainly is this so when, by the use of smaller quantities of the explosives or in some other way, even at a greater expense, he can avoid such a result. In this case it is very clear that the blasting in the way proposed to be done by Bradley is not necessary, even within the exceedingly broad rule in favor of builders laid down in the *Booth* case (*supra*)."

In this we think that Judge Andrews was mistaken. While he professes to admit that in determining the question of reasonableness the interest of defendant alone is not the only thing to be considered, but that the interest of the other party is also to be regarded, yet we think that he gave undue weight to the interest of the defendant, and that he should have held that the defendant's user in that case was unreasonable; or, at the least, should have held that the question of reasonableness ought to be submitted to the jury. Mr. Lewis says that the decision in the Booth case "would seem to be fairly open to criticism."⁵⁷

The fact that substantial damage has resulted, or the fact that such a result was foreseeable, does not conclusively establish the unreasonableness of the user. But these facts are both circumstances to be weighed in determining whether the user was unreasonable. And in a very large proportion of blasting cases they would have great and practically controlling weight.⁵⁸

It is well settled that to determine whether a user was reasonable the interest of *both* parties must be considered.⁵⁹

As to attempts to justify on the ground that the mode of user adopted saves expense to the blaster, see authorities given in the note below.⁶⁰

⁵⁷ See 9 LEWIS AM. R. R. & CORP. REP., 103.

⁵⁸ 17 COL. L. REV. 387.

⁵⁹ THEOBALD, LAW OF LAND, 62; Carpenter, J., *Rindge v. Sargent*, 64 N. H. 294-295, 9 Atl. 723 (1886); Loomis, J., *Hurlbut v. McKone*, 55 Conn. 31, 42, 10 Atl. 164 (1887); 17 COL. L. REV. 390-393.

⁶⁰ "In none of these cases where negligence is alleged and proved, could the answer be admitted, that the profits of the business carried on would not justify the extra expense. It is not the matter of profit or loss that determines or enters into the question of care or negligence, but rather that of danger to the public or third persons. . . . If mining at a particular place cannot be profitably carried on, and at the same time the rights of third parties be respected and protected, then it must be carried on at a loss or abandoned." Marston, J., in *Beauchamp v. Saginaw Mining Company*, 50 Mich. 163, 171, 15 N. E. 65 (1883). In this case, it was a question whether, in blasting in an open mine, the pit ought not to be covered before firing the blast.

"He will not be permitted, by the use of powerful explosives upon his own land, to injure the house of his neighbor, especially when he can avoid such a result by the use of smaller quantities of the explosives, or by pursuing some other way, even though the expense would be greater." Gildersleeve, J., in *Stevenson v. Pucci*, 32 Misc. 464, 66 N. Y. Supp. 712, 713 (1900).

"It was not disputed but that the rock could have been removed with much smaller blasts, but it would not have been removed so expeditiously, and there would, in using smaller blasts, have been much less profit to the defendants. The method adopted by the defendants was the usual one for excavating rock and the one most profitable to

Can an individual defendant justify inflicting serious damage upon an individual plaintiff upon the ground that great benefit to the community (to the public at large) has resulted from defendant's conduct? To this question Professor Bohlen makes an effective negative answer.⁶¹

Certainly a decision in favor of plaintiff, on the ground that defendant's blasting was an unreasonable use of his land, cannot be cited as sustaining the theory of "absolute liability in the absence of fault." And it would seem that the fault may fairly be classed under the general head of negligence, taking that term in its modern and enlarged conception.

We have said:⁶²

"In most of the cases where the decision in favor of the plaintiff does not appear to have been based on the existence of negligence; yet it could have been based on that ground; and such a view would not bring about a different result from that which was actually reached."

A striking illustration is afforded by the case of *Rylands v. Fletcher*.⁶³ This reservoir case is the leading English case in favor of absolute liability. The final decision endorses what may be called "The Blackburn Rule," which attempts to lay down a test whereby to determine whether a particular case or act falls under the head of acting at peril.

But

"according to the weight of modern authority, it was unnecessary in that case to decide whether the defendants could be held liable irrespective of negligence. It would seem that the same result (judgment for plaintiff) could have been reached on the ground that the defendants were legally chargeable with negligence. True, the defendants personally were guiltless of negligence. But the engineer and contractors employed by them were negligent; and for the negligence of these persons the defendants

themselves. It is very evident that the defendants in conducting this work had regard only to their own interests. Reasonable care, however, required from them a due regard for the interests of the adjoining property owners." Brown, P. J., in *Newell v. Woolfolk*, 91 Hun (N. Y.), 211, 212, 36 N. Y. Supp. 327 (1895).

⁶¹ 59 Univ. PA. L. REV. 444; and see 17 COL. L. REV. 394-395.

⁶² *Ante*, p. 672.

⁶³ L. R. 3 H. L. 330, 339-340, finally decided in 1868.

were responsible. The duty resting upon the defendants in that case could not be discharged by delegating it to an independent contractor. (As to this last proposition there is some conflict, but the weight of modern authority is strongly in favor of it.) The view that *Rylands v. Fletcher* could have been decided on the ground of negligence is supported by Bishop, Street, Bohlen, and Pollock."⁶⁴

The view of Bishop *et als* is endorsed by Professor E. R. Thayer.⁶⁵ We may add that the Blackburn Rule "is rejected by what we consider the decided weight of American authority."⁶⁶

Another illustration of a case where the decision *could have been* based on negligence is afforded by the blasting case of *Patrick v. Smith*.⁶⁷ In a very valuable note on this case, in 27 HARVARD LAW REVIEW,⁶⁸ the annotator says: "The defendant had not been negligent." It is true that the trial judge instructed the jury that "it is not necessary to prove negligence on the part of the defendant"; and that the court refused to set aside a verdict for plaintiff rendered under this instruction. But it is also true that there was ample evidence which would have justified the jury in finding the existence of negligence; and that, if the trial judge had charged that negligence was essential to recovery, a verdict for plaintiff could not have been set aside as being against evidence.

We have been comparing two theories, absolute liability and negligence, as foundation reasons for liability in certain cases of blasting; and we have attempted to show that negligence is the better reason. But we have also said that, in the great majority of cases, the result would be the same whichever of the two theories

⁶⁴ BISHOP, NON-CONTRACT LAW, § 839; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 62, 63; Professor Bohlen, 59 UNIV. PA. L. REV., 299, note 2; Pollock's Editorial Preface to 143 REVISED REPORTS, v, vi. Pollock adds: "Moreover the case was of the class where '*res ipsa loquitur*'."

The above is taken from an article by the present writer, 30 HARV. L. REV. 409, 410.

⁶⁵ E. R. Thayer, "Liability without Fault," 29 HARV. L. REV. 801, 808, *et seq.*

⁶⁶ For very explicit decisions, see *Losee v. Buchanan*, 51 N. Y. 476 (1873); *Brown v. Collins*, 53 N. H. 442 (1873); *Marshall v. Welwood*, 38 N. J. L. 339 (1876). See also BURDICK, TORTS, 2 ed., 447; Professor E. R. Thayer, "Liability without Fault," 29 HARV. L. REV. 801, 814; Williams, J., in *Gulf & Ry. v. Oakes*, 94 Texas, 155, 158, 159, 58 S. W. 999 (1900).

⁶⁷ 75 Wash. 407, 134 Pac. 1076 (1913).

⁶⁸ Pages 188-189.

is adopted. If this be so, why spend so much time in making the comparison? Why not change the title of this paper, and call it "Much Ado About Nothing"? Is not the present writer over-scrupulous in insisting on the importance of the distinction, in insisting on giving exactly the correct reason for the result, which might generally be reached on either theory? Does he not remind one of the old New Hampshire lawyer, Peyton R. Freeman, as that gentleman appears in the following anecdote?

Mr. Freeman and Daniel Webster were associated as counsel in a trial. They asked the judge to make a certain ruling, for which they thought there was a good legal reason. The judge began to intimate his opinion; and it was evident that he was about to make the requested ruling, but that he was going to make it for a wrong reason. Freeman jumped up, evidently intending to correct His Honor's erroneous view as to the reason. Webster pulled his colleague's coat tail, saying: "Sit down, Freeman. The judge is going to rule in our favor." Freeman indignantly replied: "I will have my case according to law or I won't have it at all."

Seriously, we believe it extremely important to avoid giving an incorrect reason for a correct doctrine. No doubt it is not uncommon. Indeed, John Stuart Mill says: "Nine-tenths of all the true opinions which are held by mankind are held for wrong reasons."⁶⁹ And Judge Holmes has said that judges know which way to decide a good deal sooner than they know how to give the reason why. But a clear perception of the underlying reason is essential to the beneficial working of a correct doctrine; and experienced judges have taken pains to expose "the negation of error upon erroneous grounds." By giving an erroneous reason for a correct rule, we make it difficult thoroughly to understand and apply the rule. "Indeed, the adoption of an erroneous reason for a doctrine inevitably leads to misapplication of the doctrine."⁷⁰

In our prediction⁷¹ as to the rule of the future, it was said that we were "leaving out of sight, for the moment, the influence which modern legislation may have on the views of judges as to the com-

⁶⁹ 2 LETTERS OF J. S. MILL, Appendix, 372.

⁷⁰ The present writer, 27 YALE L. J. 153, note 41.

⁷¹ 33 HARV. L. REV. 555.

mon law." As to such possible influence, we here reprint substantially what was said in 30 HARVARD LAW REVIEW.⁷²

There is modern legislation, enacted almost wholly within the last thirty years, which may indirectly operate to check any further judicial tendency to exonerate in cases of non-culpable accident, and which, conceivably, may even cause courts to reverse the modern common law doctrine that fault is generally requisite to liability. Much of this legislation is of the class usually described as Workmen's Compensation Acts. These statutes create a duty on the part of employers to compensate workmen in many kinds of industry for accidental damage, irrespective of any fault on the part of their employers or their fellow servants. This legislation singles out workmen employed in an undertaking and constitutes them a specially protected class, while overlooking other persons damaged in the same accident whose claim stands on at least equal ground.⁷³ The result reached in many cases under this legislation is absolutely incongruous with the result reached under the modern common law as to various persons whose cases are not affected by these statutes. The theory underlying most of the statutes, the basic principle, is in direct conflict with the fundamental doctrine of the modern common law of torts.⁷⁴ Under these statutes "there is a legal liability without fault, a liability much more extensive than that which grew out of the rule *respondeat superior*, qualified as that was by the fellow servant rule and the theory of assumption of risk."⁷⁵ The statutes show "a distinct revulsion from the conception that fault is essential to liability;" a distinct reversion to the earlier conception, that he who causes harm, however innocent, must make it good.⁷⁶

Here is an incongruity between statute law and modern common law as to a matter where each applies to a large class of cases.

Will this incongruity be permitted to continue permanently?⁷⁷ What available methods are there for removing it? Is not one conceivable method this: by decisions of the courts, repudiating the modern common law of torts, that fault is generally requisite to liability, and going back to the ancient common law doctrine that an innocent actor must answer for harm caused by his non-culpable conduct? What arguments can be urged to induce courts to make such a change?

⁷² Pages 417-418.

⁷³ See four examples in 27 HARV. L. REV. 237-238.

⁷⁴ See 27 HARV. L. REV. 245-247.

⁷⁵ Judge Swayze, "The Growing Law," 25 YALE L. J. 1, 5.

⁷⁶ The great majority of these statutes do not purport to apply only to extra-hazardous occupations. See 27 HARV. L. REV. 344-345, 348, 363.

⁷⁷ "Such inconsistencies must eventually lead to a change that will assimilate the rules of liability in the different cases." Judge Swayze, 25 YALE L. J. 6.

These questions have been discussed by the present writer, more fully than is possible here, in an article on "Sequel to Workmen's Compensation Acts."⁷⁸

It should be added that, up to date, the courts have not manifested an inclination to repudiate the modern common-law doctrine that fault is generally requisite to liability in tort.

Jeremiah Smith.

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⁷⁸ 27 HARV. L. REV. 235, 344. Special reference may be made to pages 250, 251, 363, first sentence on page 367, and last paragraph on page 368.

THE PROGRESS OF THE LAW, 1918-1919

TRUSTS¹

"OF all the exploits of Equity the largest and the most important is the invention and development of the trust." So Professor Maitland was accustomed to tell his students; and so indeed it is. The law of trusts, being comparatively modern, has developed more systematically, more symmetrically than the older branches of the law. Its general principles are for the most part now well settled; and most of the numerous current decisions relating to trusts involve mere questions of fact, of construction of written instruments. But there have been a considerable number of recent cases involving important questions of principle. The law of trusts has not ceased to grow. And as long as the institution of private property and the power of testamentary disposition continue to exist, it is safe to predict that the trust, the most effective instrument in effecting the disposition of private property, will hold its place in Anglo-American law. And as long as men succeed in dishonestly acquiring or retaining property, the remedy of the imposition of a constructive trust will continue to be the most effective weapon of redress.

THE NATURE OF A TRUST

Although perhaps no perfect definition of a trust has been or can be framed, yet it is clear that certain elements are necessary to constitute a trust. There must be a trust *res* held by the trustee. The trust *res* may be an interest, legal or equitable, in property, real or personal, tangible or intangible. The obligee may

¹ This is the sixth article in a series written by professors in the Harvard Law School in which it is intended to point out the most notable decisions, books, articles, and statutes, coming under the notice of the author, which affect or explain the law in the topic under discussion. The following articles have appeared: Joseph H. Beale, "The Conflict of Laws," 33 HARV. L. REV. 1; Austin W. Scott, "Civil Procedure," 33 HARV. L. REV. 236; Zechariah Chafee, Jr., "Bills and Notes," 33 HARV. L. REV. 255; Roscoe Pound, "Equity," 33 HARV. L. REV. 420; Joseph Warren, "Wills and Administration," 33 HARV. L. REV. 556. The series will be continued in the April number. — ED.

be trustee of a *chose* in action. But the obligor cannot. And one cannot be trustee of a promise made by himself to himself; he cannot, for instance, be trustee of his own note.

These principles seem so clear and so fundamental that it is astonishing that courts should occasionally lose sight of them. In *Re Leigh's Estate* ² the defendant's testator made a note whereby he promised to pay to a church the sum of \$8,000. The payee marked the note paid and gave it back to the defendant's testator, who thereupon signed and delivered to the payee an instrument wherein he acknowledged the receipt of \$8,000 and declared himself trustee of this sum for the payee. The court was of the opinion that a valid trust was thereby created. The court said: "His [the testator's] note, when made and delivered to the church, was property in the hands of the latter, and its return to him as trustee was a sufficient designation and setting apart of such sum as a trust fund to be accounted for as provided in the declaration of trust; as much so in fact for all the purposes of the law as if, instead of the making and transfer of the note, [the testator] had first paid and delivered the sum of \$8,000 in actual money to the church which thereupon returned it to him in trust for the purposes named." ³ But what was the trust *res*? If this were a trust, then any gratuitous promise to pay a sum of money might well be held to create a trust, and the requirement of consideration in the formation of a contract would become a mere matter of form. If the abolition of the requirement of consideration in the formation of contracts is desirable, it should be accomplished directly and openly and not by confusing contracts with trusts.

In *Legniti v. Mechanics & Metals National Bank* ⁴ it appeared that the plaintiff, a private banker in New York, wishing to transfer funds by cable to a bank in Naples, gave a certified check to a firm of private bankers and brokers which carried on in New York an extensive foreign exchange business and which had money or credit with the Naples bank. The firm deposited the plaintiff's check in its general account with the defendant bank, and failed

² 173 N. W. (Iowa) 143 (1919).

³ *Ibid.*, 146. The court was probably right in holding the defendant liable, because it was possible to spell out consideration for the note, in which case the surrender of the note was a valid consideration for a promise to pay \$8,000. There was a contract, but not a trust.

⁴ 186 App. Div. 105, 173 N. Y. Supp. 814 (1919).

the next day, without having cabled to the Naples bank. The court held that the firm received the check upon trust, and that the plaintiff could follow it into the account with the defendant bank. There is a strong dissenting opinion by Shearn, J., who contended that the transaction was a contract for the sale of credit, and that although the firm was liable for breach of contract, it was not trustee of the check or its proceeds. It would seem that the view of the dissenting justice is right; surely it was not intended that the firm should hold the check or its proceeds as a separate fund for the benefit of the plaintiff.⁵

CONSIDERATION

As a result of Lord Eldon's decision in *Ex parte Pye*,⁶ it is well settled that a gratuitous declaration of trust is valid. In a few early cases when an intended gift failed for lack of delivery of the subject matter of the gift or of a deed,⁷ the courts tortured the transaction into a declaration of trust.⁸ It is now held, however, that an imperfect gift cannot be upheld as a declaration of trust.⁹ If the donor intends to give away property, he cannot be held to have retained it on trust. A somewhat similar question may

⁵ See 33 HARV. L. REV. 279 (1919); 19 COL. L. REV. 322 (1919).

For another instance of the confusion between a debt and a trust, see *Myers v. Washington Trust Co.*, 105 Atl. (R. I.) 565 (1919). In that case a savings bank transferred all its assets to the defendant trust company, which assumed its liabilities and undertook to pay its depositors. The plaintiff had deposited a sum of money with the savings bank which by mistake had paid the amount of the deposit to one who was not authorized by the plaintiff to receive payment. The court held that the trust company was not liable, because the money deposited by the plaintiff had never come into its possession and that "the defendant cannot be held liable as the trustee of a fund which never came into its possession."

⁶ 18 Ves. 140 (1811); SCOTT, CASES ON TRUSTS, 143.

⁷ It was formerly held in England that an oral gratuitous transfer of a *chose* in action represented by a mercantile or common-law specialty was invalid, although the specialty or a deed of gift was delivered. *Edwards v. Jones*, 1 Myl. & C. 226 (1836) (bond); *Milroy v. Lord*, 4 D., F. & J. 264 (1862) (stock certificate). But see *Fortescue v. Barnett*, 3 Myl. & K. 36 (1834) (insurance policy). The opposite view was taken in the United States. CAS. TRUSTS, 152-165. It is now held in England that in view of the provisions of the JUDICATURE ACT (1873), 36 & 37 Vict. c. 66, sec. 25, sub-s. 6, a gratuitous oral transfer by delivery of a specialty *chose* in action is valid. *Re Lee*, [1918] 2 Ch. 320 (exchequer bond deposit book); *Re Westerton* [1919], 2 Ch. 104 (deposit receipt).

⁸ *Morgan v. Malleeson*, L. R. 10 Eq. 475 (1870); CAS. TRUSTS, 147.

⁹ *Richards v. Delbridge*, L. R. 18 Eq. 11 (1874); CAS. TRUSTS, 148-151.

arise when an obligee of a *chose* in action wishes to extinguish it. A gratuitous parol forgiveness of a *chose* in action is not valid. In the absence of consideration, there must be either a release under seal, or, if the *chose* in action is represented by a specialty, a surrender or cancellation of the specialty. There seems to be no good reason, however, why an obligee cannot orally and gratuitously declare himself trustee of the *chose* in action for the obligor. And if the obligee is trustee for the obligor, the obligor has an equitable defense to the *chose* in action, based on the prevention of circuity of action. Under the doctrine of *Ex parte Pye* it would seem that the intention to create a trust is all that is necessary. In *Cardoza v. Leveroni*¹⁰ the holder of a note and mortgage orally and gratuitously forgave the mortgagor. The court held that the mortgagor was still liable. There was no intention to create a trust, and an invalid forgiveness of a debt cannot be twisted into a valid declaration of trust.

Can a hope of inheriting property or receiving property under a will be made the subject matter of a trust? A contract to convey or to become trustee of property which may in the future be inherited or received under a will, is binding if made for a consideration or if under seal,¹¹ and if not unfair, fraudulent, or against public policy.¹² But such a mere expectancy or *spes* cannot be made the subject matter of a gift.¹³ Similarly, such an expectancy cannot be a trust *res*. It was so held in *Re Lynde's Estate*.¹⁴

THE STATUTE OF FRAUDS

By the seventh section of the English Statute of Frauds a writing is required if a trust of land is created; by the ninth section a writing is required if the interest of the *cestui que trust* is transferred. There is no provision expressly making a writing necessary for the extinguishment of a trust. May the *cestui que trust* give

¹⁰ 233 Mass. 310, 123 N. E. 672 (1919).

¹¹ Cf. *Sloan v. Breeden*, 233 Mass. 418, 124 N. E. 31 (1919) (contract by next of kin of insured to assign interest in life insurance policy payable to legal representatives of insured).

¹² CAS. TRUSTS, 179, note.

¹³ *Re Ellenborough*, [1903] 1 Ch. 697; CAS. TRUSTS, 175.

¹⁴ 175 N. Y. Supp. (Surr. Ct.) 289 (1919). See S. C., 105 Misc. 30, 172 N. Y. Supp. 523 (1918).

a valid oral release to the trustee? In *Hatcher v. Hatcher*¹⁵ the court held not. In substance the *cestui que trust* is transferring his beneficial interest, although the transfer takes the form of the extinguishment of his equitable interest. Moreover, since the eighth section of the Statute of Frauds provides that no writing is necessary in a case where a trust arises or is transferred or *extinguished* by operation of law, it appears to have been intended to require a writing where a trust is extinguished by act of the parties.¹⁶ In *Matthews v. Thompson*¹⁷ it was held that where the *cestui que trust* in writing directed the trustee to convey to a third person, intending to allow the third person to take free of the trust, the trust was extinguished. This decision is perhaps distinguishable from *Hatcher v. Hatcher* on the ground that a transferee of trust property becomes constructive trustee only if he is colluding in or is unjustly enriched by a breach of trust, and that there was no breach of trust because the trustee conveyed with the assent of the *cestui que trust*.

It is generally held that an oral trust of land is not void but merely unenforceable. If a memorandum is given subsequently to the creation of a trust, the trust becomes enforceable, at least as against the trustee. The courts have held that it becomes enforceable also against the general creditors of the trustee, against his judgment creditors, and even against his trustee in bankruptcy.¹⁸ It was so held in *Moran v. Morgan*,¹⁹ and in *Wilmer v. Dunn*.²⁰ In the former case Learned Hand, J., suggests a doubt as to the correctness of the doctrine; and it would seem that it opens the door to fraud, a door which it was the purpose of the statute to close.

STATUTES OF WILLS

In New York, when money is deposited in a savings bank in the name of the testator "in trust for" another, the courts have held

¹⁵ 107 Atl. (Pa.) 660 (1919).

¹⁶ But see *contra*, *Gorrell v. Alspaugh*, 120 N. C. 362, 27 S. E. 85 (1897); *Warren v. Tynan*, 54 N. J. Eq. 402, 34 Atl. 1065 (1896). These were both cases of an extinguishment of a resulting trust. There is a dispute on the question whether a contract for the sale of land may be rescinded by parol. See cases cited, *CAS. TRUSTS*, 205.

¹⁷ 186 Mass. 14, 71 N. E. 93 (1904); *CAS. TRUSTS*, 202.

¹⁸ *Gardner v. Rowe*, 2 Sim. & St. 346 (1825), 5 Russ. 258 (1828); *CAS. TRUSTS*, 199.

¹⁹ 252 Fed. (C. C. A. 2) 719 (1918).

²⁰ 133 Md. 354, 105 Atl. 319 (1918).

that presumptively a "tentative trust" is created; that is to say, the depositor may withdraw the money at any time during his lifetime, but there is a valid trust as to any part of the deposit remaining at the time of his death.²¹ This doctrine has recently been followed in Minnesota.²² The doctrine seems to carry out the probable intention of the depositor; it also affords a simple method of disposing of his money on his death. But does it not violate the provisions of the statutes of wills? Is not the deposit in reality a testamentary disposition? It has been held in New Jersey that it is.²³ Similarly the New Jersey courts have recently held invalid a deposit in the name of the depositor *or* his wife, it appearing that he intended to reserve power at any time until his death to revoke her authority to withdraw the deposit.²⁴

CHARITABLE TRUSTS

The House of Lords has recently handed down a decision of great importance to some two millions of people in England. The English courts have for centuries held bequests for masses illegal, as bequests for "superstitious uses." In *Bourne v. Keane*,²⁵ however, the House of Lords has upheld bequests to a cathedral and to certain Jesuit fathers for masses. It is not clear from the opinions whether or not their lordships regarded the bequests as charitable.²⁶ There was no discussion of the problem whether, if trusts for masses are not charitable, the absence of any one to

²¹ *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748 (1904); *CAS. TRUSTS*, 218. It may be shown, however, that the depositor did not intend to create a trust, or that he intended to revoke it. *Walsh v. Emigrant, etc. Bank*, 106 Misc. 628, 176 N. Y. Supp. 418 (1919). On the other hand, it may be shown that he intended to make the trust irrevocable during his lifetime. See cases cited, *CAS. TRUSTS*, 224.

²² *Walso v. Latterner*, 140 Minn. 455, 168 N. W. 353 (1918), s. c. 173 N. W. (Minn.) 711 (1919). See 4 *MINN. L. REV.* 56 (1919).

²³ *Nicklas v. Parker*, 71 N. J. Eq. 777, 61 Atl. 267 (1907).

²⁴ *Morristown Trust Co. v. Captstick*, 106 Atl. (N. J. Eq.) 391 (1919); 4 *MINN. L. REV.* 72 (1919). The depositor expressed his intention in the following words: "Dearie, I have opened a joint account in the Morristown Trust Company with you, and you may draw on it to the full amount; but, if you do, I will give you hell." See *CAS. TRUSTS*, 216, note.

²⁵ [1919] A. C. 815.

²⁶ The Court of Appeals of New York has recently held, in accordance with the weight of authority in the United States, that a bequest for masses is charitable. *Matter of Morris*, 227 N. Y. 141, 124 N. E. 724 (1919) (holding that the amount to be expended need not be "reasonable").

enforce them is a fatal objection to their validity.²⁷ The decision, at any rate, when coupled with the decision in *Bowman v. Secular Society*,²⁸ which upheld a bequest to a registered society organized for the promotion of atheism, shows that the law lords have attained a rather remarkable degree of liberality of opinion on religious questions.

In a recent Irish case, *Re Moore*,²⁹ a testator bequeathed £10,000 to whoever might be Pope at his death "to use and apply at his sole and absolute discretion in the carrying out of the sacred office." The executor brought a summons to determine the validity of the bequest. It was held that the bequest was intended not to be absolute but upon trust, and that the trust was not valid because it was not a charitable trust and there was no definite *cestui que trust*. If the trust was not charitable it would of course be invalid under the doctrine of *Morice v. Bishop of Durham*.³⁰ But was it not a charitable trust? The court thought not, because the Pope might "in the carrying out of the sacred office" apply the legacy for non-charitable or even illegal purposes. Probably the chief obstacles in the mind of the court were the Supreme Pontiff's directorship of the three great monastic orders,³¹ and his claim to temporal power. The decision, it must be confessed, is rather startling.³²

A narrow view as to the scope of charitable trusts, but one which has considerable authority behind it,³³ was also taken in *Smith v. Pond*,³⁴ where a bequest was made to the trustees of a certain Methodist church "for support of the church or such benevolent purposes as the trustees of said church shall direct." The court held that "benevolent" was broader than "charitable," and that the bequest failed.³⁵ On the other hand, in *Coffin v. Attorney General*,³⁶ a bequest to be devoted to "missions and like good objects" as the trustees should think best, was upheld; and in

²⁷ See CAS. TRUSTS, 282-284.

²⁸ [1917] A. C. 406. See 31 HARV. L. REV. 289.

²⁹ [1919] 1 I. R. 316.

³⁰ 10 Ves. 521 (1805); CAS. TRUSTS, 268.

³¹ Bequests to these orders are illegal in Ireland. *Ellard v. Phelan*, [1914] 1 I. R. 76.

³² Compare the cases cited in CAS. TRUSTS, 275-277, 281.

³³ CAS. TRUSTS, 275-277.

³⁴ 107 Atl. (N. J. Eq.) 800 (1919).

³⁵ See 29 YALE L. J. 242 (1919).

³⁶ 231 Mass. 575, 121 N. E. 397 (1919).

Miller v. Tatum,³⁷ a bequest to a church "to aid the church in its local work" and a bequest "to foreign missions" and a bequest of money to "be sent to the country and destitute places that the poor may have the gospel preached to them" were upheld.³⁸ The mere fact that the purpose of a charitable trust is left indefinite is not fatal according to the better view and the weight of authority, provided it is limited to charitable purposes. Thus a bequest "to charity \$100, to be distributed by" a certain person, was upheld in *Re Welch*.³⁹ If the trustee who was to make the distribution should die, the trust will fail if, but only if, the testator contemplated a distribution by that particular person as an essential part of his scheme.⁴⁰

In *Robinson v. Crutcher*,⁴¹ bequests "to the capital of" certain township, county, and state school funds were held to fail because no trustees were named, although the testator directed his executor to pay over the bequests "to the lawful custodians of the several public school funds mentioned." The court was of the opinion that direct gifts to the funds were intended, which failed because a fund could not be a legatee, that there was no attempt to create a trust, and that the court therefore could not designate a trustee. On this reasoning a gift to the Harvard Endowment Fund instead of to the trustees of that fund would fail. The technicality of this decision can only be equalled by the decisions in New York that a direct gift to an unincorporated charitable association cannot be upheld as a charitable trust.⁴²

³⁷ 181 Ky. 490, 205 S. W. 557 (1918).

³⁸ See CAS. TRUSTS, 275-277, 339-341.

There have been a number of recent cases of church schisms, with a resulting legal fight for church property. See *Manning v. Yeager*, 79 So. (Ala.) 19 (1918), 82 So. 435 (1919) (Baptist); *Tucker v. Paulk*, 148 Ga. 228, 96 S. E. 339 (1918) (Baptist); *Illinois Classis v. Holben*, 286 Ill. 473, 122 N. E. 46 (1919) (Reformed Church); *Stallings v. Finney*, 287 Ill. 145, 122 N. E. 369 (1919) (Apostolic Faith); *Bendewald v. Ley*, 168 N. W. (N. D.) 693 (1918), 32 HARV. L. REV. 180 (1918) (Lutheran); *Attorney General v. Armstrong*, 231 Mass. 196, 120 N. E. 678 (1918) (Methodist).

³⁹ 105 Misc. 27, 172 N. Y. Supp. 349 (1918).

⁴⁰ In *Rogers v. Rea*, 98 Ohio St. 315, 120 N. E. 828 (1918), the trust failed. On the other hand, it did not fail in *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839 (1888); CAS. TRUSTS, 334.

⁴¹ 209 S. W. (Mo.) 104 (1919).

⁴² *Ely v. Megie*, 219 N. Y. 112, 143, 113 N. E. 800 (1916). See CAS. TRUSTS, 341.

For recent contributions to the law of charitable trusts, see NOBLE, CHARITY TRUSTS UNDER MASSACHUSETTS DECISIONS, 2 ed. (1918); Bennett, "Free Churches and the

RESULTING AND CONSTRUCTIVE TRUSTS

I. During the past year there have been many cases showing how frequently men, and women too, to whom property has been given upon an oral agreement to hold the property for the transferor or for a third person, are willing to violate their promises, relying upon the Statute of Frauds or statutes of wills. Professor Ames has shown⁴³ that the proper remedy in such cases is to put the parties *in statu quo*. The statute forbids going forward; it does not forbid going back. In order to prevent unjust enrichment a constructive trust should be imposed in favor of the transferor. The courts, however, are slow to adopt this view. In most cases they either allow the transferee to keep the property in spite of his promise, or they give it to the intended beneficiary in spite of the Statute of Frauds or statutes of wills. When the conveyance is *inter vivos*, they have usually done the former;⁴⁴ when it is by will, the latter.⁴⁵ In two recent decisions, however, where a transfer *inter vivos* was made on an oral trust for the transferor, it was held that the transferor might recover the property.⁴⁶ But the opposite result was reached in another case.⁴⁷ In *Reynolds v. Reynolds*,⁴⁸ where a testator made a bequest to his executor "in trust, however, and for the purposes of paying out and disposing of same as I have advised and directed him to do," the court held that there was a constructive trust for the testator's next of kin, although prior to the execution of the will the testator had informed the legatee of the nature of the intended trust and

State," 34 L. QUART. REV. 35, 174 (1918); Zollmann, "The Development of the Law of Charities in the United States," 19 COL. L. REV. 91, 286 (1919); Sanger, "Remoteness and Charitable Gifts," 29 YALE L. J. 46 (1919).

⁴³ 20 HARV. L. REV. 549; LECT. LEG. HIST. 425. As to the remedial nature of constructive trusts, see Professor Pound's remarks in 33 HARV. L. REV. 420.

⁴⁴ CAS. TRUSTS, 397 *et seq.*

⁴⁵ *Barron v. Stuart*, 207 S. W. (Ark.) 22 (1918). So also where by his promise to hold for another an heir induces his ancestor to refrain from making a will. *Barrett v. Thielen*, 167 N. W. (Minn.) 1030 (1918); 28 YALE L. J. 201 (1918). See CAS. TRUSTS, 424, note.

⁴⁶ *Simpson Grocery Co. v. Knight*, 96 S. E. (Ga.) 872 (1918) (transfer by son to father); *Hatcher v. Hatcher*, 107 Atl. (Pa.) 660 (1919) (transfer by mother to son).

⁴⁷ *McIntyre v. McIntyre*, 171 N. W. (Mich.) 393 (1919) (transfer by brother to sister).

⁴⁸ 224 N. Y. 429, 121 N. E. 61 (1918); 28 YALE L. J. 411 (1919).

the legatee had agreed to carry out the trust. And yet if neither the existence nor the nature of the trust had appeared upon the will, the court would have given effect to the testator's intention.⁴⁹

II. When property is conveyed to one person for a consideration paid by another, a resulting trust may be imposed on the former for the benefit of the latter. If the latter has paid only part of the purchase-price, a resulting trust *pro tanto* presumptively arises.⁵⁰ It is sometimes said that no trust will arise unless the part contributed forms an "aliquot part" of the total purchase-price, or unless it appears that the money was paid with the intention of obtaining the beneficial interest in an "aliquot part" of the property.⁵¹ Strictly, of course, an aliquot part is one which is exactly contained in the whole without a remainder, that is, a part which can be expressed by a fraction which when reduced to its lowest terms has unity for its numerator. It has been explained by the courts, however, that the word "aliquot" is used "to mean 'a particular fraction of the whole' as distinguished from a 'general contribution to the purchase-money.'"⁵² In several recent decisions it is made clear that what is really meant is this: that where one person has paid a part of the purchase-price, and his contribution to the whole price can be expressed in terms of a comparatively simple fraction (*i. e.*, one whose numerator and denominator, when the fraction is reduced to its lowest terms, are small), the presumption is that the parties intended that he should have a fractional interest in the property; but if the contribution cannot

⁴⁹ See *Edson v. Bartow*, 154 N. Y. 199, 48 N. E. 541 (1897). Cf. *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639 (1918); 32 HARV. L. REV. 82 (1918); 17 MICH. L. REV. 342 (1919); 28 YALE L. J. 95 (1918) (third-party contract). The courts in a few other states have reached the same illogical result. *Blunt v. Taylor*, 230 Mass. 303, 119 N. E. 954 (1918); 32 HARV. L. REV. 89 (1918); *Olliffe v. Wells*, 130 Mass. 221 (1881); CAS. TRUSTS, 446-451. See note 44, *supra*.

⁵⁰ *Davis v. Dickerson*, 207 S. W. (Ark.) 436 (1918). The consideration may be something other than money. *Magee v. Magee*, 233 Mass. 341, 123 N. E. 673 (1919). In that case the plaintiff was not precluded from recovering by the fact that his name was omitted as grantee because he was attempting to obtain a commission from the grantor, from whom he wished to conceal the fact that he was one of the purchasers.

⁵¹ *McGowan v. McGowan*, 14 Gray (Mass.), 119 (1859); CAS. TRUSTS, 486. See also *Briscoe v. Price*, 275 Ill. 63, 43 N. E. 881 (1916); *Watts Bros. v. Frith*, 79 W. Va. 89, 91 S. E. 402 (1916).

⁵² *Skehill v. Abbott*, 184 Mass. 145, 68 N. E. 37 (1903); CAS. TRUSTS, 489. In that case it was held that a contribution of two-fifths of the purchase price was sufficient to give the contributor a two-fifths interest in the property.

be expressed by such a simple fraction, the presumption is that the parties did not intend that the contributor should have a beneficial interest in the property, but that a loan or gift of the money contributed was intended; but in either event the presumption may be overcome by evidence of a contrary intent.⁵³

III. Where a person in a fiduciary position acquires property or an interest in property, in regard to which by reason of his fiduciary position he owes a duty to another, he may be held as constructive trustee of the property or interest so acquired.⁵⁴ If, therefore, the president of a bank takes for himself the renewal of a lease of the premises on which the bank conducts its business, he may be held as constructive trustee of the interest so acquired. It was so held in *Paw Paw Savings Bank v. Free*.⁵⁵ In *Beatty v. Guggenheim Exploration Company*⁵⁶ an agent of an exploration company was sent to investigate mining claims on which the company had an option. He found and bought for himself certain other claims not included in the option, but which were necessary to the successful operation of those which were included. He was held as constructive trustee for the company.⁵⁷

IV. The courts have had considerable difficulty with cases in which A wishes to buy land and B orally agrees to advance the money and buy the land for A and to convey it to A when reimbursed by him. B's promise as such is unenforceable because of the Statute of Frauds.⁵⁸ But if a loan of the money by B to A can be spelled out, a resulting trust can be raised, for the purchase-price is then in substance paid by A.⁵⁹ And when B's agreement

⁵³ For recent cases in which the court held that there was a resulting trust *pro tanto*, see *Lowell v. Lowell*, 170 N. W. (Iowa) 811 (1919) (contribution of 18/29); *Hinshaw v. Russell*, 280 Ill. 235, 117 N. E. 406 (1917) (contribution of 29/124); *Jones v. Jones*, 281 Ill. 595, 117 N. E. 1013 (1917) (contribution of 2/7, but by agreement contributor received only 1/4); *Koehler v. Koehler*, 121 N. E. (Ind. App.) 450 (1919) (contributions of various amounts at various times, but by agreement all took equal shares).

⁵⁴ See *Keech v. Sandford*, Sel. Cas. Ch. 61 (1726); CAS. TRUSTS, 503.

⁵⁵ 171 N. W. (Mich.) 464 (1919). ⁵⁶ 224 N. Y. 595, 122 N. E. 378 (1919).

⁵⁷ See *Miller v. Walser*, 181 Pac. (Nev.) 437 (1919). See also *Healy v. Gray*, 168 N. W. (Iowa) 222 (1918) (attorney); *Johnston v. Loose*, 201 Mich. 259, 167 N. W. 1021 (1918); 28 YALE L. J. 192 (1918) (purchase by guardian of dower interest in wards' property).

⁵⁸ See *Fields v. Hoskins*, 182 Ky. 446, 206 S. W. 763 (1918); *Austin v. Young*, 106 Atl. (N. J. Eq.) 395 (1919).

⁵⁹ *McDonough v. O'Neil*, 113 Mass. 92 (1873); CAS. TRUSTS, 484.

is to take title in the name of A, it is possible to say that B is agent of A, and if in violation of his duty as agent he takes title in his own name, he can be held as a constructive trustee. If there was a preëxisting fiduciary relationship between A and B, the courts have had no difficulty in holding B.⁶⁰ It would appear, however, unnecessary to show a preëxisting fiduciary relationship; the relationship of principal and agent for the particular transaction should be sufficient, and the Statute of Frauds does not require a writing for the creation of an agency.⁶¹

If A has an interest in property which is about to be cut off by sale on foreclosure, or tax sale or some similar proceeding, and B orally agrees to buy in the property and hold it for A, it is held that B becomes constructive trustee for A.⁶² Although the promise may be unenforceable under the Statute of Frauds, and although it may be impossible to spell out a loan by B to A, or a fiduciary relationship between B and A, yet B is unjustly enriched at the expense of A, who, in reliance on B's promise, has allowed his interest in the property to be destroyed. The court should therefore put the parties as nearly as possible *in statu quo* by holding B constructive trustee of the property for A and compelling B to transfer it to A, when reimbursed by A.

V. In *Re A. Bolognesi & Co.*⁶³ it appeared that a number of persons sent funds for investment to one who, instead of making the investments, deposited the funds in his own account in a bank, and thereafter withdrew a part of his account, and subsequently made deposits of his own funds in the same account, and later became bankrupt. It was held that the claimants were entitled to a preference over general creditors to the extent of the lowest intermediate balance. There would seem to be no doubt as to this on principle or on the authorities.⁶⁴ But the court further held that this lowest intermediate balance should be shared by the

⁶⁰ *Wakeman v. Dodd*, 27 N. J. Eq. 564 (1876); CAS. TRUSTS, 511.

⁶¹ *Havner Land Co. v. MacGregor*, 169 Iowa, 5, 149 N. W. 617 (1915); *Harrop v. Cole*, 85 N. J. Eq. 32, 95 Atl. 378 (1914).

⁶² *Thomas v. Goodbread*, 82 So. (Fla.) 835 (1919); *Johnson v. Jameson*, 209 S. W. (Mo.) 919 (1919); *Rush v. McPherson*, 97 S. E. (N. C.) 613 (1918). See also *Judd v. Mosely*, 30 Iowa, 423 (1871); CAS. TRUSTS, 514.

⁶³ 254 Fed. 770 (C. C. A. 2) (1918).

⁶⁴ See Scott, "The Right to Follow Money Wrongfully Mingled with Other Money," 27 HARV. L. REV. 125, 133 (1913); CAS. TRUSTS, 542-548.

various claimants in inverse order of deposit. The court applied the rule in *Clayton's Case*,⁶⁵ to the effect that withdrawals from a bank are to be considered to have been made in the order in which the deposits were made. The courts have long ceased to apply this rule when the question arises between the wrongdoer and the claimant, and so refused in the principal case. But when the question has arisen between several claimants, it is applied, as in the principal case, according to the weight of authority. The rule is based upon a presumption as to the intention of the depositor. It would seem on principle that there should be no reason to make such a presumption of intention in the case of a wrongdoer, and that his intention should be immaterial anyway. A far more just rule would be to divide the lowest intermediate balance among the various claimants in proportion to the amount of their claims.⁶⁶

ASSIGNMENT BY *Cestui que Trust*

In the case of *Hill v. Peters*⁶⁷ a *cestui que trust* declared himself trustee of his equitable interest for the defendant and subsequently assigned his equitable interest to the plaintiff, a *bona fide* purchaser. The plaintiff gave to the trustee notice of the assignment before the defendant gave notice of the declaration of trust. It was held that the defendant should prevail. To reach this result it was necessary to hold, first, that the assignment of an equitable interest does not cut off equities; and, second, that the doctrine of *Dearle v. Hall*,⁶⁸ which makes priority as between successive assignees of equitable interests in personalty dependent upon priority of notice to the trustee, is not applicable to the case of a declaration of trust followed by an assignment.⁶⁹

SPENDTHRIFT TRUSTS

Under the fostering care of the courts in an increasing number of states, spendthrift trusts continue to grow in popularity, although

⁶⁵ 1 Meri. 572 (1816).

⁶⁶ See 27 HARV. L. REV. 130; CAS. TRUSTS, 548. A *pro rata* division was made in *Re British Red Cross Balkan Fund*, [1914] 2 Ch. 419; CAS. TRUSTS, 378 (resulting trust of surplus after fulfillment of express trust). Cf. *Sinclair v. Brougham*, [1914] A. C. 398.

⁶⁷ [1918] 2 Ch. 273; CAS. TRUSTS, 720.

⁶⁸ 3 Russ. 1, 48 (1828); CAS. TRUSTS, 619.

⁶⁹ See 32 HARV. L. REV. 431 (1919).

they were vigorously assailed by Professor Gray and have recently been attacked by Judge Robert Grant in an interesting little book on "Law and the Family,"⁷⁰ and by Professor Horack.⁷¹ In *Hopkinson v. Swaim*,⁷² it was held that a restraint upon the alienation of an equitable interest in fee simple is valid.⁷³ The courts still hold, however, that alienation of a legal estate even for life cannot be restrained,⁷⁴ and that one cannot create a spendthrift trust for his own benefit.⁷⁵

COLLUSION IN A BREACH OF TRUST

There have been several recent cases dealing with the problem of the liability of a bank which receives deposits from one whom it knows to be a trustee and who is committing a breach of trust in making the deposit or who is contemplating a breach of trust in withdrawing the deposit. The bank is liable if, and only if, it knows or ought to know of the breach of trust. Under what circumstances is the bank charged with notice? According to the decisions the bank is not in general under a duty to make inquiry; the business of banking would be too dangerous if it were. But it cannot by deliberately shutting its eyes escape liability. Accordingly the bank was held liable in *British America Elevator*

⁷⁰ "The caution which prompts a parent or other testator to hedge the next generation's lives about with barbed-wire fences seems to overlook that life is a great adventure, the chief zest of which is liberty to learn by personal experience" (p. 58). "If the toll of those spoiled for world service by being left a competency in trust were set off against those who came into their own only to squander it, over which should we be disposed to shed the most tears?" (p. 62.)

⁷¹ "Spendthrift Trusts in Iowa," 4 IOWA L. BULL. 139 (1918).

⁷² 284 Ill. 11, 119 N. E. 985 (1918); 3 MINN. L. REV. 67 (1918).

⁷³ See also *Wallace v. Foxwell*, 250 Ill. 616, 95 N. E. 985 (1911); *Boston Safe D. & T. Co. v. Collier*, 222 Mass. 390, 111 N. E. 163 (1916), *accord*. See CAS. TRUSTS, 609.

⁷⁴ *Bruceton Bank v. Alexander*, 98 S. E. (W. Va.) 804 (1919).

⁷⁵ *Benedict v. Benedict*, 261 Pa. 117, 104 Atl. 581 (1918); 32 HARV. L. REV. 441 (1919). See *Jamison v. Mississippi Valley T. Co.*, 207 S. W. (Mo.) 788 (1918).

In *Kiffner v. Kiffner*, 171 N. W. (Iowa) 590 (1919), it was held that where property was given to a trustee who was authorized to pay to the *cestui que trust* such sums as he might deem wise for the welfare of the beneficiary, the *cestui que trust* had no interest which could be reached by his judgment creditor. *Salinger, J.*, dissented on the ground that although the *cestui que trust* could not insist that anything be paid to him, the creditor was entitled to a decree whereby he should be entitled to receive whatever the trustee should decide to pay under the terms of the trust. See in accord with the dissenting opinion: *Re Coleman*, 39 Ch. D. 443 (1888); *Re Bullock*, 60 L. J. Ch. 341 (1891); CAS. TRUSTS, 613-619; GRAY, RESTRAINTS ON ALIENATION, 2 ed., § 167j.

Co. v. Bank of British North America,⁷⁶ *Tesene v. Iowa State Bank*,⁷⁷ and *Blanton v. First National Bank*,⁷⁸ but escaped in *Taylor v. Astor National Bank*⁷⁹ and *Corn Exchange Bank v. Manhattan Savings Institution*.⁸⁰ Of course a bank which has notice of the trust character of a deposit has no lien or right of set-off for a personal indebtedness of the trustee.⁸¹

LIABILITY OF TRUST ESTATE

In *Jessup v. Smith*⁸² some of the beneficiaries of a trust began a proceeding to remove a trustee, who retained the plaintiff as his counsel, telling him that he, the trustee, was poor and unable to pay counsel fees and that the plaintiff would have to look to the estate for payment. The application to remove the trustee was denied. The plaintiff then brought an action, joining as defendants all persons interested in the estate and praying that the value of his services be declared a charge upon the trust estate. The lower court dismissed the complaint on the ground that the services were not beneficial to the estate. The Court of Appeals reversed the judgment, holding that since by the contract the plaintiff was to look to the estate he was entitled to payment out of the estate. The decision seems sound.⁸³

In *Strong v. Dutcher*⁸⁴ one of the *cestuis que trust* retained the plaintiff, an attorney, to prevent the trustee from wasting the estate. The plaintiff agreed to look to the trust fund for compensation. It was held that the estate was liable, on the ground that the *cestui que trust* would have had a lien on the estate for expenses incurred in its preservation and that she could transfer the lien to the plaintiff. The decision seems sound.⁸⁵

⁷⁶ [1919] A. C. 658.

⁷⁷ 173 N. W. (Iowa) 918 (1919).

⁷⁸ 136 Ark. 441, 206 S. W. 745 (1918).

⁷⁹ 105 Misc. 386, 174 N. Y. Supp. 279 (1918).

⁸⁰ 105 Misc. 615, 173 N. Y. Supp. 799 (1919). This case seems to go too far. See 19 COL. L. REV. 72. See cases cited CAS. TRUSTS, 739.

⁸¹ *Pratt v. Commercial Trust Co.*, 105 Misc. 324, 174 N. Y. Supp. 88 (1918).

⁸² 223 N. Y. 203, 119 N. E. 403 (1918); CAS. TRUSTS, 766.

⁸³ See CAS. TRUSTS, 769, note.

⁸⁴ 186 App. Div. 307, 174 N. Y. Supp. 352 (1919); 19 COL. L. REV. 159 (1919).

⁸⁵ There have been several recent cases dealing with the question of taxes payable in respect of trust estates, which have been discussed by Professor Beale in the pages of this REVIEW. 32 HARV. L. REV. 619-623; 33 *ibid.* 7, 8. See also *Williams v. Singer*, [1919] 2 K. B. 108. And see CAS. TRUSTS, 743-748. By CAL. LAWS, 1919. c. 237,

INVESTMENTS

In determining what investments should be made, the trustee should in general be governed by express directions in the trust instrument. In extraordinary cases, however, when unforeseen emergencies have arisen making it impossible or clearly unwise to follow those directions, a departure from them may be justified. In *Matter of London*⁸⁶ a will directed trustees to invest in railroad bonds. It was held that they were justified in investing in United States bonds of the first Liberty Loan issue. It may well be questioned whether the emergency was such as to justify the departure from the terms of the will. Certainly the trustees ran a great risk in not first obtaining the permission of the court to make the unauthorized investment.

Even where the trust instrument provides that the trustee shall not be limited by the "rules governing investments by executors or trustees," and that "in the matter of investment his discretion shall be absolute and uncontrolled," it is nevertheless a breach of trust for the trustee to lend to himself. It was so held in *Carrier v. Carrier*.⁸⁷

CAPITAL AND INCOME

In dealing with the rights of life tenants and remaindermen to extraordinary dividends, it appears that the tendency of the courts is more and more toward the acceptance of the Pennsylvania rule of apportionment, rather than the Massachusetts rule which holds all cash dividends income and all stock dividends capital. In *Rhode Island Hospital Trust Company v. Peckham*,⁸⁸ the Supreme Court of Rhode Island held that extraordinary cash dividends declared out of assets earned before the creation of the trust are to be treated as capital. In *Re Duffill's Estate*⁸⁹ it was held by the Supreme Court of California that stock dividends declared out of

it is provided that the trustee of stock shall not be liable for assessments if the stock is registered in his name as trustee or if the corporation has notice of the trust and of the identity of the *cestuis que trust*, but that the *cestuis que trust* shall be liable in such case. Cf. *Lewis v. Switz*, 74 Fed. (C. C. Neb.) 381 (1896); CAS. TRUSTS, 741.

⁸⁶ 104 Misc. 372, 171 N. Y. Supp. 981 (1918); 32 HARV. L. REV. 181 (1918); CAS. TRUSTS, 791.

⁸⁷ 226 N. Y. 114, 712, 123 N. E. 135 (1919).

⁸⁸ 107 Atl. (R. I.) 209 (1919); 68 U. OF PA. L. REV. 85 (1919).

⁸⁹ 183 Pac. (Cal.) 337 (1919).

income earned during the life of the trust are to be treated as income. On the other hand, the Supreme Judicial Court of Maine in *Harris v. Moses*,⁹⁰ and the Supreme Court of Appeals of West Virginia in *Security Trust Co. v. Rammelsburg*⁹¹ (two judges dissenting), following the Massachusetts rule, have held that stock dividends are capital although declared out of income earned during the life of a trust. In Massachusetts an extraordinary cash dividend was held to be income, although stockholders were given the right to apply it in subscribing for new stock at less than its market value, and although the trustees did so apply it.⁹² In the case just referred to, it was also held that a dividend payable in stock of a subsidiary company is to be treated as income, although in jurisdictions following the Pennsylvania rule such dividends are apportioned like all other dividends.⁹³

BUSINESS TRUSTS

The Massachusetts device of creating a trust for the carrying on of a business is rapidly growing in popularity. Express provisions for the creation of business trusts were adopted in Oklahoma by a recent statute⁹⁴ allowing such trusts to be created by a recorded instrument, limiting the life of the trust to twenty-one years or the lives of the beneficiaries, and providing that the trust estate shall be liable to third persons for acts of the trustees when acting as such, but that no personal liability shall attach to the

⁹⁰ 104 Atl. (Me.) 703 (1918).

⁹¹ 97 S. E. (W. Va.) 122 (1918).

⁹² *Smith v. Cotting*, 231 Mass. 42, 120 N. E. 177 (1918). The "rights" were held to be capital. For other recent decisions as to stock subscription "rights," see *Baker v. Thompson*, 181 App. Div. 469, 168 N. Y. Supp. 871, affirmed 224 N. Y. 592, 120 N. E. 858 (1918) (capital); *Re Thompson's Estate*, 262 Pa. 278, 105 Atl. 273 (1918) (apportionable). See 18 COL. L. REV. 496 (1918).

⁹³ *Krug v. Mercantile Tr. & Deposit Co.*, 104 Atl. (Md.) 414 (1918); *U. S. Trust Co. v. Heye*, 224 N. Y. 242, 120 N. E. 645 (1918); *Matter of Megrue*, 224 N. Y. 284, 120 N. E. 651 (1918).

For recent decisions allowing apportionment of dividends on liquidation, see *Re McKeown's Est.*, 263 Pa. 78, 106 Atl. 189 (1919); *R. I. Hosp. T. Co. v. Bradley*, 103 Atl. (R. I.) 486 (1918).

For recent decisions as to what is income under the federal Income Tax Acts, see *Towne v. Eisner*, 245 U. S. 418 (1918) (stock dividends not taxable under act of 1913); *Lynch v. Hornby*, 247 U. S. 339 (1918) (cash dividends out of earnings accruing prior to 1913 held taxable); *Peabody v. Eisner*, 247 U. S. 347 (1918) (distribution of shares of subsidiary companies held taxable).

⁹⁴ OKLA. LAWS, 1919, c. 16.

trustees or the beneficiaries for such acts. In *Crocker v. Malley*⁹⁵ it was held that such a trust is not taxable as an association under the federal Income Tax Act of 1913. In *Sleeper v. Park*⁹⁶ it was held that the trustees were all liable as partners for the negligence of one of the trustees which resulted in an injury to the plaintiff, a third party. If the direction and control of the details of the business are retained by the beneficiaries, then they also may be held personally liable as partners.⁹⁷

TERMINATION OF TRUSTS

The doctrine of *Clafin v. Clafin*⁹⁸ has been accepted in Connecticut by the Supreme Court of Errors in the recent case of *De Ladson v. Crawford*.⁹⁹ In that case a testator left property to a trustee with a direction to pay the income to his niece for ten years and at the end of that period to pay her the principal. No one except the niece was given any beneficial interest in the property. The court held that the provision for postponement of enjoyment was valid, and that the niece could not insist on a termination of the trust before the expiration of the ten-year period.¹⁰⁰ The court was not impressed by the English decisions to the opposite effect nor by Professor Gray's arguments.¹⁰¹ In a dictum the court expressed the view that the provision for postponement would be valid against an assignee of the beneficiary as well as against the beneficiary herself. This is probably right, for otherwise the restraint would be a mere form.¹⁰²

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⁹⁵ 249 U. S. 223 (1919); 33 HARV. L. REV. 118 (1919); 28 YALE L. J. 690 (1919).

⁹⁶ 232 Mass. 292, 122 N. E. 315 (1919).

⁹⁷ *Horgan v. Morgan*, 233 Mass. 381, 124 N. E. 32 (1919). See CAS. TRUSTS, 774, note. In *Cunningham v. Bright*, 228 Mass. 385, 117 N. E. 909 (1917), 29 YALE L. J. 97 (1919), it was said that when the trustee of a business trust acquires the whole beneficial interest, the trust ends by merger.

In *Kimball v. Whitney*, 233 Mass. 321, 123 N. E. 665 (1919), it was held that it was not necessarily improper in Massachusetts for a trustee to invest in preferred shares of a business trust, although the trust in question amounted to a partnership.

⁹⁸ 149 Mass. 19, 20 N. E. 454 (1889); CAS. TRUSTS, 828.

⁹⁹ 106 Atl. (Conn.) 326 (1919).

¹⁰⁰ In *Odom v. Morgan*, 177 N. C. 367, 99 S. E. 195 (1919), an attempt to postpone enjoyment of the corpus for ten years was unsuccessful because the testator devised the legal estate to the beneficiary. See 33 HARV. L. REV. 324.

¹⁰¹ GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 120.

¹⁰² GRAY, RESTRAINTS ON ALIENATION, 2 ed., § 124, note.

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MARINE RISK AND WAR RISK. — The exigencies of submarine warfare have made it difficult, in many cases, to decide whether the loss of a vessel should be borne by the marine or by the war insurer. War risks are themselves but a subdivision of the more general class of marine risks,¹ but it early became customary for the marine underwriter specifically to except from his policy any liability for war losses, by a warranty — “warranted free of capture and seizure and all consequences of hostilities and warlike operations” — generally known as the f. c. s. clause.² The next step was for the shipowner to insure

¹ The earliest English policies of marine insurance enumerate many perils of war among those the insurers undertake to bear. Magens gives a policy dated in London in 1744: “Touching the Adventures and Perils which we the Assurers are contented to bear, and take upon us in this Voyage, they are, of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettizons, Letters of Mart and Countermart, Surprizals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People of what Nation, Condition or Quality soever, Barretry of the Master and Mariners and of all other Perils, Losses or Misfortunes that have come or shall come to the Hurt, Detriment or Damage of the said ship . . .” 1 MAGENS ON INSURANCE (London, 1755), 552. This form of policy has remained the standard to the present day. See 1 ARNOULD, MARINE INSURANCE, 9 ed., § 10. The British Marine Insurance Act, 1906 (6 EDW. VII, c. 41), specifically includes war perils in the definition of maritime perils. “‘Maritime perils’ means the perils consequent on, or incidental to, the navigation of the sea, that is to say perils of the seas, fire, war perils . . .” 6 EDW. VII, c. 41, § 3 (2) (c). A policy against the “risks contained in all regular policies of insurance” covers loss by capture. *Levy v. Merrill*, 4 Me. 180 (1826). A general policy without warranty covers war risks. *Barnewall v. Church*, 1 Caines (N. Y.), 217 (1803); *Hodgson v. Marine Ins. Co.*, 5 Cranch (U. S.) 100 (1809).

² See 2 ARNOULD, MARINE INS., 9 ed., § 903.

himself by a separate policy against these losses. This being the case, in an action on either a war policy or a marine policy the problem is to discover whether the loss, being a marine loss, is not also a "consequence of hostilities." If it is, it is excluded from the marine policy and falls within the war policy.³

The fact that war risks form an excepted subdivision in the category of marine risks has the further effect, once the shipowner has shown a *prima facie* marine loss, of putting the burden of proof on the marine insurer to show that the loss was caused by an excepted peril.⁴ For example, when a ship puts to sea and is never heard from again, the loss is *prima facie* ascribable to a marine peril, and if the marine insurer would escape liability on the ground that the loss was caused by war, the *onus* of proving it is on him.⁵ On the other hand, in an action against the underwriter of war risks, the owner must show that his loss was proximately caused by the peril insured against.⁶

The problem may arise where a vessel is successively the victim of an enemy attack and of the fury of the seas, and the result is total destruction. If it is shown that the hostile act so weakened the vessel that she was unable to withstand the subsequent storm, or if in any other way it can be proved that the hostile act proximately caused the loss, the war risk insurer alone is liable.⁷ But the problem presents a

³ But in an action for salvage, if the claim is for saving the vessel from both a war risk and a non-war marine risk, the claim may be apportioned. *Pyman Steamship Co. v. Lord Commissioners of the Admiralty*, [1919] 1 K. B. 49.

⁴ *Green v. Brown*, 2 Strange, 1199 (1744); *Munro Brice & Co. v. War Risks Association*, [1918] 2 K. B. 78. The rule is the same in the case of other excepted liabilities. *Ajum Goolam Hossen v. Union Marine Ins. Co.*, [1901] A. C. 362.

⁵ The amount of evidence necessary to prove that the loss was caused by a war risk may not be great in time of war. A bottle containing a paper with the message, "Oriole torpedoed, sinking," washed ashore two months after the Oriole left London for Havre, in conjunction with the known operation of submarines in the Channel, was sufficient evidence to prove that the Oriole's loss was due to war. *General Steam Navigation Co. v. Commercial Union Assurance Co.*, 31 T. L. R. 630 (1915). The length of the voyage, absence of any storm, seaworthiness of the ship, and the competency of the master, are evidence to determine whether the loss was from a war or sea peril. *Macbeth v. The King*, 115 L. T. 221 (1916); *Euterpe Steamship Co. v. North of England Protective and Indemnity Association*, 33 T. L. R. 540 (1917); *British & Burmese Steam Navig. Co. v. Liverpool & London War Risk Ins. Co.*, 34 T. L. R. 140 (1917); *Compania Maritima v. Wishart*, 34 T. L. R. 251 (1918).

⁶ An underwriter is not liable for a loss not proximately caused by a peril insured against. *De Vaux v. Salvador*, 4 A. & E. 420 (1836); *Pink v. Fleming*, 25 Q. B. D. 396 (1890); *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N. Y. 47, 120 N. E. 86 (1918). See 2 ARNOULD, MARINE INS., 9 ed., § 783. The rules as to proximate causation apply equally in determining whether a loss falls within an excepted peril. *Ionides v. Universal Marine Ins. Co.*, 14 C. B. (N. S.) 259 (1863); *William France, Fenwick & Co. v. North of England Protecting & Indemnity Association*, [1917] 2 K. B. 522. But if the policy excepts liability for "direct or indirect" results of war the maxim *proxima causa* does not apply. *Letts v. Excess Ins. Co.*, 32 T. L. R. 361 (1916).

⁷ *Leyland Shipping Co. v. Norwich Union Fire Ins. Society*, [1918] A. C. 350; *Lobitos Oil Fields v. Admiralty Commissioners*, 34 T. L. R. 466 (1918). A similar question is raised where a vessel is captured by the enemy and subsequently destroyed by fire or storm. *Dole v. New England Mutual Ins. Co.*, 2 Cliff. 394, Fed. Cas. No. 3,966 (1864); *Andersen v. Marten*, [1908] A. C. 334. Cf. *Roura and Fourgas v. Townend*, [1919] 1 K. B. 189. Where the vessel was first stranded and then captured the following cases held the capture the proximate cause of the loss. *Green v. Elmslie*, 1 Peake N. P. 278 (1792); *Livie v. Janson*, 12 East, 648 (1810); *Ionides v. Universal*

much more difficult aspect when there are not two separate attacking forces but a single cause of the catastrophe and it is necessary to decide whether or not that is a risk of war. Such is the case where a vessel in convoy, sailing a zigzag course ordered by a naval officer, runs upon a reef, or where ships collide while navigating the war zone without lights. Stranding and collision are but the commonest of the perils of the sea; yet in these cases the accident would not have happened but for the extra-hazardous methods of navigation necessitated by the war. In *British Steam Navigation Co. v. Green*⁸ the Court of Appeal held that stranding under the circumstances above mentioned was not a consequence of hostilities or warlike operations. On the collision question the British courts have decided that where one of the colliding ships is a war vessel on active duty the collision is a consequence of a warlike operation.⁹ But in *Britain Steamship Co. v. The King*,¹⁰ although it was admitted that the proximate cause of the loss was the absence of lights on the vessels, it was held that the loss was not a consequence of hostilities or warlike operations. Bailhache, J., in the Divisional Court said,¹¹ "In my judgment the Admiralty regulations that vessels should navigate at night without lights greatly increased the risk of collision but left it a marine risk."¹² If the Admiralty can thus increase the marine risk for the purpose of decreasing the war risk, it would seem that the whole question of proximate causation is beside the point and that the war insurer indemnified against captures, torpedoings, and collisions with warships and the marine insurer against stranding and foundering and ordinary collisions regardless of whether or not they were proximately caused by the war.¹³ But that this is not the view really taken by the English courts appears in *Henry & MacGregor v. Marten*,¹⁴ where the captain of a vessel rammed a floating

Marine Ins. Co., 14 C. B. (N. S.) 259 (1863); *Patrick v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 9 (1814). In the following cases the stranding alone was the proximate cause of loss. *Hahn v. Corbett*, 2 Bing. 205 (1824); *Patrick v. Commercial Ins. Co.*, 11 Johns. (N. Y.) 14 (1814). Cf. *British India Steam Navig. Co. v. Green*, [1919] 2 K. B. 670.

⁸ [1919] 2 K. B. 670. See RECENT CASES, *infra*, p. 732. Cf. *Muller v. Globe & Rutgers Fire Ins. Co.*, 246 Fed. 759 (1917). See note 12, *infra*.

⁹ *British and Foreign Steamship Co. v. The King*, [1919] 2 K. B. 773; *Ard Coasters v. The King*, 35 T. L. R. 604 (1919).

¹⁰ [1919] 2 K. B. 670. See RECENT CASES, *infra*, p. 732. *Owners of Steamship Larchgrove v. The King*, 36 T. L. R. 108 (1919), *Accord*.

¹¹ [1919] 1 K. B. 575, 582.

¹² Cf. *Ionides v. Universal Marine Ins. Co.*, 14 C. B. (N. S.) 259 (1863). In *Le Quéllec et Fils v. Thompson*, 115 L. T. R. 224 (1916), a war policy was specifically made to cover losses from "extinction of lights." The ship went ashore on a cape, where the light had been extinguished, but the court found that this was not the proximate cause of the stranding. In *Muller v. Globe & Rutgers Fire Ins. Co.*, 246 Fed. 759 (1917), the vessel was stopped by a destroyer and ordered to follow a course close to a shore on which all aids to navigation had been extinguished for war reasons, and in obeying this order ran ashore. It was held that this loss was a consequence of hostilities.

¹³ It has been argued that marine insurers do not undertake to make good all losses from certain causes, but that they contract to indemnify against certain classes of losses, however caused. See Abbot, "Perils of the Sea," 7 HARV. L. REV. 221.

¹⁴ 34 T. L. R. 504 (1918). Generally a loss incurred in attempting to avoid a peril insured against is recoverable as being proximately caused by the peril. *Covington v. Roberts*, 2 B. & P. N. R. 378 (1806); *Butler v. Wildman*, 3 B. & Ald. 398 (1820); *Ins. Co. v. Boon*, 95 U. S. 117 (1877); *Marcy v. Merchants Mutual Ins. Co.*, 19 La.

object believing it to be a submarine and sank his own vessel. The court held that whether or not the object was a submarine the loss was the consequence of warlike operations.

The question of war risk or marine risk will always be chiefly a question of fact and of the interpretation of the particular policy, but as yet no sufficient reason has been suggested why a loss from a collision between two merchant vessels bound on peaceful missions, if caused by war, should not be reckoned the result of a war risk.

THE EFFECT OF BANKRUPTCY ON A RIGHT OF ENTRY FOR CONDITION BROKEN. — In *Matter of Elk Brook Coal Co.*,¹ the District Court for the Middle District of Pennsylvania decided that a landlord who, prior to the bankruptcy of his tenant, had become entitled to terminate the lease for a default in the payment of rent and royalties, might do so subsequently against the latter's trustee in bankruptcy.² The case, however, contains *dicta* that if the landlord could have been assured complete financial reparation the trustee would have been permitted to retain the leasehold despite the provision for re-entry contained in the lease. The soundness of the decision itself seems unquestionable;³ that of the qualifying *dicta* perhaps somewhat less patent.

Bankruptcy courts evince at times a rather high-handed tendency to extend the effect of bankruptcy in defeating existing rights beyond that called for or authorized by the Bankruptcy Act. The jurisdiction which they assert to sell, free and clear of encumbrances, property of the bankrupt's already subject to valid liens, and to remit the lienholders to a claim upon the proceeds, is an example of this tendency.⁴ So too was the unsuccessful attempt to establish by judicial legislation that an insolvent tenant, whose trustee in bankruptcy refused to assume the lease, was *ipso facto* relieved by bankruptcy from further obligations under it.⁵

Ann. 388 (1867); *Singleton v. Phenix Ins. Co.*, 132 N. Y. 298, 30 N. E. 839 (1892). Cf. *Société Nouvelle D'Armement v. Spillers*, [1917] 1 K. B. 865. But the loss incurred in abandoning the voyage because of fear of capture cannot be recovered on a war policy as a consequence of hostilities. *Hadkinson v. Robinson*, 3 B. & P. N. R. 388 (1803); *Lubbock v. Rowcroft*, 5 Esp. 50 (1803); *Nickels & Co. v. London & Provincial Marine Ins. Co.*, 70 L. J. Q. B. N. S. 29 (1900); *Kacianoff v. China Traders Ins. Co.*, [1914] 3 K. B. 1121; *Becker Gray & Co. v. London Assurance Corp.*, [1918] A. C. 101. Cf. *The Knight of St. Michael*, [1898] P. 30. But if the voyage is abandoned because its further prosecution would be illegal as trading with the enemy, the insured can recover for a "restraint of princes." *British & Foreign Marine Ins. Co. v. Sanday*, [1916] 1 A. C. 650; *Associated Oil Carriers v. Union Ins. Society*, [1917] 2 K. B. 184.

¹ 44 Am. B. R. 283 (D. C. Pa., 1919).

² For a more complete statement of the facts of this case, see RECENT CASES, p. 725.

³ *Lindeke v. Associates Realty Co.*, 17 Am. B. R. 215; 146 Fed. 630 (C. C. A., 8th Circ., 1906). See 1 REMINGTON, BANKRUPTCY, § 983; 1 LOVELAND, BANKRUPTCY, § 387.

⁴ *In re Pittelkow*, 92 Fed. 901 (D. C. E. D. Wis., 1899).

⁵ *In re Jefferson*, 2 Am. B. R. 206, 93 Fed. 948 (D. C. Ky., 1899); *Bray v. Cobb*, 3 Am. B. R. 788, 100 Fed. 270 (D. C. N. C., 1900). See 1 REMINGTON, BANKRUPTCY, § 653, and see an article in 39 AM. L. REG. (N. S.) 656 on this subject.

Logically, unless the Bankruptcy Act so provides, there would seem to be no satisfactory reason why the rights of the landlord, an innocent third party, should be impaired by the bankruptcy of his tenant. An exception to this principle must, however, be noted. As in the case of all onerous contracts, the trustee has a reasonable time in which to elect whether or not he will assume the tenant's obligations under the lease, and acquire the rights which the latter may still have therein.⁶ If, however, the landlord is already entitled as against the tenant to enter for condition broken, it is submitted that the general rule should govern and that the trustee should stand squarely in the tenant's shoes.

Apart from bankruptcy the right of a landlord to terminate a lease upon breach of condition is well settled. There are, however, certain doctrines, some legal, some equitable, which restrict this right. At law the right may be "waived" by an act affirming the existence of the tenancy subsequent to, and with knowledge of the breach.⁷ Acceptance of rent not yet due at the time of breach offers a typical example of such waiver.⁸ Possibly the mere lapse of time without action by the landlord may debar him from exercising his right of entry.⁹ Finally equity, abhorring a forfeiture, will enjoin the enforcement of the legal remedy when money damages would offer exact and adequate relief for the injury occasioned by the breach.¹⁰ Such equitable interference, however, seems restricted by its terms, at least in the absence of fraud or accident, to cases where the condition broken was one for the payment of money, and where compensation for the delay in performance can be made by payment of interest.¹¹

Accordingly, though bankruptcy should in no wise impair the landlord's right of entry, yet a bankruptcy court, because it is a court of equity, may properly take cognizance of all the above restrictions upon that right, equitable as well as legal; and the *dicta* in the principal case, since they refer only to situations embraced within the scope of the last of these restrictions, would seem therefore to be sound.¹² On the other hand, bankruptcy courts should not be led by a desire to protect general creditors to extend the legal doctrine of waiver, or the equitable doctrine of relief against forfeiture, beyond the limits already defined by the law of Landlord and Tenant. This, it must be admitted, they seem sometimes to have been inclined to do.¹³ Possibly it would

⁶ *Re Sherwoods*, 210 Fed. 754, 127 C. C. A. 304 (C. C. A., 2d Circ., 1913); *Fleming v. Noble*, 250 Fed. 733, 163 C. C. A. 65 (C. C. A., 1st Circ., 1918).

⁷ *Pennant's Case*, 3 Co. 64 a (Q. B. 1596).

⁸ *Goodright v. Davids, Cowper*, 803 (K. B. 1778).

⁹ See *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118 (1892); *Allen v. Dent*, 72 Tenn. (4 Sea) 676 (1880); *Catlin v. Wright*, 13 Neb. 558, 14 N. W. 530 (1882). But see *contra*: 2 TIFFANY, LANDLORD AND TENANT, § 194, i (2), and cases there cited.

¹⁰ *Mactier v. Osborn*, 146 Mass. 399, 15 N. E. 641 (1888); *Henry v. Tupper*, 29 Vt. 358 (1857).

¹¹ See 1 TIFFANY, REAL PROPERTY, § 77; 2 TIFFANY, LANDLORD AND TENANT, 1409 *et seq.*

¹² Cf. *In re Gutman*, 28 Am. B. R. 643, 197 Fed. 472 (D. C. Ga., 1912).

¹³ See *In re Stranton Co.*, 20 Am. B. R. 549, 162 Fed. 169 (D. C. Conn., 1908); *In re Rubel*, 21 Am. B. R. 566, 166 Fed. 131 (D. C. Wis., 1908); *In re Schwartzman*, 21 Am. B. R. 885, 167 Fed. 399 (D. C. S. C., 1909); *Gardner v. Gleason*, 259 Fed. 755 (C. C. A., 1st Circ., 1919); but note the remarks of Anderson, J., dissenting, in *Gardner v. Gleason*, *idem*, p. 764.

be conducive to self-restraint to lay greater emphasis upon the fact that bankruptcy *per se* gives to the tenant, in this connection, no new immunities whatsoever.

RESTRICTIVE INTERPRETATION. — Genuine interpretation seeks to determine what the words of a statute provide as to a particular situation.¹ But when it is clear what the words of the statute provide, is it ever permissible by interpretation to depart from those words on the ground that, had the legislature adverted to the particular situation at issue, it would not have desired the statute to be applicable to it?

Some decisions under a New York statute are of interest in this connection. The statute makes it a misdemeanor to use without consent a person's name or picture "for advertising purposes or for the purposes of trade."² It seems clear that the legislature would not have desired the statute to be applied to the publication of news,³ yet its wording clearly includes such publication.⁴ However, when persons sued whose pictures had been published in a newspaper,⁵ or in a magazine,⁶ they were denied recovery. And in the recent case of *Humiston v. Universal Film Mfg. Co.*,⁷ a person whose picture had been published in a weekly news film of current events was likewise denied recovery.

What in reality is the process by which such a result may be reached? Courts almost invariably justify any such departure from the language of the statute as an application of the true legislative intent⁸ which supposedly had been inaptly expressed by the "literal"⁹ words of the act. Surely in many cases this talk is inaccurate. In the cases above, for example, even assuming that the legislature, had it considered the matter, would not have desired the statute to be applied to the publication of news, it does not follow that the legislature intended that it should not be so applied. Had it so intended it would doubtless have expressed that intention in the form of a qualification rather than have

¹ This becomes necessary when the words are ambiguous, or when there is a choice between conflicting provisions. See Roscoe Pound, "Spurious Interpretation," 7 COL. L. REV. 379, 381.

² See CIVIL RIGHTS LAW (CONSOL. LAWS, c. 6), §§ 50, 51.

³ To do so would make it illegal for a paper even to mention a person's name without consent.

The Act was apparently passed to rectify the law as found in the Robertson case, where a woman whose picture had been extensively used in the advertisement of a certain commodity was denied recovery. *Robertson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902).

⁴ Surely a paper does not publish people's pictures as a compliment to them, but for the purposes of its trade, the dissemination of news.

⁵ *Jeffries v. New York Evening Journal Publishing Co.*, 67 Misc. 570, 124 N. Y. Supp. 780 (1910).

⁶ *Coyler v. Richard K. Fox Pub. Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999 (1914).

⁷ 178 N. Y. Supp. 752 (1919). See RECENT CASES, p. 735, *infra*.

⁸ See *In re Howard's Estate*, 80 Vt. 489, 68 Atl. 513 (1908); *Curry v. Lehman*, 55 Fla. 847, 47 So. 18 (1908).

⁹ When the words of the statute are inconvenient they are frequently referred to in a derogatory manner as the "literal" words of the statute, as though the use of that adjective justified any liberties which might be taken with them by way of interpretation.

allowed the statute to go forth too broadly worded, a breeder of future trouble.¹⁰ The most that can be said is that the court seeks to apply the intent which in its opinion the legislature would have had, had it considered that situation. Austin speaks more accurately of applying the "reason of the statute."¹¹ This he calls spurious interpretation.¹² When the words of the statute include cases which its reason would not, the application of the reason he calls restrictive interpretation.¹³ The decisions in the New York cases mentioned above seem to have been reached in that way.

This sort of interpretation has certain peculiarities. Normally, in the case of genuine interpretation, the court assumes that the words used by the legislature express the "reason of the statute."¹⁴ To be sure if the words are ambiguous the court may itself determine otherwise the "reason of the statute," but only as a guide to show which is the correct sense of the words. It gives effect to its independent determination only so far as the words will allow; it is truly construing words. Here it gives effect to such determination further than the words will allow — even though the words cannot without qualification bring about any such result; it is no longer merely construing words, but might be said to construe the "reason of the statute." To do so is in effect to amend the words; where the legislature has failed to use apt words, the court steps in. Dean Pound has likened this to the compensations in the human system when some member fails to function properly.¹⁵ The line between interpretation and judicial legislation here becomes shady. So far as the words go, this looks like the latter, but inasmuch as the court attempts to apply the "reason of the statute," it may well be called one form of interpretation. Its peculiarities should, however, be recognized.

To admit such a rule is to enter upon a dangerous ground.¹⁶ Once the jurisdiction to apply some other standard than that indicated by the words of the statute is admitted, then in a doubtful case it becomes open to question whether the law as written is really applicable. The court's discretion is in some measure substituted for the written law. There is the danger of abuse.¹⁷ Ground is furnished for the belief that

¹⁰ See GRAY, *THE NATURE AND SOURCES OF THE LAW*, § 370.

¹¹ See AUSTIN, *JURISPRUDENCE*, 3 ed., 1025.

What is commonly laid down as the law seems contradictory. It is said that the court should apply the clear meaning of the language, but if it seems that the legislative intent requires a result which the words of the statute would not bring about, then the former should prevail.

¹² See AUSTIN, *JURISPRUDENCE*, 3 ed., 1028. See Roscoe Pound, "Spurious Interpretation," *supra*.

¹³ See AUSTIN, *JURISPRUDENCE*, 3 ed., 1025.

¹⁴ See *Curry v. Lehman*, *supra*.

¹⁵ See Roscoe Pound, "Spurious Interpretation," *supra*, p. 384.

¹⁶ *Ibid.*

¹⁷ See Scott, "The Progress of the Law, 1918-1919 — Civil Procedure," 33 HARV. L. REV. 236, 240, and cases cited, showing how certain courts refused to give full effect to the code provisions abolishing the distinctions between forms of action, but continued to hold persons bringing suit to the "theory of their complaint."

See also WILLISTON, *SALES*, § 407, and cases cited, showing how courts refused to give complete effect to statutes providing that bills of lading should be negotiable "in the same manner as bills of exchange."

the courts make and unmake the law at will. This leads to the desire for political control of the courts and the demand for an elective judiciary.

Whether this jurisdiction should nevertheless be entered upon involves a large problem of jurisprudence — that arising out of the conflicting desires for certainty in the law, and for due regard for the equities of individual cases.¹⁸ Suffice it here to say that under prevailing methods of drawing statutes this sort of interpretation seems at times necessary to avoid absurd and untimely results from ill-framed legislation.

COMPENSATION FOR PROPERTY TAKEN FOR THE DEFENSE OF THE REALM. — The recent English case of *De Keyser's Hotel v. The King*,¹ in which compensation was allowed for a hotel taken during the war for war purposes, seems quite irreconcilable with the earlier decision, *In Re a Petition of Right*,² in which no compensation was allowed as a matter of right to the owner of an aerodrome also taken by military authorities for war purposes. The attempted distinctions fall under three heads: administrative purposes are distinguished from use in actual hostilities; taking *in invitum* is distinguished from taking pending negotiations; and finally, the Crown did not insist in the Hotel case on the consideration of the prerogative separately from the statutes. Of the first two contentions it is enough to say that they do not square with the facts. There was no contention in the first case that the aerodrome was wanted for actual hostilities. Besides, there was no pretense of going behind the decision of the proper administrative officers on the question of the necessity of the taking in either case. As to the contention that the negotiations for the transfer of the hotel under a lease make it impossible to consider the taking without a lease *in invitum*, it need only be stated in this naked form to be refuted. One wonders whether a desire on the part of the owner of the aerodrome to haggle with the government would not have saved his case as well.

The only distinction that remains is suggested by Warrington, L. J., who sat in both cases: the admission of the Crown in the second case that the prerogative was merged in the statutes. This seems a tremendously significant limitation of the prerogative, and one wonders why the Crown after its success in the aerodrome case yielded so much. Perhaps it was on the basis of a doubt on this point that the aerodrome case was compromised while pending in the House of Lords. Perhaps it was good policy not to risk a reversal on so valuable a point, *flagrante bello*. But a more important innovation in this argument was the suggestion that the Statute of 1842 was to be read in connection with the legislation of 1914. The older statute had fixed the right of compensation. The latter simplified procedure by enabling the administrative to do away with certain restrictions. They had done away with one restriction involving a two weeks' delay in taking possession and another involving the invasion of the kingdom as a condition precedent.

¹⁸ See Roscoe Pound, "The Enforcement of Law," 20 GREEN BAG, 401.

¹ [1919] 2 Ch. 197.

² [1915] 3 K. B. 649.

They had not, and probably could not have touched the question of the ultimate right to compensation, without the repeal of the clauses on this subject in the Statute of 1842. In other words, the decision in the aerodrome case was wrong.

Where judicial reasoning is thus bent to the breaking point to bring about a result inconsistent with a precedent only four years old, the true significance is probably to be sought in the effect of external events on public opinion rather than in the law itself. Have the political events of the last few years completed the supremacy of Parliament over the relics of the prerogative, which is now frankly defined as implied executive power?³ Or has the coming of peace, a successful peace, restored to the judiciary in England the calm necessary to enable it to review coldly the history of the exercise of a power, even a war-time power, and say, "Thus far shalt thou come, but no farther"? At all events, the constitutional significance of the court's struggle to bring the statutes and regulations into harmony with English tradition and English ideas of fair play is brought out by the fact that the result finally reached is in the spirit of our Fifth Amendment: "Nor shall private property be taken for public use without just compensation." The fundamental similarity between our constitutional law and that of England is not rendered any less striking by our own doubts as to the applicability of the Fifth Amendment to property actively used in the prosecution of a war.⁴ This decision marks a return to the point of view of peacetime. May it not mean more — for example, that the tremendous impetus given to the power of the executive arm during the recent emergency is already suffering a check in favor of the older "Rule of Law"? *Inter arma silent leges* — but soon the platitude that all of the old English law books used to copy from the Institutes is rediscovered, that laws as well as arms are necessary for the glory of a sovereign.

HIRED MOTOR VEHICLES AND *RESPONDEAT SUPERIOR*. — For the purpose of establishing a liability on the ground of *respondeat superior*, shall the driver of a hired motor vehicle be deemed during that enterprise the servant of the owner or the servant of the hirer? It has often been suggested that the owner of the machine be held absolutely liable for injuries caused by the negligent operation of the machine¹ — the automobile being considered a dangerous instrumentality kept by the owner at his peril. But to-day it is fairly well settled that the automobile is not such a danger to mankind as to make absolute responsibility an incident of ownership.² If some one besides the negligent

³ [1919] 2 Ch. 216.

⁴ See 30 HARV. L. REV. 673.

¹ See Ashley Cockrill, "The Family Automobile," 2 VA. L. REV. 189; 33 HARV. L. REV. 118; L. R. A. 1915 D, 691.

² "It may be that it would be wise and in the public interests that responsibility for an accident caused by an automobile should be affixed to the owner thereof, irrespective of the person driving it, but the law does not so provide." *Cunningham v. Castle*, 127 N. Y. App. Div. 580, 588, 111 N. Y. Supp. 1057, 1063 (1908). "It is not the ferocity of automobiles that is to be feared, but the ferocity of those who

operator is liable, the liability must be fixed on principles of the law of master and servant.³

Where a party hires a motor-car and drives it himself, the owner clearly is not responsible upon any principle of agency for negligent driving and consequent damage.⁴ If the hirer furnishes his own driver, the former is the responsible principal.⁵ On the other hand, where the hirer obtains both car and chauffeur from the owner, as in the case of the hiring of a taxicab, the latter is liable for the negligent driving of the automobile; indeed, it is usually the hirer⁶ himself or another occupant⁷ of the car who is seeking a recovery for injuries sustained. The hirer of a taxicab is often injured in a collision due to the combined negligence of the chauffeur and some other party, and the cases establish that the contributory negligence of the taxicab driver cannot be imputed to the hirer.⁸ The soundness of these cases cannot be seriously questioned. The contract of hire is of comparatively brief duration, and the hirer exercises no substantial control over the operation of the car.

The chief difficulty is presented in those cases where vehicle and chauffeur are hired not for a brief trip, but upon a contract extending over a considerable period. In the case of *Finegan v. Piercy Contracting Co.*,⁹ an appellate court of New York recently decided that the hirer was the master *pro hac vice*, and hence liable. A few days prior thereto, and apparently unknown to the Appellate Division, the New York Court of Appeals in the case of *McNamara v. Leipzig*¹⁰ had decided that the hirer in such a situation was not the master. In the latter case the hirer was in the car when the accident occurred. In *Finegan v. Piercy Contracting Co.*, he was not present; hence, the Court of Ap-

drive them. . . . There are times when these machines not only lack ferocity but assume such an indisposition to go that it taxes the limit of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evilly disposed mules and the like." *Lewis v. Amorous*, 3 Ga. App. 50, 55, 59 S. E. 338, 340 (1907). See also cases cited in 28 HARV. L. REV. 92, note 12.

³ In this connection see the following cases, in which a chauffeur not acting in his master's business caused no liability on the part of his employer. *Eakin v. Anderson*, 169 Ky. 1, 183 S. W. 217 (1916); *Hartnett v. Gryzmish*, 218 Mass. 258, 105 N. E. 988 (1914); *Brinkman v. Zuckerman*, 192 Mich. 624, 159 N. W. 316 (1916); *Soloman v. Trust Co.*, 256 Pa. St. 55, 100 Atl. 534 (1917); *Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016 (1910).

⁴ *Neubrand v. Kraft*, 169 Ia. 444, 151 N. W. 455 (1915); *Braverman v. Hart*, 105 N. Y. Supp. 107 (1907).

⁵ *Hornstein v. Southern Boulevard Co.*, 79 N. Y. Misc. 34, 138 N. Y. Supp. 1080 (1913).

⁶ *Forbes v. Reinman*, 112 Ark. 417, 166 S. W. 563 (1914); *Meyers v. Tri-State Automobile Co.*, 121 Minn. 68, 140 N. W. 184 (1913); *Wallace v. Keystone Automobile Co.*, 239 Pa. St. 110, 86 Atl. 699 (1913).

⁷ *Forbes v. Reinman*, *supra*; *Rodenburg v. Clinton Garage*, 84 N. J. L. 545, 87 Atl. 71 (1913), *aff'd* 85 N. J. L. 729, 91 Atl. 1070 (1914); *Gerretson v. Rambler Garage*, 149 Wis. 528, 136 N. W. 186 (1912).

⁸ *Broussard v. Louisiana R. Co.*, 140 La. 517, 73 So. 606 (1916); *Harding v. City of N. Y.*, 181 N. Y. App. Div. 251, 168 N. Y. Supp. 265 (1917).

⁹ 178 N. Y. Supp. 785 (1919). For a statement of the facts in this case, see RECENT CASES, *infra*, p. 725.

¹⁰ 125 N. E. 244 (N. Y. 1919), reversing 180 N. Y. App. Div. 515, 167 N. Y. Supp. 981. For a statement of the facts in this case, see RECENT CASES, *infra*, p. 725 (Three out of seven judges dissented).

peals case was, if anything, a stronger one for holding the hirer. It is hardly to be expected that *McNamara v. Leipzig* will establish any definite rule of law in New York. The question of who is the master is primarily one of fact; and when a rule of law must be applied to facts, distinctions crop up which in no small measure tend to confusion and apparent irreconcilability.¹¹ Of the many tests¹² which have been prescribed for determining which of two persons shall be deemed to be the master at a particular time, it seems that the most satisfactory is: "Whose work is being done, and who, during the course of that work, has or exercises control over the doing of that work?"¹³ If the hirer has virtual control, he should be deemed the principal, even though the owner or general employer engages and pays the chauffeur. A transfer of control should *ipso facto* effect a transfer of responsibility.¹⁴

An injured plaintiff, in view of conflicting decisions, will find it perplexing to determine just which of the two employers will be considered by the court or jury the master in the course of whose employment the injury occurred.¹⁵ The plaintiff can no doubt allege a joint liability,¹⁶ but it is clear that the two parties are not jointly liable. The situation suggests the advisability of statutes modifying the rigidity of common-law procedure by allowing a suit in the alternative.¹⁷ The plaintiff

¹¹ "The decisions as to the liability of parties hiring vehicles . . . are exceedingly close, and it is difficult to distinguish between the facts upon which diverse judgments have been founded." *Waldman v. Picker Bros.*, 140 N. Y. Supp. 1019 (1912). In this case the hirer was not held liable. But in *De Perri v. Motor Haulage Co.*, 185 N. Y. App. Div. 384, 173 N. Y. Supp. 189 (1918), and in *Diamond v. Sternberg Truck Co.*, 87 N. Y. Misc. 305, 149 N. Y. Supp. 1000 (1914), the owner was not held liable. Query whether the holding of one party not liable would lead the court to hold that the other party was liable.

¹² See 2 *MECHEM, AGENCY*, 2 ed., § 1863; *WOOD, MASTER AND SERVANT*, 2 ed., § 317; 1 *LABATT, MASTER AND SERVANT*, 2 ed., §§ 52-62.

¹³ See *McNamara v. Leipzig*, 180 N. Y. App. Div. 515, 520, 167 N. Y. Supp. 981, 985. On this question see the oft-quoted test laid down by Moody, J., in *Standard Oil Co. v. Anderson*, 212 U. S. 215, 221 (1909), which was a case of hiring a hoisting machine and stevedore; in concluding the learned justice says: "To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary coöperation, where the work furnished is part of a larger undertaking."

¹⁴ "The respondents in the course of business had transferred the vehicle and driver to the control of the hirer, who alone could say where and in what the work of the truck should thereafter consist, and if this effected a transfer of control it must, *ipso facto*, have effected a transfer of responsibility." *Olson v. Veness*, 178 Pac. 822 (Wash. 1919). In this case the owner of a motor-truck who furnished both vehicle and driver to a hirer was not held liable for the driver's negligence.

¹⁵ As an example of the problem before the plaintiff, see *Pease v. Montgomery*, 111 Me. 582, 88 Atl. 973 (1913), in connection with *Pease v. Gardner et al.*, 113 Me. 264, 93 Atl. 550 (1915). See also *Frerker v. Nicholson*, 41 Colo. 12, 92 Pac. 224 (1907), and *Nicholson v. McGovern Undertaking Co.*, 41 Colo. 1, 92 Pac. 225 (1907).

¹⁶ *Finegan v. Piercy Contracting Co. et al.*, *supra*; *Thorn v. Clark et al.*, 188 App. Div. 411, 177 N. Y. Supp. 201 (1919); *Neubrand v. Kraft et al.*, *supra*. For a case where the two suits were tried together, see *Tornroos v. R. H. White Co.*, *Same v. Autocar Co.*, 220 Mass. 336, 107 N. E. 1015 (1915).

¹⁷ As to joinder of defendants in the alternative, see 51 L. R. A. (N. S.) 640; 31 HARV. L. REV. 1034. For the English Statute, see THE ANNUAL PRACTICE, 1916,

should be permitted to allege directly that one of the two defendants — the owner or the hirer — is the party answerable to him on the ground of *respondet superior*, and that he submits it to the court or jury to determine which.

THE APPLICATION OF BULK SALES STATUTES. — Since 1901 over forty states have passed statutes to the general effect that a sale in bulk of a large part or the whole of a stock of merchandise shall be void as against creditors of the vendor, unless the parties have complied with rather elaborate requirements in the way of giving notice. These statutes are not uniform,¹ and some were at first held unconstitutional;² but they are now almost³ unanimously considered valid.⁴ Yet in the construction of these statutes it is noticeable that the courts are by no means agreed. Thus the recent case of *Swift & Co. v. Tempelos*⁵ held that the North Carolina statute did not apply to the sale of a restaurant together with the goods and fixtures therein, while under the Washington statute the contrary was decided.⁶ Again, apparently a statute including "fixtures pertaining to the business" does not apply to the sale by a retail coal dealer of his coal bags, wagons, and safe,⁷ while a statute not including fixtures does apply to the sale of a soda fountain by a retail druggist.⁸ There is also a conflict over the meaning of the words "shall be presumed fraudulent and void," some courts holding that a rule of substantive law is thus established,⁹ while others regard

Rules, Order XVI. See also Rule 8 of the NEW JERSEY PRACTICE ACT (1912). Suits in the alternative are suggested in the PROPOSED SIMPLIFICATION OF THE NEW YORK CODE (1919), p. 12.

¹ For a summary of the different forms, see L. R. A. 1915 E, 917.

² *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404 (1905); *Off v. Morehead*, 235 Ill. 40, 85 N. E. 264 (1908); *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854 (1904); *Block v. Schwarz*, 27 Utah, 387, 76 Pac. 22 (1904); *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631 (1904).

³ The Utah statute made a sale without the required notice a misdemeanor, and no new statute has been passed. In Ohio the original statute was changed to make the sale only presumptively fraudulent instead of void, but was still held unconstitutional. *Williams v. Preslo*, 84 Ohio St. 328, 95 N. E. 900 (1911).

⁴ In some states, changes pursuant to the expressed opinion of the courts were made in the statutes, which were thereafter declared constitutional. *Sprintz v. Saxton*, 126 App. Div. 421, 110 N. Y. Supp. 585 (1908); *Johnson Co. v. Beloosky*, 263 Ill. 303, 105 N. E. 287 (1914); *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 97 N. E. 1 (1912).

In others the statutes in their original forms have been held constitutional. *Kidd, D. & P. Co. v. Musselman Grocer Co.*, 217 U. S. 461 (1910); *Young v. Lemieux*, 79 Conn. 434, 65 Atl. 436 (1907); *Lemieux v. Young*, 211 U. S. 489; *McGray v. Woodbury*, 110 Me. 163, 85 Atl. 491 (1912); *Squire v. Tellier*, 185 Mass. 18, 69 N. E. 312 (1904); *Kett v. Masker*, 86 N. J. L. 97, 90 Atl. 243 (1914); *Neas v. Borches*, 109 Tenn. 398, 71 S. W. 50 (1902).

⁵ 101 S. E. 8 (N. C.). See RECENT CASES, p. 731, *infra*.

⁶ *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784 (1904). The Washington statute, however, reads, "the sale of any stock of merchandise."

⁷ *Bowen v. Quigley*, 165 Mich. 337, 130 N. W. 690 (1911).

⁸ *Young v. Lemieux*, *supra*. But see *contra*, *Lee v. Gillen*, 90 Neb. 730, 134 N. W. 278 (1912).

⁹ *Moore Dry Goods Co. v. Rowe*, 97 Miss. 775, 53 So. 626 (1910); *Daly v. Sumpter Drug Co.*, 127 Tenn. 412, 155 S. W. 167.

such a statute as constitutional largely on the ground that it creates only a rule of evidence, not necessarily conclusive.¹⁰

Such diversity of construction leads to the suspicion that there is little real need for remedial statutes of this nature. Before the Federal Bankruptcy Act there was undoubtedly a serious evil. If an insolvent retail dealer could suddenly and secretly sell his stock in bulk, not only was it difficult for his creditors to find out what had been done with the proceeds, but the debtor could often make preferences which the remaining creditors were unable to defeat.¹¹ But the National Bankruptcy Act obviates both these dangers, by providing for a speedy discovery of assets¹² and by making a preference by an insolvent debtor an act of bankruptcy¹³ and voidable.¹⁴ Thus these statutes are of little use except in cases where the seller is solvent at the time of the sale, or where the purchaser acts *bona fide* and the seller absconds. The first application is hard on the seller. Among other results it leads to his being unable to recover the purchase price on a sale in violation of the statute until all his debts are paid.¹⁵ The second application is in derogation of the ordinary law of fraudulent conveyances¹⁶ and seems unduly hard on the purchaser. Of course, such burdens are largely relieved if the statute is taken merely as a rule of evidence.¹⁷

It seems doubtful, then, whether such an evil now exists as to render these statutes an expedient remedy. The real dangers for which such statutes might have been a wholesome remedy were largely removed by the Bankruptcy Act in 1898. The fact that the Bulk Sales Laws have all been enacted since 1898 makes it probable that their passage has been due rather to private enterprise¹⁸ than to public need. The great majority of cases involve wholesale creditors and retail debtors, and it is obvious that these statutes give the former a great power over the latter. For the wholesaler can do much to prevent any sale of which he has notice. The statutes seem thus to furnish a surviving instance in which the law has favored the diligent creditor.¹⁹

POWERS OF NATIONAL BANKS TO ACQUIRE VARIOUS KINDS OF PROPERTY. — A recent case in Ohio, *Gress v. The Village of Fort Loramie*,¹ raises again the question of the kinds of property national banks may

¹⁰ *Goldstein v. Maloney*, 62 Fla. 198, 57 So. 342 (1911); *Sprintz v. Saxton*, *supra*.

¹¹ See *Lupton v. Cutter*, 25 Mass. 298, 303 (1829). See also BUMP ON FRAUDULENT CONVEYANCES, 4 ed., 182.

¹² See NATIONAL BANKRUPTCY ACT, § 7, a, 1, and § 7, a, 8.

¹³ *Id.*, § 3, a, 2.

¹⁴ *Id.*, § 60, a, b.

¹⁵ *Seattle Brewing Co. v. Donofrio*, 34 Wash. 18, 74 Pac. 823 (1904).

¹⁶ See *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S. E. 257 (1909); *Boise Ass'n of Credit Men v. Ellis*, 26 Idaho, 438, 144 Pac. 6 (1914).

¹⁷ See note 10, *supra*.

¹⁸ See BULLETIN OF THE COMMERCIAL LAW LEAGUE OF AMERICA, Vol. VII, No. 2, p. 13; and Vol. XII, No. 2, p. 4.

¹⁹ In Connecticut the statute is obviously aimed at preventing the small tradesman from selling his business. Strangely enough it was considered expedient to mention the proprietors of shoe-shine and dental parlors, and of hat-cleaning establishments, in express language. See CONN. STAT., REV. 1917, Chap. 204.

¹ 125 N. E. 112. See RECENT CASES, p. 726, *infra*.

acquire and the effect of such acquisition. The power to acquire real estate is strictly limited. National banks may not make present loans on the security of real estate mortgages,² although they are permitted to take mortgages in good faith as security for debts previously contracted, to accept conveyances in satisfaction of such debts, and to purchase real estate at sales under judgments, decrees, or mortgages held by them.³ The National Banking Act permits a banking association organized under it to own such real estate "as shall be necessary for its immediate accommodation in the transaction of its business."⁴ The words "immediate accommodation" would seem to limit the size of a building which a bank may erect to provide itself with banking quarters, but there is authority that it is not *ultra vires* for a bank to erect on its lot a building which is larger than the bank will ever require for its own purposes, on the ground that a bank, like any prudent owner of valuable land, may improve it in such a way as will render it most productive.⁵ Since a national bank may invest its funds directly in real estate for banking quarters, it has been permitted to subscribe for stock in a corporation organized for the purpose of erecting an office building in which, by an agreement with the promoters, the bank was to take a lease of banking quarters.⁶

As regards the acquisition of stock, a somewhat greater latitude is allowed. Banks are prohibited from purchasing their own shares of stock, or making loans on the security of the same, although they may buy in such stock or take it as security in order to prevent a loss upon a debt previously contracted in good faith.⁷ They have no power to purchase stock in other corporations as an investment, nor to deal in the same.⁸ They do, however, possess the incidental power of accepting *bona fide* stock of other corporations as collateral security for present

² Every national banking association is authorized "to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . . by loaning money on personal security . . ." U. S. R. S., § 5136. Though this section does not in express terms prohibit the making of loans on the security of real estate, the implication to that effect is clear. But by the Federal Reserve Act of 1913, § 24, 38 STAT. L., Pt. I, 273, certain specified national banks are permitted, under limitations, to make loans secured by farm lands.

³ See U. S. R. S., § 5137. Property so acquired must be disposed of within five years. *Ibid.*

⁴ *Ibid.*
⁵ See *Brown v. Schleier*, 118 Fed. 981 (1902). In this case the cost of the building exceeded the amount of the bank's capital stock. The larger part of the building was rented to tenants. The case was affirmed in 194 U. S. 18 (1904).

⁶ *Nat. Bank v. Stahlman*, 132 Tenn. 367, 178 S. W. 942 (1915).

⁷ See U. S. R. S., § 5201. Stock so acquired must be disposed of within six months from the date of its purchase. *Ibid.* By the Federal Reserve Act any bank becoming a member of a Federal Reserve Bank is required to conform to the provisions of law respecting the prohibition against making purchases of or loans on such stock. 38 STAT. L., Pt. I, 259.

⁸ *California Bank v. Kennedy*, 167 U. S. 362 (1897); *Nat. Bank v. Hawkins*, 174 U. S. 364 (1899); *Barron v. McKinnon*, 196 Fed. 933 (1912). See *Nat. Bank v. Nat. Exch. Bank*, 92 U. S. 122 (1875). In *California Bank v. Kennedy* the court said: "It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. . . . It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

loans, or for a previous indebtedness.⁹ In the enforcement of their lien they may purchase such stock,¹⁰ or may accept it in absolute satisfaction of a doubtful debt, with a view to its subsequent sale or conversion into money, in order to prevent or reduce an anticipated loss.¹¹ Loans made on the security of stock of other national banks are permissible.¹² Not only are national banks allowed to accept stock of other corporations in payment of debts which are due to them, but it has even been held that they may in a *bona fide* compromise of a claim which *they owe* acquire such stock as part of the settlement.¹³

The courts are opposed to allowing national banks to acquire property which will subject them to any great or uncertain liability. Consequently, they cannot under any circumstances become the absolute owner of certificates representing an interest in a partnership, by which they will incur the partner's risk of unlimited liability.¹⁴ It is beyond their power to engage in the business of operating a mill which has been acquired in satisfaction of a debt,¹⁵ or to prosecute a mining en-

⁹ See *California Bank v. Kennedy*, *supra*.

¹⁰ *Westminster Nat. Bank v. N. E. Electrical Works*, 73 N. H. 465, 62 Atl. 971 (1906); *McBoyle v. Nat. Bank*, 162 Cal. 277, 122 Pac. 458 (1912).

¹¹ *Tourtlot v. Whithed*, 9 N. D. 467, 84 N. W. 8 (1900). See *Nat. Bank v. Nat. Exch. Bank*, *supra*. But *cf.* *Nat. Bank v. Converse*, 200 U. S. 425 (1906). In this last case the creditors, one of whom was a national bank, of an insolvent corporation organized a new corporation to purchase the capital stock, debts, and assets of the insolvent company, and to manufacture the articles which the insolvent had made. The creditors exchanged their claims against the old corporation for stock in the new one. The new company carried on business for more than sixteen years and then in turn became insolvent. The receiver sued the bank to recover an assessment levied on the stock of the new corporation, which by statute was subject to a double liability. The court refused recovery on the ground that the action of the bank in taking the stock was *ultra vires*. A national bank, it held, has no power, expressed or implied, to engage in or promote a purely speculative business or adventure, or to take stock in a corporation for that purpose.

¹² *Nat. Bank v. Case*, 99 U. S. 628 (1878). On default in the payment of the loan the pledgee bank became the owner of the stock, and upon the failure of the bank whose stock was held, became liable as a stockholder. See *Nat. Bank v. Hawkins*, *supra*.

¹³ *Nat. Bank v. Nat. Exch. Bank*, *supra*. In this case the debtor bank could have compromised the debt by a payment of \$20,000. Instead it paid \$40,000, and received from the creditor in addition to the cancellation of the claim fourteen hundred shares of stock in other corporations. The reasoning of the court was that, since a bank may accept stock of other corporations in payment of debts due to it, conversely, if the bank is itself a debtor, it may invest fresh funds in the purchase of stocks, provided their acquisition is part of the transaction by which the claim was paid. The later case of *Nat. Bank v. Converse*, *supra*, seemingly holds national banks to a much stricter rule, and though the two cases are distinguishable on their facts and may both be followed on the exact points decided, they seem on principle to be difficult to reconcile.

¹⁴ *Merchants' Nat. Bank v. Wehrmann*, 202 U. S. 295 (1906). The certificates were originally taken as security for a loan, and the bank became the owner of them in satisfaction of the debt. The court distinguished this case from *Bank v. Case*, *supra*. In the latter case the debts of the corporation were not the debts of the stockholders, and though the stock was subject to an added liability, this did not amount to more than the par value of the shares. In the former case the liability was unlimited, for the debts of the partnership were the debts of the partners.

¹⁵ *Cockrill v. Abeles*, 86 Fed. 505 (1898): "The most liberal view which may be fairly taken of the implied powers of national banks would not sustain their right to engage directly in a manufacturing or business enterprise under any circumstances." But in *Peterborough Hydraulic Power v. McAllister*, 17 Ont. L. Rep. 145 (1907), the

terprise on property similarly acquired.¹⁶ They are not estopped to plead their lack of power in order to escape liability on their *ultra vires* contracts.¹⁷ Though the courts will refuse on grounds of public policy to enforce such contracts, the bank will not be permitted to retain any benefit which it may have received under the contract. The other party will be allowed on principles of *quasi-contract* to recover the property or its value upon a repudiation of the contract.¹⁸ In *The Village of Fort Loramie*¹⁹ case referred to above, a national bank bought in a street railway at a receiver's sale in order to protect the bonds of the company which it owned. The village tried to compel the bank to continue the operation of the road according to the terms of the franchise, and the bank set up its lack of power to assume such an obligation. The court properly held that the bank could not be compelled to perform its illegal contract, and allowed it thereby to escape the duty which it owed to the public as owner²⁰ of the franchise to operate the road.²¹ But instead of permitting the bank to dismantle the road unless a tender was made to it within a limited time of the amount which it paid for the property, the court should, it is submitted, have compelled the bank to put the road up at public auction and accept whatever price it might bring. In this way a purchaser might have been found who would have been willing to operate the road and perform the obligations of the franchise.

PRIVILEGE OF NON-RESIDENTS ENGAGED IN PUBLIC DUTY FROM SERVICE OF PROCESS. — If a person is within the territory¹ of a sovereign,

court held that a bank could carry on a milling business which had been acquired in satisfaction of a bad debt, for the purpose of disposing of it as a going concern. And in *Reynolds v. Simpson*, 74 Ga. 454 (1885), it was held that a state bank was not exceeding its corporate powers by running an iron works similarly acquired, in order to satisfy the debt it held against the former owner. A National Bank may buy wheat in order to seed a farm which it has been compelled to purchase under an execution in its own favor. *Nat. Bank v. Bannister*, 7 Kan. App. 787, 54 Pac. 20 (1898).

¹⁶ *Cooper v. Hill*, 94 Fed. 582 (1899).

¹⁷ *California Bank v. Kennedy*, *supra*; *Nat. Bank v. Hawkins*, *supra*; *Nat. Bank v. Converse*, *supra*; *Nat. Bank v. Wehrmann*, *supra*. The reasons why the courts refuse to apply the doctrine of estoppel in these cases of *ultra vires* acts of corporations are stated in *McCormick v. Bank*, 165 U. S. 538, 549 (1897): "The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

¹⁸ *Nat. Bank v. Townsend*, 139 U. S. 67 (1891); *Pullman's Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, 151 (1898); *Appleton v. Nat. Bank*, 190 N. Y. 417, 83 N. E. 470 (1908); *Barron v. McKinnon*, 196 Fed. 933, 938 (1912).

¹⁹ See *supra*, note 1.

²⁰ Title to the property passes to the vendee bank under an executed *ultra vires* contract. *Barron v. McKinnon*, *supra*. Neither the grantor nor third persons can avoid the conveyance on the ground that the grantee has exceeded its powers. The disregard of the Act of Congress only lays the bank open to proceedings by the government for exercising powers not conferred by law. *Kerfoot v. Farmers' & Merchants' Bank*, 218 U. S. 281 (1910).

²¹ On the right of a public utility to cease operation and dismantle its plant, see 32 HARV. L. REV. 716.

¹ For the basis of jurisdiction in European countries see Joseph H. Beale, Jr., "Jurisdiction of the Courts over Foreigners," 26 HARV. L. REV. 193.

however briefly,² and is properly served, he may be subjected to the jurisdiction of the courts of that sovereign.³ But in order to prevent the use of judicial machinery from defeating the very purpose of its existence, the courts have held certain persons indispensable to judicial proceedings privileged from process. It is essential that these persons be free to attend the business of the courts, and, clearly, their presence should not be rendered unavailable by the court's own process. From early times, suitors and witnesses were privileged from arrest, *eundo, morando, et redeundo*.⁴ A similar exemption has been enjoyed by members of Parliament⁵ summoned by the King's writ since the days when Parliament was still regarded as a court.⁶ After the legislative and judicial functions of government were definitely localized the privilege of legislators was continued by statute in England,⁷ and is provided for generally by constitutional provisions in the United States.⁸ The immunity from arrest existed not only in criminal cases but also in civil cases when the seizure of the person was the normal mode of bringing a defendant before a court.⁹ Where physical restraint was not sought the reason for the privilege no longer remained. Consequently, civil actions unaccompanied by arrest did not violate the privilege of members of Parliament,¹⁰ or parties and witnesses, and, while it might constitute contempt to serve process in the presence of the court,¹¹ the defendant could not abate the suit.¹² To-day, since arrest is no longer the ordinary means for beginning suit, legislators are not exempt from service of summons¹³ and resident suitors and witnesses enjoy only the protection afforded by the dignity of the court.¹⁴

² *Mason v. Connors*, 129 Fed. 831 (1904); *Alley v. Caspari*, 80 Me. 234, 14 Atl. 12 (1888); *Peabody v. Hamilton*, 106 Mass. 217 (1870).

³ Of course it would be unfair to exercise jurisdiction over persons brought into the state by the fraud or force of the plaintiff. *Williams v. Reed*, 29 N. J. L. 385 (1862). But there is no reason why this should not be done if the plaintiff is innocent of any wrong. *Taylor*, petitioner, 29 R. I. 129, 69 Atl. 553 (1908). It is no objection that the defendant is in jail. *Ramsay v. M'Donald*, 1 W. Bl. 30 (1748); *White v. Underwood*, 135 N. C. 25, 34 S. E. 104 (1899); *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118 (1822).

⁴ See VINER, ABRIDGMENT, Tit. "Privilege," B. pl. 3 (Party); C. pl. 16 (Witness).

⁵ "The privilege rests on the supreme necessity of attending the business of Parliament, the King's highest court." 3 STUBBS, CONST. HIST. OF ENG., 495.

⁶ See MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY, chap. 3. Cf. "A prayer for the High Court of Parliament," BOOK OF COMMON PRAYER.

⁷ Act 10 GEO. III, c. 50.

⁸ U. S. CONST., Art. I, sec. 6, para. 1; 1 STIM. AM. ST. LAW, 68.

⁹ See 3 BLACKSTONE, COMMENTARIES, 282.

¹⁰ *Benyon v. Evelyn*, O. Bridg. 324 (1664). ¹¹ *Cole v. Hawkins*, 2 Str. 1094 (1738).

¹² *Poole v. Gould*, 1 H. & N. 99 (1856); *Flechter v. Franko*, 21 N. Y. Civ. Pro. 34, 15 N. Y. Supp. 674 (1891). See VINER, ABRIDGMENT, Tit. "Privilege," B. Pl. 24. See also Alderson, JUDICIAL WRITS, § 117.

¹³ A few states by constitutional provision have extended the common-law immunity from arrest to cover service of civil process. See COOLEY, CONST. LIMITATIONS, 5 ed., p. 161. Two jurisdictions have unjustifiably reached the same result by judicial interpretation. *Bolton v. Martin*, 1 Dall. (Pa.) 296 (1788); *Miner v. Markham*, 28 Fed. (Wis.) 387 (1886). But the weight of authority is *contra*. *Howard v. Trust Co.*, 12 App. D. C. 222 (1898); *Peters v. League*, 13 Md. 58 (1858); *Rhodes v. Walsh*, 55 Minn. 542, 57 N. W. 212 (1893); *Berlet v. Weary*, 67 Neb. 375, 93 N. W. 238 (1903); *Bartlett v. Blair*, 68 N. H. 232, 38 Atl. 1004 (1895); *Worth v. Norton*, 56 S. C. 56, 33 S. E. 792 (1899).

¹⁴ But see *Cameron v. Roberts*, 87 Wis. 291, 58 N. W. 376 (1894), (holding the service void).

But special considerations govern the case of non-residents. If the court requires their presence, and will be deprived of it unless they are privileged in civil suits, a perfect case for privilege is made out. Material witnesses frequently reside outside the jurisdiction, and since they cannot be subpoenaed and their presence is necessary for the proper adjudication of controversies, no obstacles should be put in the way of their voluntary appearance. Therefore in accordance with the practical needs of the situation, non-resident witnesses have everywhere been held privileged from service of summons while in a state for the purpose of attending judicial proceedings.¹⁵ The majority of states¹⁶ have the same rule for non-resident parties.¹⁷ But it would seem that it is the party's own interest, whether he be plaintiff or defendant, and not the court's, which demands his presence.¹⁸ The court will not be hampered by his absence, nor will the possibility of other actions keep him away if it is to his advantage to come into a state. Hence the practical necessity for the privilege does not exist. The argument found in the cases granting the immunity, that "the courts should be open and accessible to all"¹⁹ cuts both ways and leads to the conclusion that non-resident parties should be amenable to, rather than privileged from, service of process. In the case of legislators the privilege is granted by the sovereign only to its own lawmakers and can obviously have no extra-territorial effect. Within the territory of the sovereign it is equally violated by arrest at home or in another county, or, under the Federal Constitution, in another state. Even in the few jurisdictions where the immunity extends to civil process, no distinction has been made between service at the residence and elsewhere.²⁰

This analysis of the privilege as the privilege of the court has been disregarded in the recent case of *Filer v. M'Cornick*,²¹ holding exempt from process a non-resident temporarily in the state on public business. The president of a bank, which was a stockholder in the Federal Reserve

¹⁵ *Walpole v. Alexander*, 3 Doug. 45 (1782); *Chittenden v. Carter*, 82 Conn. 585, 74 Atl. 884 (1909); *Fidelity and Cas. Co., v. Everett*, 97 Ga. 787, 25 S. E. 734 (1896); *Mayer v. Nelson*, 54 Neb. 434, 74 N. W. 841 (1898); *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 153, 21 Atl. 186 (1890).

¹⁶ *Stewart v. Ramsey*, 242 U. S. 128 (1916); *Hale v. Wharton*, 73 Fed. 730 (1896); *Halsey v. Stewart*, 4 N. J. L. 426 (1817); *Matthews v. Tufts*, 87 N. Y. 568 (1882); *Andrews v. Lembeck*, 46 Ohio St. 38 (1888); *Partridge v. Powell*, 180 Pa. St. 22, 36 Atl. 419 (1897).

¹⁷ To extend the privilege to defendants brought into the state by extradition is to lose sight of the reason for the rule. *Reid v. Ham*, 54 Minn. 305, 56 N. W. 35 (1893); *Netograph Man. Co. v. Scrugham*, 197 N. Y. 377, 90 N. E. 962 (1910). Where the privilege is granted it rests upon interstate courtesy. *Martin v. Bacon*, 76 Ark. 158, 88 S. W. 863 (1905); *Compton et al. v. Wilder*, 40 Ohio St. 130 (1883). The express provisions of treaties affect the case of a person extradited from a foreign country. *In re Reinitz*, 39 Fed. 204 (1889).

¹⁸ The following cases denied the privilege to non-resident plaintiffs: *Bishop v. Vose*, 27 Conn. 1 (1858); *Guyen v. McDanel*, 4 Ida. 605, 43 Pac. 74 (1895); *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29 (1893); *Tiedeman v. Tiedeman*, 35 Nev. 259, 129 Pac. 313 (1912); *Baldwin v. Emerson*, 16 R. I. 304, 15 Atl. 85 (1888). See *Chittenden v. Carter*, *supra*. One jurisdiction denies the privilege to non-resident defendants. *Ellis v. De Garmo*, 17 R. I. 715, 24 Atl. 579 (1892); *Capewell v. Sipe*, 17 R. I. 475, 23 Atl. 14 (1891).

¹⁹ *Halsey v. Stewart*, *supra*, per Southard, J.

²⁰ *Berlet v. Weary*, *supra*, and cases cited in note 13.

²¹ 260 Fed. 309 (1919). See RECENT CASES, *infra*, p. 734.

Bank, was called by the governor of such bank to attend a conference in another state to discuss means of selling treasury certificates for war purposes. While in the other state he was served with process. The court on motion quashed the service. This decision rests the privilege upon the policy of making public service attractive. It is submitted that responsible men will not be deterred from public duty by a fear of suits in strange jurisdictions. The privilege from process exists solely to prevent the clogging of judicial business,²² and it is the duty of the court to exercise the powers delegated to it and to refrain therefrom only when required to do so by the exigencies of judicial machinery. When it becomes desirable to have a different set of rules for the enforcement of the personal obligations of men in public life, the legislatures doubtless will enact appropriate legislation.

RECENT CASES

ADOPTION — WILLS — PARTIAL REVOCATION OF A WILL BY ADOPTION OF A CHILD. — A testatrix adopted a child in the manner prescribed by statute. The statute provided that the parties to the adoption should have all the rights and duties incident to the natural relation of parent and child (1915 KAN. GEN. STAT., §§ 6362, 6363). The Statute of Wills provided for the partial revocation of the will of a parent in favor of a child born after the execution of the will (1915 KAN. GEN. STAT., § 11795). *Held*, that the adoption effected a partial revocation of the will. *Dreyer v. Schrick*, 185 Pac. 30 (Kan.).

At common law, a will disposing of all the testator's property, and making no provision for the future wife and child, was revoked by subsequent marriage and the birth of a child. *Marston v. Fox*, 8 A. & E. 14; *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 853. Since the basis of the rule is the change in the testator's circumstances, the same result has been reached when the child was adopted instead of born into the family. *Glascott v. Bragg*, *supra*. Under such a statute of adoption, as in the principal case, an adopted child has been held to come within the term "children" as used in a statute of descent. *Lanferman v. Vanzile*, 150 Ky. 751, 150 S. W. 1008. So also as to "issue" in statutes of distribution. *Scott v. Scott*, 247 Fed. 976; *Buckley v. Frazier*, 153 Mass. 525, 27 N. E. 768. The same result has been reached where the words were "lineal descendants." *State v. Yturria*, 204 S. W. (Tex.) 315; *In re Cook's Estate*, 187 N. Y. 253, 79 N. E. 991. In accord with the principal case, it has been held, that, for the purpose of partial revocation of wills, children adopted are children "born." *Bourne v. Downey*, 184 App. Div. 476, 171 N. Y. Supp. 264; *In re Sandon's Will*, 123 Wis. 603, 101 N. W. 1089. But there is also authority to the contrary. *Goldstein v. Hammell*, 236 Pa. 305, 84 Atl. 772; *Evans v. Evans*, 186 S. W. (Tex.) 815. The view of the principal case seems correct, since the adopted child, though it is not a child "born" to the testator, is given by statute all the rights, interests, and duties of such a child. The result should not be affected by the fact that the adoption statute was enacted prior to the statute to be construed. *Buckley v. Frazier*, *supra*; *Scott v. Scott*, *supra*.

²² "The reason for this (denial of privilege) is that such a summons amounting simply to notice does not obstruct the administration of justice nor interfere with the attendance of a party to a suit then on trial." *Ellis v. De Garmo*, *supra*, per Stinnes, J.

AGENCY — PRINCIPAL'S LIABILITY TO THIRD PERSONS IN TORT — WHO IS LIABLE FOR NEGLIGENCE OF DRIVER OF HIRED MOTOR VEHICLE. — The defendant hired an automobile and a chauffeur from A for three months. While driving the defendant, the chauffeur negligently ran over plaintiff's intestate. *Held*, that the defendant is not liable. *McNamara v. Leipzig*, 125 N. E. 244 (N. Y.).

The defendant hired an auto-truck and a chauffeur from A for use in his business. The chauffeur, while engaged in delivery work for the defendant, negligently injured the plaintiff. *Held*, that the defendant is liable. *Finegan v. Piercy Contracting Co.*, 178 N. Y. Supp. 785 (App. Div.).

For a discussion of these cases, see NOTES, p. 714, *supra*.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — LEASEHOLD INTERESTS — LANDLORD'S RIGHT OF ENTRY. — The landlord, under a lease providing for a right of entry for condition broken, becomes entitled to enter for failure to pay rent and royalties. The tenant becomes bankrupt, and the landlord then seeks to enter against the bankrupt's trustee, in possession. *Held*, that he may do so. *Matter of Elk Brook Coal Co.*, 44 Am. B. R. 283 (Dist. Ct. Pa., 1919).

For a discussion of this case, see NOTES, p. 709, *supra*.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — VOLUNTARY PROCEEDINGS INSTITUTED IMMEDIATELY PRIOR TO AN EXPECTED INHERITANCE. — An insolvent debtor filed a voluntary petition in bankruptcy knowing that his mother, who had made a will in his favor, could live only a few days. A creditor moved to set aside the adjudication on the ground that this was fraudulent. *Held*, that the motion be denied. *Matter of Swift*, 44 Am. B. R. 211 (Dist. Ct. N. D. Ga.).

It was one of the prime purposes of the Bankruptcy Act to enable an honest insolvent debtor to be discharged from creditors' claims against him upon giving up all his non-exempt property. And the Act does not restrict the filing of petitions to cases where the debtor has no hope of ever being solvent again. If the court has jurisdiction, no creditor has any standing to object to a voluntary petition by a natural person. *In re Carlton*, 115 Fed. 246; *In re Ives*, 113 Fed. 911. If any injustice is done in the principal case, it seems to flow from the fact that the creditor derives no benefit from the debtor's *spes successionis* which had become almost a certainty at the time of the petition. This result, however, follows from the doctrine that a *spes*, be it ever so certain of fulfillment, is not property, and hence that it does not pass to the trustee in bankruptcy. *Moth v. Frome*, 1 Amb. 394. But this doctrine of the nature of a *spes* is not confined to courts of bankruptcy. Thus an expectancy is not property which can be the subject of a trust, or which can be reached by a creditor's bill. *In re Ellenborough*; [1903] 1 Ch. 697; *Smith v. Kearney*, 2 Barb. Ch. 533. Perhaps the fact that no previous decision seems to have raised the point involved in the principal case shows that it is not one of such grave practical importance as to demand the immediate change of our bankruptcy law. As the law stands, the decision seems unassailable.

BANKS AND BANKING — NATIONAL BANK ACT — USURY — CONSTRUCTION OF NATIONAL BANK ACT AUTHORIZING INTEREST AT RATE ALLOWED BY LAWS OF THE STATE. — The defendant national bank discounted the plaintiff's short-time note at eight per cent, taking interest in advance. The National Bank Act provides that national banks may charge interest, "at the rate allowed by the laws of the state where the bank is located," and declares that knowingly charging a greater rate is usury. (REV. STAT., §§ 5197, 5198.) Eight per cent was the maximum interest rate allowed by statute in Georgia, where the defendant bank was located (1910, GA. CODE, §§ 3426, 3436); but

the Georgia Supreme Court had held that taking interest upon short-time paper in advance at eight per cent was usurious. (*Loganville Banking Co. v. Forrester*, 143 Ga. 302, 84 S. E. 961.) The plaintiff, having sued in the state court to recover the penalty allowed by the National Bank Act, on *certiorari*, *Held*, that the transaction does not violate the statute. Pitney, Clarke, and Brandeis, JJ., dissenting. *Evans v. National Bank of Savannah*, U. S. Sup. Ct., No. 67, October Term, 1919.

The sole question seems to be what is meant by the words of the National Bank Act, "at the rate of interest allowed by the laws of the state where the bank is located." In determining what are the laws of a state, the Supreme Court usually follows the latest state decision upon the question. *Union National Bank v. Louisville, Etc. R. R. Co.*, 163 U. S. 325; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555. The "rate of interest" has been construed to include the mode of charging interest. Where a state statute declared that interest compounded oftener than annually was usury, a note bearing interest compounded semi-annually was held usurious under the National Bank Act, although the total interest did not exceed the maximum allowed by State law. *Citizens National Bank v. Donnell*, 195 U. S. 369. Furthermore, the obvious intent of the framers of the National Bank Act was that national banks should charge as much but not more than state banks. In favor of the principal case, it may be said that, contrary to the Georgia case, the weight of authority and long-established business custom is that the taking of interest in advance at the maximum rate is not usury. *Bank of Newport v. Cook*, 60 Ark. 288, 30 S. W. 35; *Stark & Wales v. Coffin*, 105 Mass. 328. But the majority opinion does not purport to question the correctness of the Georgia decision. Thus the dissenting opinion seems the better one.

BANKS AND BANKING — NATIONAL BANKS — POWER OF NATIONAL BANK TO ACQUIRE AND OPERATE A STREET RAILWAY. — A street railway was built over certain streets in a village under a twenty-five year franchise granted by the village. The railway was twice placed in the hands of a receiver, and under the second receivership was sold to a national bank, which bought in the property in order to protect the bonds of the company which it owned. The bank continued to operate the road for a short time. Failing to find a purchaser, it was about to discontinue operation and dismantle the road. The village brought suit to enjoin the discontinuance. The bank pleaded its lack of power to assume the obligations of the franchise to operate the road. *Held*, that the bank be authorized to discontinue operation and dismantle the road. *Gress v. Village of Ft. Loramie*, 125 N. E. 112 (Ohio).

For a discussion of this case, see NOTES, p. 718, *supra*.

CONFLICT OF LAWS — CAPACITY — NOTE MADE BY MARRIED WOMAN IN ONE STATE PAYABLE IN ANOTHER. — An action was brought in Virginia upon a promissory note executed and delivered by a married woman in Tennessee, where she was without capacity to contract. The note was payable in Virginia, where the disabilities of coverture had been removed. *Held*, that coverture is no defense. *Poole v. Perkins*, 101 S. E. 240 (Va.).

A fair degree of unanimity has obtained with reference to the question of the controlling law as to capacity to enter into a personal contract. In the United States, in case of conflict between the law of the domicile and the law of the place where the contract is made, the question is resolved with reference to the latter. *Bell v. Packard*, 69 Me. 105; *Milliken v. Pratt*, 125 Mass. 374. And as the existence of a contract must depend, in our system of territorial law, upon the effect conferred by the law in force where the agreement is entered upon, the *lex loci contractus* controls, as to capacity, in case of con-

flict between that law and the law of the place of performance. *Union Nat. Bank v. Chapman*, 169 N. Y. 538, 62 N. E. 672; *Hager v. Nat. Ger. Am. Bank*, 105 Ga. 116, 31 S. E. 141. *Contra*, *Mayer v. Roche*, 77 N. J. L. 681, 75 Atl. 235. The court seems, in the instant case, to have failed to distinguish clearly between capacity and the broader question of the validity of contracts generally — such as the effect of particular provisions of a contract which admittedly exists. There have been various holdings as to the latter: that the governing law is that of the place of making, of the place of performance, or of the place intended by the parties to the contract. See Joseph H. Beale, "What Law Governs the Validity of a Contract," 23 HARV. L. REV., 79-103, 194-208. And there is considerable force in the contention that this question, too, should be governed by the law of the place where the agreement is made. See Beale, 23 HARV. L. REV., 270-272. Considerations of convenience have doubtless influenced the court in the principal case, but the decision can hardly be justified on principle or authority.

CONSTITUTIONAL LAW — CONFLICT OF LAWS — STATUTE TAKING AWAY RIGHT OF ACTION ARISING IN ANOTHER STATE FOR DEATH BY WRONGFUL ACT. — The plaintiff's intestate was killed in Ohio through the negligence of the defendant, the Ohio statutes giving a right of action to the administrator for death by wrongful act. The plaintiff brought this action in Illinois under a statute allowing suits for the recovery of damages for such a death even though occurring without the state. Pending an appeal and before any final judgment, the Illinois statute was amended so as to forbid the institution or prosecution of any such action arising outside of the state, though allowing actions for such deaths within the state. *Held*, that the plaintiff may not recover. *Wall v. Chesapeake & O. Ry. Co.*, 125 N. E. 20 (Ill.).

A statute is not brought into conflict with the Fourteenth Amendment by the mere fact that it is retrospective in its operation. *League v. Texas*, 184 U. S. 156. But vested rights of property, regardless of their source, whether contractual or otherwise, come within its protection. See *Pritchard v. Norton*, 106 U. S. 124, 132. See also TAYLOR, DUE PROCESS OF LAW, §§ 224 *et seq.* A statute may deprive a person of his property as effectually by taking away all means of enforcement as by denying its existence. *Ettor v. Tacoma*, 228 U. S. 148. Thus a repealing act which takes away all remedy for a right of action for injuries to property is unconstitutional. *Ettor v. Tacoma*, *supra*. It has been held, however, that there can be no vested right in a claim of damages for personal injuries or death. *Carson v. Gore-Meenan Co.*, 229 Fed. 765. But this seems too broad. Where such a right of action is assignable or survives, it would seem clearly to be "property," even though not reduced to judgment; and a statute taking away such a local cause of action would be unconstitutional. See *Louisiana v. New Orleans*, 109 U. S. 285, 291; *Angle v. Chicago, &c. Ry.*, 151 U. S. 1, 19. The Constitution requires that any policy a state may adopt as to the limits of the jurisdiction of its courts must operate in the same way on its own citizens and those of other states. *Blake v. McClung*, 172 U. S. 239. But in other respects each state may determine how far its courts, having jurisdiction of the parties, shall hear and decide transitory actions, where the cause of action has arisen outside of the state. *Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142; *St. Louis, &c. R. Co. v. Taylor*, 210 U. S. 281. See 17 HARV. L. REV. 54. Accordingly, the principal case does not involve any question of "due process" but merely illustrates the old principle that the laws of one state can have no extraterritorial effect except by the permission of other states. *Paul v. Virginia*, 75 U. S. (8 Wall.) 168; *Huntington v. Attrill*, 146 U. S. 657. See 32 HARV. L. REV. 172. It would seem, however, that the court might have avoided a harsh result by so interpreting the statute as to avoid retrospective operation.

DAMAGES — MITIGATION OF DAMAGES — EFFECT OF VIOLATION OF A CONTRACT DUTY OWED TO A THIRD PERSON. — The plaintiff sent a message by the defendant company, authorizing his agents to sell certain land at \$55 an acre. The message as delivered read \$50 an acre. The agents made a contract of sale at the lower figure, which provided for a deposit of \$500 in a bank to be paid the buyer as his damages, "if default was made by the seller." The plaintiff conveyed the land at the contract price, which was \$800 less than he would have received at the price he quoted to the defendant. *Held*, that the plaintiff can recover only \$500. *Western Union Telegraph Co. v. Southwick*, 214 S. W. (Tex. 987).

The principle is well established in the law of damages that a plaintiff cannot recover for any injury which he could reasonably have avoided. *Western Union Telegraph Co. v. Williams*, 57 Tex. Civ. App. 267, 122 S. W. 280; *Postal Telegraph & Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119. But a plaintiff is not required to violate the rights of third parties in order to mitigate the injury to himself. *Kankakee, etc. R. R. Co. v. Horan*, 23 Ill. App. 259. See *Leonard v. New York Telegraph Co.*, 41 N. Y. 544, 566. Thus in the principal case it becomes essential to decide whether the contract was in the alternative or not. The use of the word "default" would seem to indicate an intent to bind the vendor to a single obligation, with liquidated damages for a breach thereof. See *Ropes v. Upton*, 125 Mass. 258, 261. Judged by the constructions in the decided cases the contract in the principal case does not seem to be in the alternative. *Howard v. Hopkyns*, 2 Atk. 371; *Zimmerman v. Gerzog*, 13 N. Y. App. Div. 210, 43 N. Y. Supp. 339; *Dills v. Doebler*, 62 Conn. 366, 26 Atl. 398. Hence, the plaintiff was not required to break his contract with the purchaser and surrender his deposit, and should have recovered \$800. The fact that the deposit was in the hands of a third party makes no difference. See 29 HARV. L. REV. 454.

DIVORCE — CUSTODY AND SUPPORT OF CHILDREN — WHAT LAW CREATES AND ENFORCES OBLIGATION OF A DIVORCED FATHER TO SUPPORT CHILDREN. — An Illinois court divorced the plaintiff from her husband and gave her the custody of the children, but made no provision for their maintenance. Subsequently the plaintiff and her children became residents of Missouri, as did the father also. On the death of the latter, the plaintiff sued his executor in Missouri for the maintenance of the children since divorce. *Held*, that she can recover. *Winner v. Shucart*, 215 S. W. 905 (Mo.).

When the parents are divorced, some courts, with or without statutory permission, impose on the father the duty of supporting the children even though their custody has been granted to the mother. *Plaster v. Plaster*, 47 Ill. 290; *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041. *Contra*, *Ramsey v. Ramsey*, 121 Ind. 215, 23 N. E. 69. While the obligation to support is often made a part of the divorce decree, it may be imposed on a subsequent application, provided the court granting the divorce still has personal jurisdiction over the parties. *McKay v. Superior Court*, 120 Cal. 143, 52 Pac. 147; *Gibson v. Gibson*, *supra*. Such an alimentary obligation is not penal in its nature; the court imposes it on the father for the sake of the child and to prevent the burden of its support from falling on the state. Such an obligation, therefore, should be created and enforced at the domicile of the child or his place of residence for the time being, for no other sovereign has any interest in his support. See J. H. Beale, "The Progress of the Law, 1918-1919 — The Conflict of Laws," 33 HARV. L. REV. 14-15. Similarly, if a statute of an adult pauper's domicile imposes an alimentary obligation on the parent which the law of the latter's domicile does not, only the courts of the pauper's domicile should enforce performance of the obligation. See *Coldingham Parish Council v. Smith*, [1918] 2 K. B. 90. Courts should reach a similar result, as did the principal case, when the new duty is judicially imposed.

DIVORCE — JUDICIAL SEPARATION — PETITIONER'S ADULTERY AS DEFENSE — EFFECT OF RESPONDENT'S CONNIVANCE. — A decree of dissolution on the ground of the wife's adultery was refused because of the petitioner's own conduct conducing to her acts. The wife then sought a judicial separation on the ground of cruelty. The Divorce Court granted the decree. On appeal, *held*, that the wife's adultery is an absolute bar to a decree of judicial separation. *Everett v. Everett*, 121 L. T. R. 503 (Court of Appeal).

The petitioner on his return from foreign service found his wife living in adultery under such conditions as to endanger the health and morals of his own children by her. He removed the children to the home of a friend, with whom he later had intercourse. He desires a divorce in order to marry this second woman, who appears to be making a good home for his children. A decree *nisi* for dissolution having been granted, the King's Proctor intervened, asking that the decree be dismissed. But the court in the exercise of its discretion *held*, that the decree be made absolute. *Wilson v. Wilson*, 36 T. L. R. 91 (Prob. Div. & Adm. Div.).

The respondent wife was incited to adultery by the petitioner, who himself was guilty of adultery down to the time of the petition. The court being convinced that the respondent will later marry the corespondent, who appears worthy and sober, *held*, that a decree *nisi* issue and the respondent be given custody of the children. *Marven v. Marven*, 36 T. L. R. 106 (Prob. Div. & Adm. Div.).

Adultery of the petitioner is ordinarily a bar to a decree for judicial separation. *Hawkins v. Hawkins*, 193 N. Y. 409, 86 N. E. 468; *Otway v. Otway*, 13 P. D. 141. But where the petitioner's adultery has been condoned by the respondent there is authority under which the Court of Appeal in the *Everett* case might have granted the decree of separation. *Anichini v. Anichini*, 2 Curt. 210. See 20 & 21 VICT. c. 85, § 22. Cf. DRAFT ACT COM'RS UNIFORM STATE LAWS, ANNULMENT OF MARRIAGE & DIVORCE, § 5 (1907). Failure to do so drives the wife back to a life of prostitution under the husband's orders. A better result is reached by the lower court in the other two cases where decrees of dissolution issued. For in most jurisdictions after such an absolute divorce remarriage is open even to guilty parties. See 20 & 21 VICT. c. 85, § 57. See also STIMSON, AM. STAT. LAW, § 6241; BISHOP, MAR., DIV. & SEP., § 706. But see *People v. Baker*, 76 N. Y. 78. Moreover, there is authority to support these two decisions where the petitioner's adultery was condoned. *Cumming v. Cumming*, 135 Mass. 386; *Jones v. Jones*, 18 N. J. Eq. 33; *Burdon v. Burdon*, [1901] P. 52. See TIFFANY, DOM. REL., § 108. Such a plea as adultery by way of recrimination fails when it does not itself show sufficient grounds for a divorce. *House v. House*, 131 N. C. 140, 42 S. E. 546. Certainly the connivance appearing in the principal cases should be as destructive to a recriminatory plea as mere condonation.

EQUITY — JURISDICTION — RIGHT OF A MINOR CHILD TO MAINTENANCE BY FATHER. — The defendant had abandoned his wife and minor children. The children, by their next friend, bring a bill in equity requesting a monthly allowance for maintenance, and that the same be made a lien upon the defendant's property. *Held*, that the bill be dismissed. *Rawlings v. Rawlings*, 83 So. 146 (Miss.).

At common law the duty of a father to support his infant child was regarded as a mere moral obligation. See *Shelton v. Springett*, 11 C. B. 452, 455; *Bazeley v. Forder*, L. R. 3 Q. B. 559, 565. This duty has been enforced indirectly by holding the father liable, by a fiction of implied authority to those who supply the children with necessaries. *Walters v. Niederstadt*, 194 S. W. 514 (Mo.). See 10 HARV. L. REV. 454. In equity the court may decree maintenance out of the child's separate estate if the father is unable to provide satisfactory

support. *Bedford v. Bedford*, 136 Ill. 354, 26 N. E. 662. See *Buckworth v. Buckworth*, 1 Cox, 80, 81. But in no instance would equity compel a father to maintain his child, for no legal obligation was recognized. But more recently many courts have declared that the father is under a legal duty to support his minor children. *Porter v. Powell*, 79 Iowa 151, 44 N. W. 295. See *Treasurer & Receiver General v. Sermini*, 229 Mass. 248, 251, 118 N. E. 331. See also 9 HARV. L. REV. 488. The dissenting opinion in the principal case contends that equity should act, since the law gives no remedy for the violation of this new legal duty. But it would seem that this is not a relative duty but an absolute one, for which there is properly no correlative legal right. See 1 AUSTIN, JURISPRUDENCE, 4 ed., 67, 413; Langdell, "A Brief Survey of Equity Jurisdiction," 1 HARV. L. REV. 55. The law is well settled in accordance with the majority opinion that equity will not order a father to provide maintenance in the absence of an express statutory enactment. *Huke v. Huke*, 44 Mo. App. 308. See *Alling v. Alling*, 52 N. J. Eq. 92, 96; 27 Atl. 655, 657. The dissent is interesting as illustrative of a recurring tendency to identify law and morals.

EQUITY — PROCEDURE — CROSSBILL IN EQUITY ADDING NEW PARTIES. — The assignee of a real estate mortgage brought action thereon against a purchaser of the property who had assumed the debt. The defendant filed a counterclaim against the plaintiff for damages resulting from fraud practiced in inducing him to purchase the property, and a demand on the same account against several new parties alleged to have participated in the fraud. The Kansas statutes allowed new parties to be brought in by counterclaim, but the defendant had not complied with the statutory provisions. (1915 KAN. GEN. STAT., §§ 6930, 6991.) Held, that the parties were properly joined. *Davies v. Lutz*, 185 Pac. 45 (Kan.).

The flat rule that new parties may never be joined by a crossbill has been laid down in many cases, on the theory that the defendant may bring in only parties necessary to the complaint, and this he must do by objection for non-joinder. *Patton v. Marshall*, 173 Fed. 350; *Richman v. Donnell*, 53 N. J. Eq. 32, 30 Atl. 533 (discredited by *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099); *Perea v. Harrison*, 7 N. M. 666, 41 Pac. 529. There is a tendency in the later cases to allow new parties by crossbill when, as in the principal case, the new parties are necessary to the relief sought against the complainant by the crossbill, or to a complete determination of the questions raised by it. *Ulman v. Jaeger*, 155 Fed. 1011; *Indian River Mfg. Co. v. Wooten*, 48 Fla. 271, 37 So. 731; *Green v. Stone*, *supra*. A crossbill which sets up matter not pertinent to that of the original bill and seeks no relief against the complainant, should be dismissed for want of equity. *Andrews v. Hobson's Adm'r*, 23 Ala. 219; *Daniel v. Morrison*, 6 Dana, 182; *Josey v. Rogers*, 13 Ga. 478. This on principle should be the test of any crossbill, regardless of whether new parties are sought to be added by it or not. In the majority of the cases laying down the rule that new parties may never be thus added, the same result would have been reached under this test. It was easy for the court in the principal case to reach the proper result because of the liberalization of the common-law rule as to new parties in the Kansas statutes cited. Cf. 31 HARV. L. REV. 1034.

FOREIGN CORPORATIONS — VALIDITY OF SERVICE ON AGENT FOR FOREIGN CAUSE OF ACTION AFTER WITHDRAWAL FROM STATE. — A foreign corporation, doing business in New York, appointed an agent for receiving service on it, as required by statute. (CODE CIV. PRO., § 1780; GEN. CORP. L. §§ 16, 432.) Prior to this suit, the corporation had withdrawn from the state, but had failed to revoke the agent's authority. The plaintiff served the agent on a

cause of action arising outside of the state. *Held*, that such service is invalid. *Chipman, Limited, v. T. B. Jeffery Co.*, 260 Fed. 856 (Dist. Ct. S. D. N. Y.).

Statutes are common requiring foreign corporations to designate some local agent upon whom process may be served. These are unquestionably valid. *In re Louisville Underwriters*, 134 U. S. 488; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *N. E. Mutual Life Ins. Co. v. Woodworth*, 111 U. S. 138. Statutes may insist on the maintenance of such an agent as long as outstanding liabilities incurred in the state exist, irrespective of the continuance of business therein. *Groel v. United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822. See 19 HARV. L. REV. 52. It may also be provided that such agent shall be liable to service in actions arising without the state. *Bagdon v. Phil. & Reading Coal Co.*, 217 N. Y. 432, 111 N. E. 1075; *Smolik v. Phil. & Reading Coal Co.*, 222 Fed. 148. See 29 HARV. L. REV. 880. The basis of consent to such provisions is the transaction of business within the state. Though the corporation should not be allowed to escape liability resulting from the business transacted within the jurisdiction by withdrawing its business therefrom, justice does not require that liability to suit continue with respect to actions arising without the jurisdiction. Hence, even though the statute requires the appointment of an "irrevocable agent," such agency may be effectively revoked so as to invalidate service on such person as to foreign causes of action. *Mutual R. F. L. Ass'n v. Boyer*, 62 Kan. 31, 61 Pac. 387. *Hunter v. Mutual Reserve Life Ins. Co. et al.*, 218 U. S. 573. See also *Williams v. Mutual R. F. L. Ass'n*, 145 N. C. 128, 58 S. E. 802. Since it is the withdrawal of business and not the formal revocation of the agency which takes such causes of action out of the jurisdiction of this court, it was correctly decided in the principal case that the lack of such revocation is immaterial. See *Mutual R. F. L. Ass'n v. Boyer, supra*; BEALE, FOREIGN CORP., §§ 279 *et seq.*

FRAUDULENT CONVEYANCES — BULK SALES ACTS — WHAT IS MERCHANDISE UNDER A BULK SALES STATUTE. — The plaintiff was a creditor of one of the defendants. The latter sold his restaurant, together with all the food and fixtures therein, to the other defendant. Under a statute making the sale of a large part or the whole of a stock of merchandise void against creditors unless certain conditions are fulfilled, the plaintiff sought to have the property subjected to the payment of the debt due him. *Held*, that it is not subject to the payment of the debt. *Swift & Co. v. Tempelos et al.*, 101 S. E. 8 (N. C.).

For a discussion of the principles involved in this case see NOTES, p. 717, *supra*.

GARNISHMENT — GARNISHEE'S RIGHT TO SET OFF CLAIMS AGAINST THE PRINCIPAL DEBTOR ACQUIRED AFTER SERVICE OF THE WRIT. — The defendant bank, after it had been served with a writ of garnishment, allowed the principal debtor, one of its depositors, to draw checks for which he had no funds in the bank and later received deposits from him to cover the overdrafts. At no time between the service of the writ and the trial did the debtor's account show a balance in his favor. The bank now contends that it is not liable, as garnishee, for these deposits. *Held*, that the bank is liable with no right of set-off. *Benni v. First National Bank of Mildred*, 68 Pitts. L. J. 22.

The property subject to garnishment depends upon particular statutes. In most jurisdictions, it is only such as is in the hands of the garnishee at the service of the writ. *Eller v. National Motor Co.*, 181 Iowa, 679, 165 N. W. 64; *Gillette v. Cooper*, 48 Kan. 632, 30 Pac. 13. But in the principal case the statute makes the garnishee chargeable with all that comes into his possession before answer. *Glazier v. Jacobs*, 250 Pa. 357, 95 Atl. 532. The garnishee's right of set-off is determined independently of his liabilities. He is entitled to all set-offs existing at the time of service. *Truan v. Range Power Co.*, 124

Minn. 339, 145 N. W. 26; Mass. R. L., c. 189, § 25. But if his claim arises after service, it is not available as a set-off. *Wheeler v. Emerson*, 45 N. H. 526. In the instant case, the court treats the deposits as after-acquired property subject to garnishment, and the overdrafts as after-acquired claims against the principal debtor, unavailable as defenses. Assuming this, it is submitted that where a garnishment statute creates responsibility for property acquired between service and answer, the courts should, for obvious reasons of business convenience, allow the garnishee to set off claims acquired during the same period. Furthermore, it seems improper to consider the deposits as claims due the principal debtor so as to be subject to garnishment. They are really payments of the garnishee's claim for the overdrafts. Where the garnishee is an employer, this view has been taken as to wages payable in advance. *Bump v. Augustine*, 154 N. W. 782 (Iowa); *Callaghan v. Pocasset Mfg. Co.*, 119 Mass. 173.

INSURANCE — MARINE INSURANCE — APPORTIONMENT BETWEEN WAR RISK AND MARINE RISK. — The Admiralty requisitioned a vessel, the charter party providing that "the Admiralty shall not be held liable if the steamer shall be lost . . . in consequence of dangers of the sea . . . collision . . . or any other cause arising as a sea risk," but the Admiralty took the risk of "all consequences of hostilities or warlike operations." The vessel while navigating at night without lights, in compliance with Admiralty orders, collided with another vessel also navigated without lights, and sank. *Held*, that the loss was not a consequence of hostilities or warlike operations. *Britain Steamship Company, Ltd. v. The King*, [1919] 2 K. B. 670 (Court of Appeal).

By one policy a vessel was insured against "all consequences of hostilities or warlike operations by, or against the King's enemies," and by another policy against the usual maritime perils "warranted free from . . . all consequences of hostilities and warlike operations." While proceeding in convoy at night, zigzagging on a course ordered by a naval officer, the vessel ran upon a reef and became a total wreck. *Held*, that the loss falls upon the marine risk underwriters. *British India Navigation Co. v. Green, et al.*, [1919] 2 K. B. 670 (Court of Appeal).

For a discussion of these cases, see NOTES, p. 708, *supra*.

INSURANCE — MARINE INSURANCE — RECOVERY DENIED FOR PARTIAL LOSS WHEN FOLLOWED BY TOTAL LOSS FROM AN EXCEPTED PERIL. — A vessel was insured against marine risks only, including particular average, on a time policy. Indemnity for loss by war risks was contracted for by the British Admiralty, value to be ascertained at date of loss. Due to a partial loss by marine risks, the vessel depreciated in value to the extent of £1770. This loss remained unrepaired, and on a subsequent voyage, during the currency of the policy, the vessel was totally destroyed by war risks. Indemnity to the then value of the ship was paid by the Admiralty, and the owner sued the underwriter for its share of the £1770 partial loss. *Held*, that the partial loss may not be recovered. *Wilson Shipping Co., Ltd., v. British and Foreign Ins. Co., Ltd.*, [1919] 2 K. B. 643.

Section 77 (2) of the British Marine Insurance Act of 1906, which provides that there shall be no recovery for an unrepaired partial loss, when followed by a total loss, appears to contemplate a case where both partial and total loss would fall upon the underwriter. See 6 EDW. VII, c. 41. Reliance is placed, in the instant case, upon a decision of Lord Ellenborough to the effect that an unrepaired partial loss, which caused a depreciation in the value of the vessel, could not be recovered when there was immediately afterwards a total loss from an excepted peril. *Livie v. Janson*, 12 East, 648. Whether the principle of that decision is sound is open to question. See PHILLIPS ON

INSURANCE, 2 ed., 220. Justification for such a holding has been said to be that there is, looking at the whole period of the policy, no continuing prejudice by the partial loss. See *Lidgett v. Secretan*, L. R. 6 C. P. 616, 630; McARTHUR, INSURANCE, 2 ed., 220. Recovery may be had if the partial loss has been brought home to the assured by repair, though there is, thereafter, a total loss. *Le Cheminant v. Pearson*, 4 Taunt. 367. And if the unrepaired partial loss is fixed by a subsequent sale of the vessel, or by the termination of the policy, recovery may be had, for in these cases the partial loss has proved to be a real prejudice. *Pitman v. Universal Ins. Co.*, 9 Q. B. D. 192; *Lidgett v. Secretan*, *supra*. Even accepting *Livie v. Janson* as binding authority, the principal case seems wrongly decided. The reason given for that decision — that there was no continuing prejudice — is certainly not present here, and the last cases cited above furnish a closer analogy.

INSURANCE — MUTUAL BENEFIT INSURANCE — RIGHT OF BENEFICIARY TO REINSTATE SUSPENDED POLICY AFTER DEATH OF INSURED. — A policy issued by a fraternal life insurance company provided that a life benefit member, suspended for the non-payment of a monthly rate, might be reinstated within a certain time by complying with the by-laws of the company. While suspended, but before the expiration of the period for reinstatement, the holder of such a policy died. The beneficiary offers to pay the assessments in arrears and seeks thus to secure reinstatement. *Held*, that he may do so. *Knights of the Maccabees of the World v. Johnson*, 185 Pac. 82 (Okla.).

The contract of insurance between a society and its members consists of the policy, application, charter, and by-laws taken together. *Wallace v. United Order of Golden Cross*, 106 Atl. 713 (Me.); *Evans v. Supreme Council of Royal Arcanum*, 223 N. Y. 497, 120 N. E. 93. These contracts usually impose suspension for non-payment, with a right to reinstatement within a certain time upon payment of arrears. Whether this right, when the insured dies during suspension, may be exercised by the beneficiary, is sometimes a troublesome question. If the policy contains an express disclaimer of liability for death during suspension, it is clear that the beneficiary can assert no right. *Ward v. Merchant's Life and Casualty Co.*, 139 Minn. 262, 166 N. W. 221. In the absence of such a provision, the courts have often reached the same result by construction. *Tabor v. Modern Woodmen of America*, 163 S. W. 324 (Tex. Civ. App.); *Gifford v. Workmen's Ben. Ass'n*, 105 Me. 17, 72 Atl. 680; *Campbell v. Supreme Lodge Knights of Pythias*, 168 Mass. 397, 47 N. E. 109. Other courts have reached the contrary result on the ground that by the terms of the particular contract the period was one of grace and not of forfeiture. *Provident Savings Life Assurance Soc. v. Taylor*, 142 Fed. 709; *Gottlieb v. Abraham Lincoln Mut. Life Ins. Co.*, 225 Pa. 102, 73 Atl. 1057. Still other courts have found in the facts of the case before them a suspension, but also a subsequent waiver by the company of its rights. *Jackson v. N. W. Mutual Relief Ass'n*, 78 Wis. 463, 47 N. W. 733; *McGowan v. N. W. Legion of Honor*, 98 Iowa, 118, 67 N. W. 89; *Dennis v. Mass. Ben. Ass'n*, 120 N. Y. 496, 24 N. E. 843. In the instant case the court has gone too far in fixing an absolute rule that the beneficiary may secure reinstatement of the policy. The rights of the beneficiary are determined by the terms of the original contract; and the problem, as in all contracts, is simply one of the manifested intention of the contracting parties.

LANDLORD AND TENANT — TENANCIES AT WILL AND AT SUFFERANCE — LANDLORD'S LIABILITY FOR FORCIBLE EVICTION. — The plaintiff occupied a cottage upon the defendant's premises as its employee. After he had left its service, the defendant gave him repeated notices to vacate and finally ejected him with the use of reasonable force. The plaintiff sued for forcible entry and

assault. *Held*, that the plaintiff cannot recover. *Hemmings v. Stoke Poges Golf Club*, 36 T. L. R. 77 (Court of Appeal).

In England by statute a forcible entry to a peaceable possession by one entitled to possession is made a criminal offense, but no civil remedy therefor is given to the party dispossessed. See *Beddall v. Mailland*, 17 Ch. Div. 174, 188. There can be no recovery of the land by ejectment nor of damages for trespass *quare clausum fregit*. *Turner v. Meymott*, 1 Bing. 158. See SALMOND ON TORTS, 3 ed., 154. But the tenant has been allowed to recover for assault, even though the landlord employed only such force as was reasonably necessary to eject him. *Newton v. Harland*, 1 M. & G. 644; *Beddall v. Mailland*, *supra*. This doctrine is overruled by the principal case on the ground that since the statute in no way affects the civil rights and liabilities of the parties, as to civil actions the possession of the landlord is lawful although obtained by means of a criminal act. See *Harvey v. Brydges*, 14 M. & W. 437, 442; POLLOCK ON TORTS, 10 ed., 404; 4 AM. L. REV. 429. The older decisions seem preferable in that they more effectually check the evil which the statute aims to eradicate and since they dispense with the fiction of calling the landlord's right to possession a sufficient actual possession to justify the use of force in protecting it. In most American jurisdictions, by statute, the tenant is given a civil action for the restoration of the premises. *Phelps v. Randolph*, 147 Ill. 335, 35 N. E. 243. See 2 TAYLOR, LANDLORD AND TENANT, 9 ed., § 786. When the relief sought is for the assault, the weight of authority in this country is in accord with the principal case. *Low v. Elwell*, 121 Mass. 309; *Walker v. Chanslor*, 153 Cal. 118, 94 Pac. 606. *Contra*, *Thiel v. Bull's Ferry Land Co.*, 58 N. J. L. 212, 33 Atl. 281; *Bristol v. Burr*, 120 N. Y. 427, 24 N. E. 937. See 21 HARV. L. REV. 295.

PROCESS — MANNER AND EFFECT OF SERVICE — PRIVILEGE OF NON-RESIDENTS TEMPORARILY IN A STATE ON A PUBLIC DUTY. — The president of a bank which was a stockholder in the Federal Reserve Bank was called by the governor of such bank to attend a conference in another state to discuss means of selling treasury certificates for war purposes. While in the other state he was served with process. *Held*, that a motion to quash the service be granted. *Filer v. M'Cornick*, 260 Fed. 309 (Dist. Ct. N. D. Cal.).

For a discussion of this case, see NOTES, p. 721, *supra*.

RECORDING AND REGISTRY LAWS — NOTICE — EFFECT OF FRAUDULENT CANCELLATION OF RECORDS. — The payee of a note secured by a second deed of trust upon a parcel of land, fraudulently procured the recorder to cancel the prior deed of trust. He then recorded his own deed and sold the note for value to the defendant, who had no actual notice of the prior deed. The plaintiff is the holder of a note secured by the prior deed of trust and brought this bill to have the cancellation set aside. *Held*, that this relief be granted. *Sweet v. Leffel*, 215 S. W. 908 (Mo.).

When a statute requires re-recording of a destroyed record, and a vendee fails to re-record within the allotted time, his rights may be defeated by a subsequent *bona fide* purchase for value from his vendor. *Magee v. Merriman*, 85 Tex. 105, 19 S. W. 1002. The same is true if the vendee is at fault in misleading the subsequent purchaser, as by withdrawing his deed after having filed it for record. *Webb v. Austin*, 22 Ky. L. Rep. 764, 58 S. W. 808. But under the ordinary recording statute, such as that in the principal case and where the vendee himself is not at fault, he will be protected even though the records be destroyed. *Paxson v. Brown*, 61 Fed. 874; *Cooper v. Flesner*, 24 Okla. 47, 103 Pac. 1016; *Tucker v. Shaw*, 158 Ill. 326, 41 N. E. 914. The same result is reached in case a provision for re-recording is merely permissive. *Gammon v. Hodges*, 73 Ill. 140; *Ashburn v. Spivey*, 112 Ga. 474, 37 S. E. 703.

Contra, Tolle v. Alley, 15 Ky. L. Rep. 529, 24 S. W. 113. Furthermore, when the vendee has complied with the recording requirements, his rights will not be prejudiced by the fact that the recorder's negligence has misled purchasers. *Bigelow v. Topliff*, 25 Vt. 273. Nor can his title be made defeasible by the recorder's intentional unauthorized act. See *Robben v. Benson*, 173 Pac. (Cal.) 766. The principal case introduces a still different situation, but the decision seems to follow logically from the above principles. It is true that the defendant is equally as innocent as the plaintiff, but the plaintiff has done everything that was by statute required of him to render his prior lien indefeasible and should be protected.

RIGHT OF PRIVACY — STATUTORY INTERPRETATION — USE OF PICTURE IN NEWS FILM AND POSTERS. — A statute prohibited the use without consent of a person's name or picture "for advertising purposes or for the purposes of trade." The plaintiff had become famous as a detective by solving a murder mystery. The defendant Film Company in its weekly film of current events showed actual photographs of the plaintiff at work, and also showed her picture and name on certain posters used to announce the subjects presented in the weekly film. *Held*, that this was not a violation of the statute. *Humiston v. Universal Film Mfg. Co. et al.*, 178 N. Y. Supp. 752.

This statute has been held not applicable to the publication of a picture as news in a newspaper or a magazine. *Jeffries v. New York Evening Journal*, 67 Misc. 570, 124 N. Y. Supp. 780; *Coyler v. Richard K. Fox Pub. Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999. Similar interpretation seems called for in the case of publication in weekly news films. These are quite distinct from photoplays, to which the statute has been held applicable. *Binns v. Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108. The statute appears to be too broadly worded and restrictive interpretation justified. The posters present a more difficult problem. But granted that the statute should be interpreted as not applicable to the publication of news, it seems clear that it would not apply either to cases where the picture used as news is shown merely as a sample of the news of which it forms a part, as when a newspaper company shows its pictorial supplement in its show window. Therefore the principal case seems correct as to both the films and the posters.

For a further discussion of the principles of restrictive interpretation involved herein, see NOTES, p. 721, *supra*.

SOVEREIGN — PREROGATIVE OF THE ENGLISH CROWN AND COMPENSATION AS A MATTER OF RIGHT. — During the war the Crown took over a large hotel for administrative purposes connected with the war. The owner claimed compensation as a matter of right. The Crown resisted (1) on the ground of the prerogative, and (2) on the basis of the several Defense of the Realm Acts. *Held*, that the plaintiff is entitled to recover as a matter of right. *De Keyser Hotel v. The King*, [1919] 2 Ch. 197 (Court of Appeal).

For a discussion of this case, see NOTES, p. 711, *supra*.

STATUTE OF FRAUDS — INTERESTS IN LANDS — ORAL CONTRACT TO PROCURE MORTGAGEE OF LAND. — The plaintiff desired to borrow money upon the security of a certain tract of land. The defendant, his financial agent, orally contracted to find a mortgagee within a reasonable time, but failed to do so. The trial judge ruled that the contract was to create an interest in land and so unenforceable under the Statute of Frauds. *Held*, that the judgment of the trial court be affirmed. *Dalgely & Co. v. Gray*, [1919] Vict. L. R. 586 (Privy Council).

It is generally held that an undertaking to procure a purchaser of land is not within the Statute of Frauds. *Hannan v. Prentis*, 124 Mich. 417, 83

N. W. 102; *Walters v. McQuigen*, 72 Wis. 155, 39 N. W. 382. The reason given is that such a contract is entirely collateral to the land. The same reasoning applies to an agreement to find a mortgagee, and the result should be the same. However, contracts between landowners and brokers are notoriously fertile sources of litigation, so that many states have, by special provision, required them to be in writing. 1909 CAL. CIV. CODE, § 1624 (6); 1901 IND. ACTS, 104; 1905 WASH. LAWS, 110. But this provision has not been adopted in Victoria. 1915 VICT. STAT., No. 2672, § 228. However, an oral agreement to execute a mortgage is unenforceable. *Clabaugh v. Byerly*, 7 Gill. (Md.) 354; *Irwin et al. v. Hubbard*, 49 Ind. 350. And an oral executory contract is unavailable as a ground of claim for either party if the promise of one is within the statute. *Johnson v. Hanson*, 6 Ala. 351; *Scott v. Bush*, 26 Mich. 418. Therefore, the principal case might be supported if the agreement involved a promise by the plaintiff to execute a mortgage to such mortgagee as the defendant should procure. But such a construction seems entirely unwarranted as the contract was essentially one of agency.

STATUTE OF FRAUDS — SALE OF GOODS — EFFECT OF PART PAYMENT ON A SINGLE CONTRACT TO SELL LAND AND PERSONALTY. — The plaintiff sought specific performance of an oral contract by which, he alleged, the defendant promised to sell him a hotel with the furniture therein. The defendant admitted the contract to sell the hotel but denied that it included the furniture. At the time of the contract the plaintiff paid the defendant £30 as part payment, and took a written receipt which described the £30 as "being deposit for sale on Club Hotel." The jury found that the contract was as the plaintiff claimed. *Held*, that the plaintiff is not entitled to the furniture. *Strang v. Gordon*, 12 Queens. L. R. 64.

The court based its decision on the ground that the contract as to the furniture did not comply with § 17 of the Statute of Frauds. The plaintiff claimed that the statute was satisfied either by the receipt as a memorandum or by the part payment. The court found that the word "hotel" in the receipt could not be taken to describe the furniture, but is silent as to the plaintiff's second contention. It cannot be denied that the sale of the hotel and the furniture was a single contract. *Scott v. Railway Co.*, 12 M. & W. 33; *Thayer v. Rock*, 13 Wend. (N. Y.) 53. The payment, therefore, was made on account of the furniture as well as of the realty; and such a payment on general account will take each part of a contract to sell several articles, out of the statute. *Berwin v. Bolles*, 183 Mass. 340, 67 N. E. 323. *Cf. Day v. Mayo*, 154 Mass. 472, 28 N. E. 898. And while the writing as a memorandum was construed as not including the furniture, yet as a receipt it is not conclusive of the purpose of the part payment. *Powell v. Powell*, 52 Mich. 432, 18 N. W. 203, *Shepherd v. Busch*, 154 Pa. St. 149, 26 Atl. 363. The plaintiff is not relying on the receipt but on the part payment to take the sale of the furniture out of the statute. In fact, since the contract as to the realty is not here disputed, the plaintiff's case would be equally well off without the receipt at all.

TAXATION — GENERAL LIMITATION ON THE TAXING POWER — VALIDITY OF TAX ON NET INCOME OF FOREIGN CORPORATION ENGAGED IN INTERSTATE COMMERCE. — By a Connecticut statute corporations, foreign or domestic, were required to pay an annual tax of two per cent on that proportion of their net income which their tangible property within the state bore to their total tangible property (1915 PUB. ACTS, c. 292, part 4). The protesting taxpayer was a foreign corporation manufacturing in Connecticut and selling principally to customers in other states. *Held*, that the tax is constitutional. *Underwood Typewriter Co. v. Chamberlain*, 108 Atl. 154 (Conn.).

A state may tax a corporation, either foreign or domestic, upon its intra-state business activities, since the state may refuse permission to carry on such business. *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171; *Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456; *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252. But if the corporation is engaged in interstate commerce, the state tax may conflict with the federal government's control over commerce. A state tax levied directly upon interstate commerce is clearly unconstitutional. *Western Union v. Kansas*, 216 U. S. 1; *International Paper Co. v. Mass.*, 246 U. S. 135. The only question is how far a state may burden interstate commerce indirectly. A state tax on total capital or total gross receipts as such has generally been condemned, unless some reasonable maximum is imposed. *Western Union v. Kansas*, *supra*; *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217; *Looney v. Crane Co.*, 245 U. S. 178; *Baltic Mining Co. v. Mass.*, 231 U. S. 68. See 25 HARV. L. REV. 95. But it is said that a tax levied upon the net income of a corporation constitutes only an indirect burden. *United States Glue Co. v. Oak Creek*, 247 U. S. 321; *Baldwin Tool Works v. Blue*, 240 Fed. 202. Cf. *Peck & Co. v. Lowe*, 247 U. S. 165. On this ground the Supreme Court recently sustained a Wisconsin tax upon the net income of a domestic corporation, roughly apportioned to its earnings within the state. *United States Glue Co. v. Oak Creek*, *supra*. The reasoning of the court would apply equally well to a foreign corporation. See T. R. Powell, "Indirect Encroachment on Federal Authority," 32 HARV. L. REV. 634. Whether or not a state tax on net income with no attempt at apportionment would escape the commerce clause is very doubtful. See 1917 LAWS OF MISSOURI, 528; 1916 VA. CODE. ANN., Vol. IV, 552-554. And such a tax, if levied upon a foreign corporation, would probably violate the Fourteenth Amendment.

TAXATION — LICENSE TAX — CONSTITUTIONALITY OF MOTOR VEHICLE TAX GRADUATED ACCORDING TO CARRYING CAPACITY. — A statute provided for the collection of license fees on motor vehicles transporting freight and passengers for hire or hauling general freight over the public highway. The fee was graduated according to the number of passengers or the volume of freight carried (1919 ARK. STAT., Act 408). The plaintiff sought to enjoin the collection of such fees, alleging the tax to be unreasonable and oppressive, and therefore unconstitutional. *Held*, that the bill be dismissed. *Pine Bluff Transfer Co. et al. v. Nichol*, 215 S. W. 579 (Ark.).

Such a tax is a privilege, not a property tax. *Kane v. Titus*, 81 N. J. L. 594, 80 Atl. 453; *State v. Lawrence*, 108 Miss. 291, 66 So. 745. Accordingly, it cannot be attacked upon the ground of double taxation. *Jackson v. Neff*, 64 Fla. 326, 60 So. 350; *Harder's, etc. Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245. And it may clearly be imposed in addition to an occupation tax. *St. Louis v. Weitzel*, 130 Mo. 60, 31 S. W. 1045; *Macon, etc. Co. v. Macon*, 96 Ga. 23, 23 S. E. 120. But see *Newport v. Fitzer*, 131 Ky. 544, 115 S. W. 742. A license fee is not a tax within the meaning of constitutional provisions requiring uniformity of rates. *Johnson v. Mayor, etc.*, 58 N. J. L. 604, 33 Atl. 859; *Re Kessler*, 26 Idaho, 764, 146 Pac. 113. See 1 COOLEY, TAXATION, 3 ed., 260. A classification of types, with graded rates for each, may therefore be established. *Re Kessler*, *supra*. If such classification proceeds upon a reasonable principle, the courts will sustain it. *Terre Haute v. Kersey*, 159 Ind. 300, 64 N. E. 469; *St. Louis v. Green*, 7 Mo. App. 468. Engine power has furnished a convenient and legitimate basis for the gradation. *Kane v. Titus*, *supra*. The scheme of classification used in the principal case is an even more scientific one, since it is calculated to impose the heaviest tax on the vehicles most destructive to the roads. The classification seems therefore to be clearly constitutional. Cf. *St. Louis v. Green*, *supra*.

TRUSTS — LIMITATION OF ACTIONS — EFFECT OF DELAY BY SUBSTITUTED TRUSTEE UPON RIGHTS OF INFANT *CESTUI QUE TRUST*. — A trustee wrongfully conveyed the trust *res* to the defendant who had notice of the trust. The fraudulent trustee resigned and a new trustee was appointed, who failed to proceed against the defendant within the period of limitations. The infant *cestui que trustent*, having come of age, now bring suit to charge the defendant as constructive trustee. *Held*, that the plaintiffs are barred by the Statute of Limitations. *Hart v. Citizens' National Bank*, 185 Pac. (Kan.) 1.

Because of the wrong done to him, a *cestui que trust* is given a direct right in equity against a *mala fide* purchaser. *Parker v. Hall*, 2 Head (Tenn.), 641; *Rolfe v. Gregory*, 34 L. J. Ch. (N. S.) 274. Equity also allows the trustee a *locus penitentiae* by permitting him to maintain a bill against the transferee. *Wetmore v. Porter*, 92 N. Y. 76. Where such a right of the trustee is recognized and the period of limitations has run against him, it is held that the *cestui que trust*, although under disabilities, is also barred. *Johnson v. Cook*, 122 Ga. 524, 50 S. E. 367; *Willson v. Louisville Trust Co.*, 102 Ky. 522, 44 S. W. 121. But where the repentant trustee has no standing in court to undo his wrong, his delay can have no effect upon the rights of the *cestui que trust*. *Parker v. Hall*, *supra*; *Elliott v. Landis Machine Co.*, 236 Mo. 546, 139 S. W. 356. Upon principle, it should be immaterial whether the wrongful trustee has or has not a *locus penitentiae*. Such a right is predicated upon his duty toward the *cestui que trust*, and should be considered in aid of, or alternative to, the *cestui's* own direct right. See Roscoe Pound, "The Decadence of Equity," 5 COL. L. REV. 20, 34; 12 HARV. L. REV. 132. In the instant case, the delay was by a substituted trustee to rectify the wrong of his predecessor. Here, also, by similar reasoning, the independent right of the *cestui que trust* should remain until it has itself been barred by the statute. This should be true whether the nature of the interest of the *cestui que trust* is conceived of as real or personal. See Austin W. Scott, "The Nature of the Rights of the *Cestui que Trust*," 17 COL. L. REV. 269, 282.

WAR — PRIZE — CLAIM FOR FREIGHT AND DEMURRAGE BY NEUTRAL SHIP-OWNERS AGAINST ENEMY CARGO. — A cargo of tobacco was shipped from San Domingo to Copenhagen in a neutral vessel and was seized at Kirkwall and sold as enemy property having an enemy destination, under the Reprisals Order in Council of March 11, 1915. The owner of the ship claims to be allowed, out of the proceeds of the sale of the cargo, the freight charges and damages for the delay of the ship beyond the time the original voyage would have consumed. *Held*, that only *pro rata* freight charges and no damages for demurrage be given. *The Heim*, [1919] P. D. 237.

Prize courts in the past have generally recognized the lien of a neutral ship-owner on a condemned enemy cargo for the whole freight, unless his right is forfeited by the ship carrying contraband or breaking a blockade or by other misconduct. *The Race-Horse*, 3 Rob. 101. See 3 Rob. 304, note; *The Frances*, 8 Cranch (U. S.), 418, 419. In the principal case, in restricting the claimants to *pro rata* freight, the court relied, not on any such forfeiture, but on a test laid down in a recent case. *The Juno*, [1916] P. D. 169. That case is distinguishable from the present in that there the claimants were British subjects. In the ordinary case of a subject of a belligerent trading with the enemy, his property would be subject to condemnation since his conduct amounts to a breach of allegiance. *The Hoop*, 1 Rob. 196; *The Jonge Pieter*, 4 Rob. 79. But the special circumstances of *The Juno* justified the court in restoring the ship and in giving *pro rata* freight. The right of a neutral, on the other hand, to deal with either belligerent, except in contraband and blockaded areas, has been generally recognized, at least since the Declaration of Paris in 1856. See *The Juno*, *supra*, 174; CHITTY, LAW OF NATIONS, 108. If the completion of the

voyage is prevented by the seizure of the cargo as enemy goods, the shipowner should receive the full freight which he would rightfully have earned had not the seizure taken place. *The Fortuna*, Edw. Adm. 56; *The Prosper*, Edw. Adm. 72. See CARVER, CARRIAGE BY SEA, 6 ed., § 556. This line of reasoning would also entitle the claimants here to demurrage for delay caused beyond the time which the original voyage would have consumed. Cf. *The Anna Catharina*, 6 Rob. 10; *The Industrie*, 5 Rob. 88. This view has the support of the older text-writers. See 1 KENT COMM., § 125; POLSON, LAW OF NATIONS, 47. Compare the executive settlement of *The Wilhelmina*, PYKE, LAW OF CONTRABAND OF WAR, 189.

WILLS — CONSTRUCTION — GIFT TO A CLASS — DEVISE OF REMAINDER TO TESTATOR'S LIVING CHILDREN. — The testator devised land to his son for life, remainder in equal shares to his "living daughters." The son and three daughters survived the testator. Two of the daughters predeceased the son, and on his death the surviving daughter conveyed to the defendants. The plaintiffs, issue of one of the deceased daughters, brought ejectment to recover their mother's undivided interest. *Held*, that the plaintiffs recover. *Kohl v. Kepler*, 67 Pitts. L. J. 721.

The case turned on the question whether the word "living" referred to the time of the death of the testator or of the son. In direct and immediate gifts to a class, the class is determined at the time of the testator's death, unless a different intention appears from the will. *Davis v. Sanders*, 123 Ga. 177, 51 S. E. 298; *In re Ruggles' Estate*, 104 Me. 333, 71 Atl. 933. This is true even though the distribution is postponed to a later period. *Chasmar v. Bucken*, 37 N. J. Eq. 415. In the case of a gift by way of remainder or executory devise to a class described as the testator's heirs, next of kin, or relatives, the class is likewise to be ascertained at his death, not at the termination of the intervening estate. *Bullock v. Downes*, 9 H. L. Cas. 1; *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751; *Boston Safe Deposit & Trust Co. v. Parker*, 197 Mass. 70, 83 N. E. 307. Where the gift is to the children, the same rule applies; the children *in esse* at the death of the testator take a vested interest in the remainder, subject to open up and let in those born afterward, before the time of distribution. *McLain v. Howald*, 120 Mich. 274, 79 N. W. 182; *Haug v. Schumacher*, 166 N. Y. 506, 60 N. E. 245; *Inge v. Jones*, 109 Ala. 175, 19 So. 435. The law prefers to construe a remainder as vested rather than as contingent. *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660; *Doe v. Spratt*, 5 Barn. & Ad. 731. The rule accords with the presumed intention of the testator by preventing the disinheritance of the issue of a remainderman who may die during the existence of the preceding estate. *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. 890. The word "living" in the principal case may be applied with equal force to the time of the death of the testator as to that of the son. It was proper, therefore, for the court to follow, as it did, the general rules of construction outlined above.

BOOK REVIEWS

THE LAW AS A VOCATION. By Frederick J. Allen. With an introduction by William Howard Taft. Cambridge: Harvard University. 1919. pp. viii, 83.

A small book presenting, as its preface promises, a "clear, accurate and impartial study of the law," in order to assist the choice of those inclining to enter the profession, would be a miracle if wholly successful. To cover the subject in so few words is impossible; and this work is rather a section of a

University Handbook apprising students of what they must encounter than an exposition of the soul of a profession.

To a hardened lawyer it has the interest of indicating how he looks to others; something we have for centuries been accustomed to at the hands of satirical poets and novelists, — to be examined by a modern professor has the merit of novelty.

Yet the work is legal, and put together with skill; and like most legal work, it is made up of fact and opinion. The facts relate to what preparation for the profession is necessary, what lawyers may do, how most of them occupy their time, how much they get for it, and what is the present status and tendency of the profession as a whole. The opinions cover a wide range, relating for the most part to professional ethics, the future of the bar under the manifestly changing conditions of American society, and the human qualities which make for or against professional success.

The facts are sufficiently full for the purpose of publication, and accurate in the main, though minor errors and deficiencies are not infrequent. From a list of the various sorts of lawyers (p. 5) is omitted what in the great cities is now the dominating professional figure, — that business guide, or *agent d'affaires*, vulgarly known as the "corporation lawyer."

Again, an appeal from the United States District Court to the Supreme Court (p. 9) is rare indeed, and it would be hard to discover in the scheme of federal jurisprudence any tribunal officially denominated an "Admiralty Court" (p. 10). If it were true that such officers as Registers of Deeds and of Probate, and Clerks of Court, were, the country over, holding offices "based on legal training" (pp. 11 and 18), we should be enjoying a counsel of perfection. It is certainly no longer true that the average attorney is "occupied mainly by litigation" (p. 12); there is not enough of it to go round, and attorneys general of states do not *usually* take personal charge of the trial of even the more important cases (p. 15). The charge, in days before law schools were in the ascendancy, for study in the office of eminent counsel is understated; forty years ago the Philadelphia charge was usually \$100, and frequently \$150 (p. 47); indeed in some regions the school gained students, by what would now be called "rate-cutting."

If it be useful to deter the student by the mere size of the fraternity he aspires to join, it is a more serious matter that the latest and best figures were not used. Totals at second-hand from the census of 1900, as to the number of American lawyers, are given at p. 66, — instead of the returns for 1910. The far more careful investigations of the last census showed rather less than 108,000 men and women who even called themselves practicing lawyers, and of them nearly 300 were under the age of twenty. "Judges, justices and magistrates" accounted for some 6800 more, of whom it is amusing to note that seven had not attained their majority.

Nor was there any necessity for resting on an "estimate" that New York City contained 12,000 lawyers; there were in 1910 about 10,500 who even claimed that title. Again, there is no excuse for carrying into a book of elementary information such a statement as that "the great majority of both Houses of Congress and of most state legislatures are lawyers by profession" (p. 71). It is doubtless the prevailing opinion that the profession exercises a dominant influence in most legislative bodies; but the mere number in the present Congress who even think it worth while to refer to their legal training in the Congressional Directory constitutes scarcely three fifths of the whole; while in the present legislature of New York the proportion of lawyers to non-lawyers is as seven to eighteen. It is a marked sign of the times, that while it is still true that the most distinguished legislative body in the country, the national Senate, is composed principally of lawyers, the number in legislative bodies generally has for years been relatively decreasing.

The book over-displays the ancient bugaboo of a crowded profession, but with that exception the facts presented are useful, timely, and substantially accurate; nor is there any other publication which even attempts the information.

When it comes to opinion about a lawyer's life and the prospects either of an individual or the profession generally, there is a marked contrast between the tone of President Taft's introduction and the spirit of the text. The former points to the formulation and practical application of the ideals formed or greatly advanced by the World War as lawyers' work, and spiritedly suggests that the student of to-day may be that lawyer of to-morrow fit "to lead in the real progress of a nation." The text apparently acquiesces in an opinion inclining toward belief, that what used to be the profession of the law is to-day for the most part "law-business" (pp. 32 and 73). It yields much space to the Cassandra utterances of one of the New York Lawyers' Associations, which declare "every branch of the profession" threatened by a species of "law-corporation" which extinguishes the "individuality of the lawyer . . . and almost every valuable attribute of his office" (p. 74), and holds the profession itself responsible for that "American disregard of the law" (p. 70) asserted but not defined.

This is the principal criticism of an otherwise valuable publication. Its tone is too somber; it fails to point out that the profitable practice of every profession as distinct from a trade is and always has been difficult; while the law affords far more numerous avenues of escape than do most other professions, because preparation for it is more useful in other walks of life than is the study of more highly specialized sciences; and it fails entirely (and perhaps designedly) to paint the attractive side of an occupation which if followed professionally and with even moderate success is singularly independent, and if used as a portal whereby to enter commercial or corporate business, frequently gives opportunity for entrance by the "cabin window" rather than the "hawse-pipe."

Professional ethics are treated for the most part by reference to the code of the American Bar Association, an admirable document, but which, after all, is and never can be more than an expansion of the oldest form of professional oath still used in this country, — that prescribed by the Assembly of Pennsylvania in 1752, whereby the applicant for admission swore to a promise "to behave yourself in your office of attorney according to the best of your learning and ability; and with all good fidelity as well to the court as to the client. You will use no falsehood nor delay any man's cause for lucre or malice."

The practitioner who adheres to the spirit and the letter of this oath is an "officer and a gentleman," — in the language of another and even more ancient profession.

The most original work in the book, and most valuable for one seriously contemplating strictly professional activities, is the study of those mental qualifications and character traits which may be discovered even in the young, and emphatically make for success at the bar (pp. 23-24).

It is of course true that what the writer calls the "necessary fundamental qualities," — integrity, persistence, judgment, self-confidence, and concentration, will probably insure success in any walk of life. It is the secondary qualities, such as tact, decision mingled with caution, and the like, that turn the scale toward the bar; and of these secondary qualities a long observation of lawyers successful and worthy of success would lead one to put in the foremost place what the writer calls the "gift of sympathy to take the part of a client properly." Almost any one can learn in the old phrase "to strive mightily" in court; but there is a vast difference between the man who strives by main force and the one who strives sympathetically. The young man who feels (and he soon learns to know the feeling) that he cannot like every client he

would like to have, may find delightful and even lucrative professional occupation; but he will rarely if ever rise to the higher planes of advocacy.

The book further does a real service in drawing attention, even if in a somewhat alarming way, to the existing dangers of practice and those which threaten the profession's future. It is true that the commercializing of life has, especially in the very large cities, made the law so profitable a trade as to submerge the professional instinct; and it having always been true that legal opportunities cluster around commercial expansion, the cities tend to swallow up the rising men of smaller communities. It is also true that more than one tenth of the active bar of the United States works in whole or in very large part within fifty miles of the City Hall of New York; but there is nothing new in kind about all this. It is all very old, only the degree requires watching, and youth well advised is forearmed when forewarned.

The profession is and always has been, for every man, what he chooses to make it, if he makes anything of it. It lies with the man himself whether he will graduate into a Sampson Brass, ultimately join the firm of Quirk, Gammon & Snap, or be listened to with friendly respect whenever he chooses to speak before the most admired and eminent magistrate in his community, — this might have been more insistently set forth.

Yet the modest volume fulfills its main purpose; for the youth who thinks he would like to be a lawyer will be moved by its reading to think again, and will more carefully question that friend or relative whose apparently fortunate position was the probable source of inclination; while the lad, impartial and not very determined, who surveys the list of human occupations looking for a congenial and not too engrossing job, will hardly be induced to study law by the perusal of this handbook — all of which is good for the profession and the country.

CHARLES M. HOUGH.

NEW YORK.

A PRACTICAL TREATISE ON TITLE TO REAL PROPERTY, INCLUDING THE COMPILATION AND EXAMINATION OF ABSTRACTS, WITH FORMS. By George W. Thompson. Indianapolis: Bobbs-Merrill Co. 1919. pp. iii, 1112.

This book raises an interesting question of title by accession. The writer has combined his materials and labor with those of Mr. George W. Warvelle, the author of the well-known treatise on "Abstracts and Examinations of Title to Real Property," apparently without any authorization by the latter. The book is substantially a paraphrased edition of Warvelle's work, issued under a more pretentious name. The order of chapters follows exactly that of Warvelle, and the section headings are practically the same, with slight variations and transpositions. No acknowledgment is made of the author's indebtedness to Warvelle beyond the following statement in the preface: "In the preparation of this work the author has combined his own experience with the experience of a number of eminent conveyancers and lawyers, with whom he has been privileged to consult, and to whom he acknowledges many obligations for advice and suggestions."

This generous acknowledgment is itself substantially lifted from Warvelle's Preface. With the author's genius for "combining" his own work with that of others, or, one might say, "grafting" it upon that of others, one wonders whence he derived the inspiration for the additions which he has made to Warvelle in chapters XXXII, XXXIII, and XXXIV, in which he has added a digest of statutes pertaining to the execution and acknowledgment of deeds, a digest of statutes of descent, and a digest of statutes of wills. He has also added a brief chapter on Registration of Title Under the Torrens System.

The author, or one may perhaps call him editor, has somewhat elaborated

and paraphrased Warvelle's text, and has added numerous citations of cases which seem well selected.

With so much at hand ready made, it must be a comparatively easy task to write a law book. All that is necessary is to take the digest and the encyclopedia and dictate the "combination." It will seldom be necessary in such a "practical" work to look beyond the headnotes. The writer is not concerned with the "theory" or the underlying principles of the law. There is no need for scholarly insight or acumen, or even literary style. It is something like compiling an abstract.

Warvelle in the original work did not profess to compile a treatise upon Titles to Real Property; his main purpose was evidently to furnish information and suggestions to those who prepare abstracts of title. The statements of the law, both in his book and that of Thompson, are for the most part brief, general, and elementary. By his elaboration and annotation Thompson has made it more valuable as a digest of cases, but less clear and intelligible for study by the beginner.

It is no doubt useful to epitomize enough law to instruct the abstracter in the mode of preparing his abstract, to assist him in selecting his materials, and to indicate in a general way the various matters which affect the title to real property. Such an elementary book may serve the purpose of abstracters and business men who do not have access to encyclopedias, but it is hardly to be regarded as a law book for lawyers and conveyancers in advising on abstracts of title. The "forms and precedents" given are similar to those given by Warvelle, being merely for the use of abstracters.

A few illustrations of the superficiality and defects of the treatment may be given. In defining an estate in fee simple on page 42, the statement is taken from *Warden v. Lyons*, 118 Pa. St. 396, that a fee simple "includes all qualifications or restrictions as to the persons who may inherit as heirs; thus distinguishing it from a fee tail." The word "includes," in the opinion in the Pennsylvania case, is substituted for the word "excludes" in quoting a definition from "Bouvier's Law Dictionary." The editor-author copies the mistake from the report without stopping to think what his definition means.

On page 343 the writer speaks of a resulting trust being raised by fraud, evidently confusing resulting and constructive trusts.

It would be hopeless for either a lawyer or a beginner to get any information from the incoherent remarks on the subject of "jurisdiction *in rem*" and "*quasi in rem*" on page 662.

In laying down the rule on page 715 "that no disseisin on the part of any one can affect a reversioner or remainder-man," the writer fails to mention the rule prevailing in Iowa and Nebraska, by which statutes giving any person who claims an interest in real property a right to maintain an action against any person who claims the title thereto, are construed to make the statute begin to run against the holder of a future estate when he knows of the adverse holding. Thus future interests which in most jurisdictions constitute a great obstacle to the automatic quieting of title to realty, may there be destroyed by adverse possession. (5 IOWA LAW BULLETIN, 112; 32 HARV. L. REV. 146.)

In treating of the right of a murderer to inherit the property of his victim, the writer fails to mention the possibility of subjecting the wrongdoer to a constructive trust, as suggested by Dean Ames. (AMES, LECTURES ON LEGAL HISTORY, 310. See also 1 CAL. L. REV. 397.)

As a book for students and beginners, the work is defective in its entire lack of concrete illustrations or discussion of underlying principles. As a lawyer's book, it is largely useless to one who has access to encyclopedias, digests, and more detailed textbooks. It can be recommended to those who desire a cursory general treatment for ready reference, such as those in the abstract business or in real estate offices.

HENRY W. BALLANTINE.

UNIVERSITY OF ILLINOIS.

JAMES MADISON'S NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 AND THEIR RELATION TO A MORE PERFECT SOCIETY OF NATIONS.
By James Brown Scott. New York: Oxford University Press. 1918.
pp. xviii, 149.*

The first half of this little volume is devoted to an excellent *résumé* of the history of the Federal Convention of 1787, primarily in the light of Madison's Notes of the Debates; the latter half points the significance of the issues there dealt with and the actual working of the federal system in their relation to the problems involved in a society of nations. The apparently dominant thought of the author is embodied in the proposition that the Federal Convention "was in fact as well as in form an international conference." Consequently its success justifies belief in the possible effectiveness of arrangements for the solution of international questions and the adjustment of international disputes. The practicability of such arrangements is demonstrated by the effective jurisdiction of the United States Supreme Court in dealing with controversies between states; and the decisions of the Supreme Court have been so explicit in marking the difference between judicial and political cases that "it is therefore a confession of ignorance to maintain that the distinction cannot be laid down with precision."

At the risk of "confessing ignorance" the reviewer ventures to wish that the author had indicated with greater clarity what he conceives to be the essential principle that underlies the Supreme Court's differentiation of political and judicial questions. As a rule, it seems easier to appreciate the distinction than to define it.

But, apart from this difficulty — which perhaps is not insuperable — it is interesting to note the importance which is attached, and very properly, to the direct authority of the central government as explaining the success of the present system when contrasted with the inadequacy of the form of government under the Articles of Confederation.

But does this not indicate that, to be effective, a society of nations must likewise have a direct relation, in the sphere of its authority, to the individual and to all the territory over which it possesses authority? And does not opposition to the proposed "Covenant" result, in substantial measure, from this fact as well as from the fear that a society of nations will inevitably assume, with reference to the nations composing it, a relation similar to that which exists between the United States and the states?

Mr. Scott seems principally concerned with the possible judicial activities of an international authority. But, if the federal experiment in this country is of importance, it would seem to demonstrate that the effectiveness of the judicial branch of the government is necessarily dependent upon competent legislative and efficient executive authority.

And while the reviewer is fully persuaded that some more intimate arrangement among the nations is an entirely practicable means of preventing as well as of disposing of much international discord, it is a sobering thought to reflect upon the futility of judicial effort in the face of a controversy which strikes deep into diverse interests of the community, particularly if it involves a moral aspect. The Dred Scott case should not be overlooked when a society of nations is discussed.

The author's preface bears the historic date "November 11, 1918": it would be interesting to know to what extent his views have altered in the light of subsequent developments.

HENRY WOLF BIKLÉ.

LAW SCHOOL, UNIVERSITY OF PENNSYLVANIA.

* The last fifty pages of the book constitute an appendix made up of the text of the Declaration of Independence, the Articles of Confederation, and the Constitution of the United States.

LAW AND THE FAMILY. By Robert Grant. New York: Scribners' Sons. 1919.

Under the title of "Law and the Family" Judge Robert Grant of the Boston, Massachusetts, Probate Court has collected a series of essays or papers for laymen upon such subjects as Women and Property, the Relation of the Third Generation to Invested Property, generally when it comes out of trust, the Perils of Will-Making, the Future of Women under the Law, Domestic Relations, Feminine Independence, and Marriage and Divorce.

The position of Judge of Probate in an important county in a New England state may, under favorable circumstances, be a singularly interesting and broadening experience, and Judge Grant in his varying capacity as an author and a judge is excellent evidence of the possibilities of this office. Departing in this case from his more usual habit of writing fiction, he applies the insight of an author to the problems of an administrative judge. A good judge of probate never loses touch with the lay portions of the community. Every twenty years or so all the property in the community passes through his court and under his eye. A very substantial part of that property remains under his eye year after year as trust property. The interpretation of the law to laymen could not easily come from a better source. The man who is part judge, part *parens patriæ*, and part administrator, must necessarily understand the institutions of property and inheritance as laymen experience them.

The variety of subjects dealt with by Judge Grant is too great for comment here. From the interesting suggestion that women will make good executors based upon the will of the late Secretary of State Richard Olney, through the discussion of whether it is better to have a conservative trustee or a brave one, Judge Grant passes on to the melodrama of adoption, the domestic relations, and divorce.

His book merits attention principally because of the skill and insight with which he presents the common sense of law as he administers it. His views should be interesting both to the laymen who do not understand law, and to the lawyers who cannot see the wood for the trees.

BOSTON.

RICHARD W. HALE.

CASES ON THE LAW OF EVIDENCE. By Edward W. Hinton. St. Paul: West Publishing Company. 1919. pp. xxiii, 1098.

This collection of cases is well adapted to its purpose: instruction in the law schools. The arrangement is especially good. In chapter I the editor treats of the respective functions of court and jury, including such topics as The Burden of Proof, Presumption, and Judicial Notice. Some difference of opinion exists among teachers as to the proper placing of these extraneous matters; Professor John H. Wigmore in both editions of his *Cases on Evidence* placed them near the end; and many teachers have followed this method in the arrangement of their courses; on the other hand, Professor Hinton follows Professor James Bradley Thayer in treating them at the beginning. The writer ventures the opinion that the latter is the better method, since these topics mainly involve certain matters of procedure which the student should know before he is called upon to examine cases dealing with the law of evidence proper. Moreover the topics are comparatively difficult and uninteresting; it is true that for this reason some instructors prefer to take them up last, but it is submitted that it is better for instructor and student to get this rather disagreeable task out of the way as soon as possible.

Chapter II deals with Witnesses. Certain instructors have preferred to treat this subject first, being largely influenced by the fact that it is the part of the course most attractive to the student. In Thayer's *Cases* the subject is treated

last. Professor Hinton justifies his intermediate arrangement by the assertion that the rules relating to witnesses throw light on the hearsay rule. On the other hand, it is obvious that a knowledge of the hearsay rule is valuable in dealing with privilege and impeachment, and therefore it seems that there would be good reason for retaining Mr. Thayer's arrangement.

The editor has seen fit to devote sixty-nine pages to the subject of privilege; it is submitted, however, that a larger treatment is desirable in view of the uncertainty and difficulty of the law and the frequent recurrence of decisions relating to this subject.

Chapter III treats of The Hearsay Rule. It is a notable feature that the editor discards the classification of *res gesta*, which is probably a wise change in view of the many perversions of the term. He also omits the usual classification of Declarations of Mental State, arranging cases of the type of *Mutual Life Insurance Company v. Hillmon* under the heading of "Spontaneous Statements." It is submitted that it is difficult to discover the spontaneity of such statements and that it would have been preferable to adhere to the former practice as exemplified by the collections of Professor Thayer and Professor Wigmore.

The arrangement of the remaining chapters, which deal with Opinion, Circumstantial Evidence (including Character), The Best Evidence Rule, and The Parol Evidence Rule, reflects the experiences of the able teacher.

In truth the book is replete with instances showing the editor's purpose to make it a book useful for teaching. Perhaps there has been a sacrifice of logical arrangement in some parts; but this result is fully justified by the fact that it meets the requirements of the natural order of presentation. The section dealing with Character is an illustration of the way in which the editor has kept his objective constantly in mind. In this section he deals, in the order named, with the character of the defendant in a criminal action, the character of the deceased in a prosecution for homicide, the character of the prosecutrix in a prosecution for rape, the moral character of a party to a civil action, and character for carefulness or negligence in a civil action. A further illustration is found in chapter IV, entitled Opinion and Conclusions, which deals successively with the lay witness, the expert witness, and the subject of handwriting.

Professor Hinton recognizes the impossibility of crowding the whole of this immense subject into the limits of a single case book, but it is remarkable how far he has gone toward achieving this result. He has accomplished this by a judicious selection and abridgment of cases and by the use of appropriate foot-notes. Facts are usually fully stated, or if condensed, carefully summarized; and no unduly long opinions are reproduced. The foot-notes are numerous, concise and apparently accurate. Certain matters have been unavoidably passed over, but it is believed that the matters which the lawyer meets most frequently in practice are given proper place in the book.

The immensity of the subject has given to the editor opportunity to select new cases; comparatively few of his cases are contained in previous collections; the book is original as to contents as well as to arrangement. Furthermore, the cases appear to have been wisely selected with respect to time; while all stages in the history of the law of evidence are represented, recent cases are properly given a large place.

Altogether the book is a valuable contribution to the subject, and reflects sane, careful, and scholarly preparation in a marked degree.

MORTON C. CAMPBELL.

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A CONTEMPORARY STATE TRIAL—THE UNITED STATES *VERSUS* JACOB ABRAMS *ET AL.**

I

SHORTLY before eight o'clock, on the morning of August twenty-third, 1918,¹ several men and boys were loitering at the corner of Houston and Crosby streets, in New York City, perched on sprinkler hydrants or standing about in talk, while they waited for

* This article will form part of a book on Freedom of Speech, to be published by Harcourt, Brace, and Howe, New York City.

¹ The principal sources are the TRANSCRIPT OF RECORD, Supreme Court of the United States, October Term, 1919, No. 316, Jacob Abrams *et al.*, Plaintiffs-in-Error, *v.* The United States; the two briefs, and the opinions of the court in 40 Sup. Ct. Rep. 17 (1919), also reprinted in "The Espionage Act Interpreted," 20 NEW REPUBLIC, 377 (Nov. 26, 1919). Transcript and briefs are in the library of the Law School of Harvard University, in the complete set of United States Supreme Court records presented to the school by Justices Gray and Holmes. (See CENTENNIAL HISTORY OF HARVARD LAW SCHOOL, 112.) It has not been thought necessary to give references to the RECORD except for significant passages. Some information about the trial not contained in the RECORD is taken from current issues of the *New York Times* and the *New York Call*, or from personal conversation and correspondence; the sources of such unofficial data are indicated in every instance.

For criticism of the trial, see the pamphlet, SENTENCED TO TWENTY YEARS PRISON, published by the Political Prisoners Defense and Relief Committee, New York, 1919, "Our Ferocious Sentences," 107 NATION, 504 (Nov. 2, 1918).

Comment in support of the majority opinion of the Supreme Court will be found in a note, "The Espionage Act and the Limits of Legal Toleration," 33 HARV. L. REV. 442 (January, 1920); and in an article "Justice Holmes's Dissent," 1 REVIEW, 636 (December 6, 1919). The minority opinion is supported by a note, "Free Speech in Time of Peace," in 29 YALE L. J. 337 (January, 1920); and articles, "The Call to Toleration," 20 NEW REPUBLIC, 360 (November 26, 1919); "What is Left of Free Speech," Gerard C. Henderson, 21 NEW REPUBLIC, 50 (December 10, 1919). See note 72.

The United States official document on Russian internal affairs is, BOLSHIEVİK PROPAGANDA, HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE JUDI-

the day's work to begin in the manufacturing building close by. One or two happened to look up and saw something being thrown from a window above and falling — the air was full of leaflets. Nothing of the kind had ever happened there before, and the workmen picked the papers up curiously from sidewalk and gutter. Some circulars in Yiddish they could not make head or tail of, but they read together others in English, which attacked the recent dispatch of troops to Russia.²

CIARY, United States Senate, Sixty-Fifth Congress, Third Session and thereafter, pursuant to Senate Resolutions 439 and 469; Washington, 1919.

A partial bibliography on the Espionage Act and freedom of speech generally is appended to "Freedom of Speech in War-Time," Zechariah Chafee, Jr., 32 HARV. L. REV. p. 932 (1919).

² These circulars are as follows. The English circular is Government's Exhibit No. 1, RECORD, p. 245:

"THE
HYPOCRISY
OF THE
UNITED STATES
AND HER ALLIES

"Our' President Wilson, with his beautiful phraseology, has hypnotized the people of America to such an extent that they do not see his hypocrisy.

"Know, you people of America, that a frank enemy is always preferable to a concealed friend. When we say the people of America, we do not mean the few Kaisers of America, we mean the 'People of America.' You people of America were deceived by the wonderful speeches of the masked President Wilson. His shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.

"The President was afraid to announce to the American people the intervention in Russia. He is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.' Instead, he uttered beautiful phrases about Russia, which, as you see, he did not mean, and secretly, cowardly, sent troops to crush the Russian Revolution. Do you see how German militarism combined with allied capitalism to crush the Russian revolution?

"This is not new. The tyrants of the world fight each other until they see a common enemy — WORKING CLASS — ENLIGHTENMENT as soon as they find a common enemy, they combine to crush it.

"In 1815 monarchic nations combined under the name of the 'Holy Alliance' to crush the French Revolution. Now militarism and capitalism combined, though not openly, to crush the Russian Revolution.

"What have you to say about it?

"Will you allow the Russian Revolution to be crushed? YOU: Yes, we mean YOU the people of America!

"THE RUSSIAN REVOLUTION CALLS TO THE WORKERS OF THE WORLD FOR HELP.

"The Russian Revolution cries: 'WORKERS OF THE WORLD! AWAKE! RISE! PUT DOWN YOUR ENEMY AND MINE!'

The Military Intelligence Police arrested Rosansky, the Russian who threw out the circulars, and then with his aid entrapped six

"Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM.

"It is a crime, that workers of America, workers of Germany, workers of Japan, etc., to fight THE WORKERS' REPUBLIC OF RUSSIA.

"AWAKE! AWAKE, YOU

WORKERS OF THE WORLD!

REVOLUTIONISTS

"P. S. It is absurd to call us pro-German. We hate and despise German militarism more than do your hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House."

The Yiddish pamphlet, Government's Exhibit No 2 (RECORD, p. 247), has been translated. This translation was accepted as correct by the government and the defense. Abrams, however, suggested a few changes during his testimony. It would be interesting to know how much stronger the Yiddish equivalent for "murder" at the end of the fourth paragraph is than the word for "kill."

"WORKERS — WAKE UP.

"The preparatory work for Russia's emancipation is brought to an end by his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!

"America, together with the Allies, will march to Russia, not, 'God Forbid,' to interfere with the Russian affairs, but to help the Czecko-Slovaks in their struggle against the Bolsheviki.

"Oh, ugly hypocrites; this time they shall not succeed in fooling the Russian emigrants and the friends of Russia in America. Too visible is their audacious move.

"Workers, Russian emigrants, you who had the least belief in the honesty of our government, must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war. With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.

"You who emigrated from Russia, you who are friends of Russia, will you carry on your conscience in cold blood the shame spot as a helper to choke the Workers Soviets? Will you give your consent to the inquisitionary expedition to Russia? Will you be calm spectators to the fleecing blood from the hearts of the best sons of Russia?

"America and her Allies have betrayed [the workers]. Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

"Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the government know that not only the Russian Worker fights for freedom, but also here in America lives the spirit of revolution.

"Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to fight.

"Three hundred years had the Romanoff dynasty taught us how to fight. Let all

other Russians, — five men and a girl. The oldest man was twenty-nine, the youngest man twenty-one, the same age as the girl. One prisoner died before trial, but the others were indicted for conspiracy to violate four clauses of the Espionage Act of 1918,³ and tried in October in the United States District Court before Judge Henry D. Clayton. The author of the Clayton Act was summoned from Alabama to New York because of the crowded condition of the local docket. This was his first Espionage Act case.

The overt acts were proved without contradiction. Soon after United States troops were sent to Vladivostok, the group had begun meeting in the bare "third floor-back" on East 104th Street, where most of them lived, and decided to protest against the attack on the Russian Revolution, with which as anarchists or socialists they strongly sympathized. Schwartz, the dead prisoner, had written the Yiddish circular, and Lipman the English. Abrams, the oldest, bought a power press under chattel mortgage and installed it in a cellar. After printing five thousand copies of each circular he stopped for lack of funds. Lachowsky and Molly Steimer had distributed about nine thousand pamphlets, throwing them in the streets where there were the most working people or passing them around at radical meetings. Rosansky's aid had been secured just before the arrests. There was no evidence that one person was led to stop any kind of war work, or even that the pamphlets reached a single munition worker.

The defense, besides contending that the Espionage Act was unconstitutional, maintained that it was not violated, and in particular that the criminal intent required by the express terms of the statute did not exist. Each count of the indictment⁴ covered one clause of the Act, as follows, according to the language of the statute. Certain phrases in the indictment which are not in the Act are enclosed in brackets.

"Whoever, when the United States is at war, . . . shall willfully utter, print, write, or publish

rulers remember this, from the smallest to the biggest despot, that the hand of the revolution will not shiver in a fight.

"Woe unto those who will be in the way of progress. Let solidarity live!

THE REBELS."

³ The conspiracy section of the Espionage Act is Act of June 15, 1917, c. 30, title I, § 4; 40 STAT. AT L. 219; U. S. COMP. STAT. 1918, § 10212 d.

⁴ The indictment is in RECORD, pp. 2-19.

"(Count 1) any disloyal, . . . scurrilous, or abusive language about the form of government of the United States, . . .

"(Count 2) or any language intended to bring the form of government of the United States . . . into contempt, scorn, contumely, or disrepute, . . .

"(Count 3) or . . . any language intended to incite, provoke, or encourage resistance to the United States [in said war with the German Imperial Government], . . .

"(Count 4) or shall willfully by utterance, writing, printing, publication, . . . urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products [to wit, ordnance and ammunition] necessary or essential to the prosecution of the war in which the United States may be engaged, [to wit, said war with the Imperial German Government], with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, . . .

"shall be punished by a fine of not more than twenty years or both."

As to the first crime charged, the publication of "disloyal, . . . scurrilous, or abusive language" about our form of government, the Espionage Act by its terms punishes the act of publication, without any mention of intent.⁵ Although some district judges have con-

⁵ Cases involving the new crimes created by the Espionage Act of 1918, reported in the BULLETINS of the Department of Justice on the Interpretation of War Statutes, the FEDERAL REPORTER, and the U. S. REPORTS, are as follows:

(1) Obstruction of war loans. *United States v. Bold*, BULL. 183 (Ore., Wolvertson, J.); *Hall v. United States*, 256 Fed. 748, BULL. 189 (C. C. A. 4th, 1919, per Pritchard, J.).

(2) Disloyal, etc. language about form of government of United States. *Abrams v. United States*, 40 Sup. Ct. Rep. 17 (1919) (Clarke, J.; Holmes, J., dissenting).

(3) Language intended to defame form of government. *Abrams v. United States*, *supra*.

(4) Disloyal, etc. language about military or naval forces. *United States v. Buessel*, BULL. 131 (Conn., 1918, Howe, J.); *United States v. Curran*, BULL. 140 (S. D. N. Y., 1918, L. Hand, J.); *United States v. Martin*, BULL. 157 (E. D. Tenn., 1918, Sanford, J.; criticism of President's military policy is within this clause since he is commander-in-chief of army and navy); *United States v. Equi*, BULL. 172 (Ore., 1918, Bean, J.).

(5) Language intended to defame the military or naval forces. *United States v. Equi*, *supra*; *United States v. Vevig*, BULL. 162 (Alaska, 1918, Bunnell, J.).

(6) Disloyal, etc. language about flag. *United States v. Buessel*, *supra*.

(7) Language intended to defame the flag. *United States v. Equi*, *supra*.

(8) Language intended to incite, etc. resistance to United States or promote cause of enemies. *United States v. Zadernack*, BULL. 143 (N. D. Ohio, 1918, Westenhaver, J.); *United States v. Debs*, BULL. 155 (N. D. Ohio, 1918, Westenhaver, J.); *United States v. Martin*, *supra*; *United States v. Weist*, BULL. 169 (E. D. Mo., 1918, Munger, J.); *United States v. Equi*, *supra*; *United States v. Carlson*, BULL. 185 (W. D.

sidered that there must be an evil or wicked intention,⁶ it has been contended with much force and on high authority⁷ that the utterance of the words is in itself criminal regardless of the state of mind. On this view, all that is necessary is intention to publish. There need be no intention to be abusive or disloyal about the form of government. If so, the Espionage Act is in this respect much more rigorous than the Sedition Act of 1798,⁸ which created the crime of "publishing any false, scandalous and malicious writing against the government," but required intent to defame it or excite against it the hatred of the people or stir up sedition. Also the penalty was only two years' imprisonment, and truth was a defense under that Act, whereas now a statement in real or technical war-time of the soundest truths about our form of government is punishable by twenty years in prison if only those truths are sufficiently damaging to be considered abusive or disloyal.

However this may be, intention to injure is certainly material on the other three counts. Furthermore, the first and second counts may be dismissed at this point from further discussion. First, these clauses of the Espionage Act of 1918 punishing attacks on the Constitution and our form of government seem clearly unconstitutional. They have nothing to do with war. They may be used during some petty struggle with Haiti to arrest and imprison for twenty years an excitable advocate of the repeal of the Eighteenth Amendment or the abolition of the Senate. If there was one thing which the First Amendment was meant by our ancestors to protect, it was criticism

Wash., 1918, Neterer, J.); *United States v. Albers*, BULL. 191 (Ore., 1919, Wolverton, J.); *United States v. Dodge*, BULL. 202 (W. D. N. Y., 1919, Hazel, J.); 258 Fed. 300 (C. C. A. 2d, 1919, Rogers, J.); certiorari denied, 40 Sup. Ct. Rep. 10 (1919); *Abrams v. United States*, *supra*.

(9) Language urging curtailment of production of war materials. *United States v. Carlson*, *supra*; *Abrams v. United States*, *supra*.

(10) Favor cause of enemies or oppose that of United States. *United States v. Buessel*, *supra*; *United States v. Zademack*, *supra*; *United States v. Schoberg*, BULL. 149 (E. D. Ky., 1918, Cochran, J.); *United States v. Bunyard*, BULL. 168 (E. D. Mo., 1918, Munger, J.); *United States v. Weist*, *supra*; *United States v. Bold*, *supra*; *United States v. Albers*, *supra*; *United States v. Dodge*, *supra*; *Schulze v. United States*, 259 Fed. 189 (C. C. A. 9th, 1919, per Gilbert, J.).

⁶ *United States v. Buessel*, BULL. 131; *United States v. Martin*, BULL. 157; *United States v. Equi*, BULL. 172.

⁷ 33 HARV. L. REV. 442, 443, citing Learned Hand, J., in *United States v. Curran*, BULL. 104.

⁸ Act of July 14, 1798, 1 STAT. AT L. 596.

of the existing form of government and advocacy of change, the kind of criticism which George III's judges punished. Even if the Act permits temperate discussion, which is doubtful, in view of the words about causing "contempt . . . or disrepute," it still abridges free speech, for the greater the need of change, the greater the likelihood that agitators will lose their temper over the present situation. It is impossible to speak respectfully of that portion of our form of government and Constitution which is represented by the electoral college. Other portions may prove equally objectionable in future. Also, even if these clauses of the Act are constitutional, there was no attack in the pamphlets on our form of government, but only upon those who were administering that government. Surely the phrase "capitalistic nation" does not constitute defamation of our political structure, which is compatible with other types of economic organization, such as national ownership of all industries. Although the heavy fines imposed on the defendants under these two counts necessitated some decision on their constitutionality or construction, the Supreme Court refused to make it, and Justice Clarke contented himself with suggesting that the distinction between abusing our form of government and abusing the President and Congress, the agencies through which it must function in time of war, might be only "technical."⁹ If so, these sections of the Espionage Act must have been more frequently violated in Wall Street than in Harlem.

The controversy about this case must be limited to the third and fourth counts of the indictment. Aside from questions of constitutionality, the government had to establish the specific criminal intent required by the indictment and the Espionage Act. (1) It had to prove intention to publish the pamphlets, because of the word "willfully" and on general principles of *mens rea*. This it undoubtedly did. (2) Under the fourth count it had to prove intention to produce curtailment of munitions; because the words "urge, incite, advocate" create an offense analogous to criminal solicitation, which invokes a specific intent to bring about the overt act. There are some sentences in the Yiddish circular which show such an intention, although it is open to question whether an incidental portion of a general protest which is not shown to have come dangerously near success really constitutes criminal solicitation or amounts to advo-

⁹ *Abrams v. United States*, 40 Sup. Ct. Rep. 17, 20 (1919).

cating. (3) At all events, the main task of the government was to establish under both counts an additional intention to interfere with the war with Germany, and the question whether it proved anything more than an intention to obstruct operations in Russia is the vital issue of fact in the case.

Since we had not declared war upon Russia, protests against our action there could not be criminal unless they were also in opposition to the war with Germany. There are two conceivable theories of guilt which might connect the circulars with the war. First, that the dispatch of troops to Siberia was "a strategic operation against the Germans on the eastern battle front," so that any interference with that expedition hindered the whole war. The second theory is, that the circulars intended to cause armed revolts and strikes and thus diminish the supply of troops and munitions available against Germany on the regular battle front.

Clearly the second theory is the only legitimate basis for conviction. The first theory would raise the complex question whether the Russian expedition was a part of the war. If this is a political question which must be answered in the affirmative on the mere *ipse dixit* of the government, then the existence of a war enables the government to withdraw the most remote and questionable policies from the scope of ordinary discussion simply by labeling them a war matter. The annexation of Mexico to prevent its becoming a base for German operations, the use of American troops to put down strikes in England or Sinn Fein in Ireland, are not more remotely connected with the war with Germany than the Russian affair. On the other hand, if the relation of such an expedition to the war is put in issue to be decided by the jury, the defense ought to be able to call witnesses to disprove it. On this account, in the Abrams case, Raymond Robins and other eyewitnesses of Russian affairs were summoned to prove that the Bolshevist and Czecho-Slovak situation was such that our intervention was not anti-German; but this testimony and all questions of the constitutionality of intervention were excluded by Judge Clayton with the remark, "The flowers that bloom in the spring, trala, have nothing to do with the case."¹⁰

That opposition intended to hinder the armed occupation of neutral territory should be *per se* criminal is so clearly a violation

¹⁰ RECORD, pp. 120, 132.

of free speech that this view has been unanimously rejected by the United States Supreme Court in the Abrams case,¹¹ by the government brief,¹² and by writers¹³ who support the decision. They have all adopted the second theory of guilt and have taken it for granted that the jury followed the same course. If so, the convictions represent a finding of fact that the defendants intended to interfere with operations against Germany directly and to embarrass or defeat the military plans of our government in Europe. Nevertheless, I believe that an examination of the record makes it highly probable that the jury convicted the defendants on just the other theory for, trying to hinder the Russian expedition. No one who recalls the publication of the Sisson documents¹⁴ and the widespread popular identification of the Bolsheviks with Germany in the summer and early autumn of 1918 can doubt that the jury would naturally regard pro-Bolshevist activities as pro-German, and that it was the duty of Judge Clayton to warn them explicitly against the Russian theory of guilt, and confine their attention to the pro-German theory. There is no trace of such a warning in the record. Instead, Judge Clayton himself repeatedly proclaimed the unsound theory of guilt, that if the defendants intended to oppose the government's Russian policy, they had *ipso facto* violated the law.

Before the defendants had put in any material testimony, he said:¹⁵

"Now the charge in this case is, in its very nature, that these defendants, by what they have done, conspired to go and incite a revolt; in fact, one of the very papers is signed 'Revolutionists,' and it was for the purpose of avoiding — a purpose expressed in the paper itself — the purposes of the Government and raising a state of public opinion in this country of hostility to the Government of the United States, so as to prevent the Government from carrying on its operations and prevent the Government from recognizing that faction of the Government of

¹¹ 40 Sup. Ct. Rep. 17, 19 (1919).

¹² Page 35, *ff.*

¹³ "The Espionage Act and the Limits of Legal Toleration," 33 HARV. L. REV. 442; "Justice Holmes's Dissent," 1 REVIEW 636 (Dec. 6, 1919).

¹⁴ War Information Series, No. 20 (October, 1918); the documents, without the historical report, are in BOLSHEVIK PROPAGANDA, ETC. (*supra*, note 1), p. 1125. The documents appeared in the public press by installments, beginning September 15, 1918. See the *New York Times* of that date. For criticism of their genuineness, see 16 NEW REPUBLIC, 209 (September 21, 1918), 107 NATION, 616 (Nov. 23, 1918), and the anti-Bolshevist book, E. H. WILCOX, RUSSIA'S RUIN, New York, 1919.

¹⁵ RECORD, pp. 117, 118.

Russia, which the Government has recognized, and to force the Government of the United States to recognize that faction of the Government in Russia to which these people were friendly.

"Now, they cannot do that. No men can do that, and that is the theory that I have of this case, and we might as well have it out in the beginning."

The court told the jury that this statement was not part of the evidence and should be disregarded in passing on the issue of fact, but the harm was done and he took no steps to present any concrete alternative view. The second and legitimate theory of guilt was never stated by him. Instead, he continued to apply the Russian theory in his cross-examination of Lipman, for it is one of the remarkable features of this case that most of the cross-examination of the prisoners was not by the district attorney but by the court, who sometimes broke in upon the direct examination before half a dozen questions had been asked.¹⁶ Lipman was testifying in response to his counsel that he had written the English pamphlet because the President after sending a telegram of sympathy to the Soviets¹⁷ had a few weeks later dispatched a military expedition to Russia. Judge Clayton took over the witness:¹⁸

"The President, you thought, and all that he was doing ought to be stopped and broken up?' 'I thought when I know he is elected by the people they should protest against intervention. . . . I did not want to break up. I called for a protest, which as I understand it, from my knowledge of the Constitution, the people of America had a right to protest.' . . .

"Did you not intend to incite or provoke or encourage resistance to the Government of the United States?' 'Not to the Government — never did.'

"Who was acting for the Government if the President was not?' 'I thought it was the Congress and Senate that was supposed to represent the people of America.'

"The President is the executive head . . . You intended to incite opposition to what the President did?' 'I did not. I intended to enlighten the people about the subject, for, as I stated, the papers were afraid to state it, and I thought it was the right time.'

¹⁶ See the court's cross-examination of Abrams, RECORD, p. 163. The testimony not included in the RECORD shows much more questioning by the judge. See current issues of the *New York Times* and *New York Call*.

¹⁷ NEW YORK TIMES CURRENT HISTORY (Part I), 49 (1918).

¹⁸ RECORD, pp. 201-203.

“ . . . The Government acts through the President, and you intended to incite opposition to what he was doing?’ ‘I intended to incite opposition to every wrong act I understood to be wrong.’

“‘You had the specific intention to make public opinion and arouse public opinion against intervention in Russia?’ ‘Yes.’”

When the judge also kept saying that the defendants’ opinion of the legality of the President’s action could not justify them in breaking the law,¹⁹ he made anti-interventionist propaganda seem a crime in itself, and there was no need for the jury to consider whether they had any intention to prevent the shipment of munitions to the western front. There is nothing in the charge about such an intention, nothing to exclude Russian operations from the scope of the war. Therefore, it is very probable that the defendants were convicted on an erroneous theory of guilt, simply because they protested against the dispatch of armed forces to Russia.

However, it is maintained that the defendants did intend to hinder the fighting against Germany and might have been convicted on the second theory of guilt. There are three classes of evidence in the case bearing on their intention.

First, the two pamphlets speak for themselves.²⁰ Both plainly protest against our Russian policy and not against the war. The English circular emphatically repudiates the charge of pro-Germanism. It is nearly all expository, but throws in a few general exhortations which have been tossed about in every socialistic hall and street-meeting for seventy years since the Communist manifesto in 1848 until Justice Clarke discovered in 1918 that it was a crime in war-time to say, “Workers of the World! Awake! Rise! Put down your enemy and mine . . . Capitalism!”

“This,” he declares, “is clearly an appeal to the ‘workers’ of this country to arise and put down by force the Government of the United States.”²¹

If this be so, practically every socialistic book or pamphlet violates the Espionage Act, and the belief of American socialists that the Act was directed against their political existence as a party under the pretext of war finds ample justification. Military imagery ought not to be taken literally in radical propaganda,

¹⁹ RECORD, pp. 115-121, 130-138, 167, 172, 173.

²⁰ Quoted *supra*, note 2.

²¹ 40 Sup. Ct. Rep. 17, 18 (1919).

any more than in church hymns. Nothing could show better than this sentence of Justice Clarke's how peace-time statutes which are limited in terms to the advocacy of "force and violence" may be interpreted judicially to punish obnoxious radical opinions which call for working-class action without a single word to indicate that force is to be employed.

The Yiddish circular is more specific and calls for a general strike, which can no more be kept out of a radical pamphlet than King Charles's head could be barred from Mr. Dick's Memorial. We ought to hesitate a long while before we decide that Congress made such shop-worn exuberance criminal. Very likely, as Justice Clarke says, "This is not an attempt to bring about a change of administration by candid discussion,"²² — but how much political discussion is candid? If nothing but candid discussion is protected by the First Amendment, its value for safeguarding popular review of official acts is *nil*. And even if words like "fight" and "revolution" indicate violence though often used in a peaceable sense, the advocacy of strikes and violence is not a crime under this indictment unless intended to resist and hinder the war with Germany.

The second group of evidence consists of two manuscripts which were seized at the time of the arrests without a search warrant.²³ One, a yellow sheet of paper in handwriting, taken from Lipman, contains a passage about keeping the allied armies busy at home in order to save the Russian Revolution.²⁴ The other, some typewritten sheets found in a closet in Abrams' rooms on a pile of books and papers, urges at its close a similar policy, so that there will be no armies to spare for Russia, and adds that if arms are used against the Russian people, "so will we use arms, and they shall never see the ruin of the Russian Revolution."²⁵ Very little attention was given to these manuscripts at the trial or in either brief on appeal, but Justice Clarke says, after quoting the passages just mentioned:

²² 40 Sup. Ct. Rep. 19 (1919).

²³ A contest could have been made on this point. *Weeks v. United States*, 232 U. S. 383 (1914); *Silverthorne Lumber Co. v. United States*, 40 Sup. Ct. Rep. 182 (1920). See Espionage Act, Title xi, 40 STAT. AT L. 228.

²⁴ Government's Exhibit 11, RECORD, pp. 250, 251. See also RECORD, pp. 45, 103; also p. 78, where Lipman, under examination by the military intelligence police, testified it meant soldiers were to be kept busy preventing and stopping protest meetings.

²⁵ Government's Exhibit 13, RECORD, pp. 252-255. See also RECORD, pp. 55, 104. The significant passages from both manuscripts are in 40 Sup. Ct. Rep. 17, 19 (1919).

"These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe."²⁶

These excerpts form a small part of two long discussions wholly concerned with the wrong committed against Russia by both Germany and ourselves. The clear and only purpose is to stop Russian intervention. Much more important, these passages do not occur in the pamphlets for which the defendants were indicted. They are in manuscripts which were never printed. There is not the slightest testimony that any one intended to print them, or indeed that the author, Lipman, ever showed them to any one. What one man jots down and refrains from printing is very weak proof of what several other men intended when they printed something else. Finally, a comparison of the second or typewritten manuscript with the English pamphlet shows that it is only a first draft, and the omission in revision of all the passages on which Justice Clarke relies furnishes decisive evidence that such language did not express the actual intention of the defendants. All talk about keeping soldiers busy and using arms was thrown out, and the postscript denouncing German militarism was added. In other words, the one portion of the draft which might conceivably be regarded as favorable to Germany was deliberately dropped before printing, and a paragraph was substituted hostile to Germany and repudiating pro-Germanism.

Thirdly, we have the testimony of the defendants on the vital issue, whether they intended to defend the Russian Revolution by the methods of impulsive youth or intended to hinder us in our war against German militarism. All were born in Russia and had remained citizens of that country during their few years in the United States. All were anarchists except Lipman, and he was a socialist. Nothing in the case rebuts the natural inference that

²⁶ 40 Sup. Ct. Rep. 17, 19, 20 (1919).

such persons were devoted to Russian radicalism and bitterly hostile to Imperial Germany.

Abrams, under cross-examination by the district attorney, said that he had offered his services to the President to go to Russia and fight Germany, but permission had been refused.²⁷ Under cross-examination by the court, he denied that he intended to obstruct and hinder the government of the United States. His object was to help Russia. He did not believe in governments and was a revolutionist, rebelling against the conditions of life from twelve years of age, but that was only his philosophy. It had nothing to do with the pamphlets, the purpose of which was to protest against intervention.²⁸ On direct examination he testified that this was his sole purpose; that every Russian revolutionist was in favor of America's crushing German militarism; that he would go to Russia to fight it any time he had a chance; that he would help send propaganda from Russia to Germany to start a propaganda there, as he had done on the border of Austria and was sent to Siberia for it. As to the appeal for strikes, he called upon the workers here not to produce bayonets to be used against the workers in Russia.

"I say it is absurd I should be called a pro-German, because in my heart I feel it is about time the black spot of Europe should be wiped out."

"You are opposed to German militarism in every form?" "Absolutely."

"You would overthrow it and help overthrow it if you could?" "First chance."²⁹

The other defendants testified to the same effect. There is not a word in the whole Record to show that any prisoner was opposed to the war with Germany or had any intention except an absorbing desire to protest against intervention in Russia.³⁰

It is hard to see how the jury could have convicted on this evidence if they had been instructed that a specific intent to hinder the war with Germany was necessary, but the charge contains nothing on this point except a mere repetition of the words of the

²⁷ RECORD, p. 197.

²⁸ RECORD, pp. 163, 164, 196.

²⁹ RECORD, pp. 182, 183, and see also 168, 180, 190.

³⁰ Lipman, page 756, *supra*, RECORD, pp. 77, 200, 203, 206; Lachowsky, RECORD, p. 223; Steimer, RECORD, pp. 82, 216, 221, 222.

statute. There is no comment on those words, no attempt to distinguish between a general intention to publish and the required specific intent. Instead, the judge charged, "People who have circulars to distribute, and they intend no wrong, go up and down the streets circulating them."³¹ During the trial, although the defendants' counsel reminded him that Russian meetings in New York had been broken up, Judge Clayton said he would leave it to the jury whether throwing pamphlets out of windows squared with good, honest intention, and whether being anarchists and wanting to break up all government squared with honesty and sincerity of purpose in this case. Soon afterward he stated:

"If it were a case where the defendant was indicted for homicide, and he was charged with having taken a pistol and put it to the head of another man and fired the pistol and killed the man, you might say that he did not intend to do that.

"But I would have very little respect for a jury that would come in with a verdict that he did n't have any intent."³²

Plainly these rulings of Judge Clayton ignore absolutely the specific intent to oppose or hinder the war with Germany, as demanded by the statute, and authorize the jury to convict the defendants for intention to publish the pamphlets and a generally bad mind.

The verdict against Abrams, Lipman, Lachowsky, Rosansky, and Molly Steimer, was guilty on all four counts. The acquittal of the other prisoner, Prober, was directed by the court.

Two features of the trial demand a passing notice. The method by which confessions were obtained from the defendants after arrest was not raised on appeal, since the overt acts were proved in other ways, but the testimony throws a significant light on the question, important to criminologists, of the treatment which political prisoners may expect in this country, especially if they be obscure aliens. The army sergeants deny threats and force,³³ but the charges of brutality are disquietingly specific and sincere.³⁴ The defendants and their counsel also insisted, but not so con-

³¹ RECORD, pp. 237, 238.

³² RECORD, pp. 159-161.

³³ RECORD, pp. 70, 75, 85.

³⁴ *New York Call*, October 17, 22, 23, 1918; and the pamphlet, "SENTENCED TO TWENTY YEARS PRISON," *passim*.

vincingly, that Schwartz's fatal illness resulted from the violence of one soldier, whom Judge Clayton relieved from the necessity of telling whether or not he was called by his associates, "The Tiger." The court observed, "There is no evidence as to who killed Schwartz any more than there was any evidence as to who killed cock robin."³⁵

Legal historians have always taken interest in the criminal judge who jests with the lives of men.³⁶

"'You keep talking about producers,' said Judge Clayton to Abrams. 'Now may I ask why you don't go out and do some producing? There is plenty of untilled land needing attention in this country.'

"... The witness said that he was an anarchist and added that Christ was an anarchist.

"'Our Lord is not on trial here. You are.'³⁷ . . .

"At another point the witness began some remarks about John D. Rockefeller.

"'Now,' said Judge Clayton, 'suppose we eliminate Mr. Rockefeller. He is not on trial. However, I will say that it is quite true that Mr. Rockefeller is a man of considerable wealth and he has done a great deal of good. He has eliminated the hookworm, which was the curse of childhood in large sections of our country; he has established and maintained a great research hospital, and in other ways used his wealth to better the condition of his fellows. We will now proceed with the case.'

"'We will now,' said Mr. Weinberger, 'ask the witness about his other writings. The Holy Alliance—'

"'Cut out the Holy Alliance. That is not in the issue. . . .'

"'When our forefathers of the American Revolution,—' the witness began, but that was as far as he got.

"'Your what?' asked Judge Clayton.

"'My forefathers,' replied the defendant.

"'Do you mean to refer to the fathers of this nation as your forefathers? Well, I guess we can leave that out, too, for Washington and the others are not on trial here.'

³⁵ *New York Call*, October 23, 1918.

³⁶ The judge's words are taken *verbatim* from the *New York Times*, October 22, 1918, which was so far from being prejudiced against him that on October 28 it said editorially, "Judge Henry D. Clayton deserves the thanks of the city and of the country for the way in which he conducted the trial," and praised his "half-humorous" methods.

³⁷ Braxfield replied to a similar comparison, "Muckle he made o' that; he was hanget." See the account of how he tried Muir for sedition in R. L. STEVENSON, *SOME PORTRAITS BY RAEBURN*, and PHILIP A. BROWN, *THE FRENCH REVOLUTION IN ENGLISH HISTORY*, London, 1918, 95-99.

Abrams explained he called them that because, "I have respect for them. We all are a big human family, and I say "our forefathers" . . . Those that stand for the people, I call them father.'" ³⁸

The day after conviction the prisoners were called before Judge Clayton for sentence. The court said:³⁹

"I am not going to permit anybody to start anything to-day. . . . There will be no propaganda started in this court, the purpose of which is to give aid and comfort to soap-box orators and to such as these miserable defendants who stand convicted before the bar of justice. . . . You don't know anything about democracy, and the only thing you understand is the hellishness of anarchy. . . .

"These defendants took the stand. They talked about capitalists and producers, and I tried to figure out what a capitalist and what a producer is as contemplated by them. After listening carefully to all they had to say, I came to the conclusion that a capitalist is a man with a decent suit of clothes, a minimum of \$1.25 in his pocket, and a good character.

"And when I tried to find out what the prisoners had produced, I was unable to find out anything at all. So far as I can learn, not one of them ever produced so much as a single potato.⁴⁰ The only thing they know how to raise is hell, and to direct it against the government of the United States. . . .

"But we are not going to help carry out the plans mapped out by the Imperial German Government, and which are being carried out by Lenine and Trotsky. I have heard of the reported fate of the poor little daughters of the Czar, but I won't talk about that now. I might get mad. I will now sentence the prisoners."

Rosansky was given three years in prison, Molly Steimer fifteen years and \$500 fine, Lipman, Lachowsky, and Abrams twenty years (the maximum), and \$1000 on each count. If they had actually conspired to tie up every munition plant in the country and succeeded the punishment could not have been more.⁴¹

³⁸ Abrams' reply is in *RECORD*, p. 194.

³⁹ *New York Times*, October 26, 1918.

⁴⁰ Abrams and Lachowsky bound books, Lipman produced furs, Rosansky produced hats, Molly Steimer produced shirt waists, Judge Clayton produced the Clayton Act.

⁴¹ It would not be treason unless they were adherents of Germany. Therefore, they would be punishable only under the Espionage Act. The general statute on conspiracy to destroy by force the government of the United States imposes only six years. *CRIM. CODE*, § 6, *U. S. COMP. STAT.* 1918, § 10170. Conspiracies to limit the produc-

"I did not expect anything better," said Lipman.

"And may I add," replied the judge, "that you do not deserve anything better." ⁴²

II

Seven judges of the Supreme Court were for affirmance of these convictions, Justice Clarke delivering the majority opinion. Justice Holmes read a dissenting opinion, in which Justice Brandeis concurred. The Supreme Court had only a limited power to correct any errors that may have occurred at the trial. It could not revise the sentences.⁴³ It could not set aside the verdict because its judges would have found differently on the facts themselves, but only if there was so little evidence of the required guilty intent that a reasonable jury could not have convicted. It would be very unlikely to grant a new trial for misdirection and failure to place properly before the jury the vital issue of specific intent to hinder the war, since no objection on this ground is noted in the bill of exceptions,⁴⁴ although as I have tried to show, the trial judge did nothing to enlighten the jury on the issues of specific intent and did much to becloud that difficult question, so that they very probably reached a verdict on entirely inadequate grounds, — the existence of intention to publish and to oppose Russian intervention. Only two real questions were before the court: the existence of the requisite specific intent under the third and fourth counts, the other two being disregarded, and whether the Espionage Act could constitutionally be interpreted to apply to this case.

The required specific intent to hinder the war with Germany

tion of necessities are punishable under the Lever Act by two years. Act of August 10, 1917, c. 53, § 9, 40 STAT AT L. 279, U. S. COMP. STAT., § 3115 1/2 i.

⁴² *New York Times*, *supra*. RECORD, p. 243, says, "I do not think you deserve anything less. Now, the next one."

⁴³ That excessive sentences may possibly constitute "cruel and unusual punishment" under the Eighth Amendment, see *Weems v. United States*, 217 U. S. 349 (1910), per McKenna, J., White and Holmes, JJ., dissenting.

⁴⁴ The Supreme Court has granted a new trial for unexcepted misdirection imperiling liberty. *Wiborg v. United States*, 163 U. S. 632, 659 (1896). *Accord*, *Skuy v. United States*, 261 Fed. 316 (C. C. A. 8th, 1919), and see *August v. United States*, 257 Fed. 388 (C. C. A. 8th, 1919), which holds that the Act of February 26, 1919, c. 48, amending Judicial Code, § 269, now authorizes an appellate court to look to the entire record and render judgment without regard to the technicality of want of exceptions. It is doubtful, however, if this statute does more than prevent reversals for non-prejudicial errors.

is worked out by Justice Clarke in this way: "It will not do to say . . . that the only intent of these defendants was to prevent injury to the Russian cause." They intended a general strike of munition workers, *i. e.*, a curtailment of production. This plan necessarily involved, before it could be realized, the paralysis and defeat of the war program of the United States. Therefore, the defendants intended such an interference with the war, since "men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."⁴⁵

The "unfortunate maxim" propounded by the Justice is a pure fiction.⁴⁶ Obviously our acts result in many probable consequences which we do not intend. If he means that the defendants were liable for such consequences even if they did not in fact intend them, he states a principle of law which is applicable to some crimes but not to those in which the law requires a specific intent, as in the case at bar. In those crimes the defendant must actually have the defined state of mind.⁴⁷ Thus a man who broke into a barn at night and cut the sinews of a horse's leg to prevent his winning a race was not guilty of burglary with intent to kill a horse, even though in consequence of the injury the horse died.⁴⁸ It is needless to multiply examples. Even recklessness does not take the place of the state of mind demanded by the statute.⁴⁹ On the other hand, if Justice Clarke means that the jury may permissibly infer as a matter of fact from the doing of an act that the actor intends its ordinary consequences, this is true enough,⁵⁰ but such an inference is worthless if there is overwhelming express evidence that the defendant had an entirely different intention. That is the situation in the Abrams case, where the pamphlets and the defendants' testimony show that they intended to help Russia.

The majority opinion must rest on the first sentence quoted from Justice Clarke, that aiding Russia was not the only intent of these defendants. It is argued that they had two intents: (1) to

⁴⁵ 40 Sup. Ct. Rep. 17, 19.

⁴⁶ Jeremiah Smith, "Surviving Fictions," 27 YALE L. J. 147, 156 (1917).

⁴⁷ MAY, CRIMINAL LAW, 3 ed., § 34; 1 BISHOP, NEW CRIMINAL LAW, 8 ed., § 335; *Roberts v. People*, 19 Mich. 401, 415 (1870); *Ogletree v. State*, 28 Ala. 693, 701 (1856).

⁴⁸ *Dobbs' Case*, 2 East P. C. 513 (1770).

⁴⁹ *United States v. Moore*, 2 Lowell (U. S.) 232 (1873).

⁵⁰ Jeremiah Smith, *op. cit.*; *People v. Scott*, 6 Mich. 287, 296 (1859).

help Russia, (2) to hinder the war by curtailment of production in order to accomplish that object; that it is immaterial which intent was principal and which subordinate, so long as they both existed.⁵¹ Thus if I throw a brick at a man behind a plate-glass window, my principal desire may be to hit him, but if that necessarily involves breaking the window and I know this fact, I have a secondary intention to break it and am guilty of intentional destruction of property, even though I would much rather not have broken the glass.⁵² When a man was indicted for assault on another with intent to disfigure him by biting off his ear, it was useless for him to argue that he only intended to injure but not to disfigure, since the disfigurement was a necessary and obviously a known consequence of the intended act.⁵³

There are several answers to this argument that one who intends a curtailment of munitions for any purpose must know that fewer munitions will hinder the war and therefore must *ipso facto* intend to hinder the war. First, the analogy of the throwing and biting cases just stated is too simple to have any application to the Abrams case. There is no such obvious and mechanical chain of cause and effect in complex social conditions. The argument supposes that the jury could pass on such obscure factors and that its finding meant (1) that the hindrance of the war was inevitable (2) that this inevitable consequence must have been in the defendants' minds. Both steps are very questionable, and a jury's opinion of them ought not to bind an appellate court. Of the first Justice Holmes says, "An intent to prevent interference with the Revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged."⁵⁴ Thus a very short strike that stopped intervention would have caused a very small loss in munitions for shipment to France, which would have been enormously offset by the release of troops and equipment previously diverted to Russia. And a different Russian policy might have created greater liberal enthusiasm in this country and elsewhere for the President's war aims. The second step ignores

⁵¹ 1 BISHOP, NEW CRIMINAL LAW, 8 ed., § 339; *Rex v. Gillow*, 1 Moody C. C. 85 (1825).

⁵² Cf. *Rex v. Pembliton*, 12 Cox C. C. 607 (1874). A shooting analogy is given in 33 HARV. L. REV. 444, note.

⁵³ *State v. Clark*, 69 Iowa, 196 (1886).

⁵⁴ 40 Sup. Ct. Rep. 17, 21 (1919).

the belief of the defendants that a friendly Soviet Government would render valuable aid in attacking Imperial Germany by war, or at least by propaganda, whose effectiveness was proved within a fortnight after the conviction of Abrams and his friends.

Secondly, if every curtailment of munitions, whatever its purpose, is necessarily criminal under this Act, because of its alleged obvious and inevitable effect on the war, why does the Espionage Act take pains to limit the crime to "curtailment . . . *with intent . . . to cripple or hinder the United States in the prosecution of the war*"? ⁵⁵ This clause is superfluous and meaningless, if every advocacy of curtailment involves such an intent. This clause about intent must add something to the rest of the definition of this crime. "Intent to hinder the war" clearly means more than the artificial lawyer-made intention to obstruct the war conjured up from any threat of a strike. The word "intent" in a very severe criminal statute, and especially a statute limiting popular discussion, must mean what any layman who wished to urge a strike in war-time lawfully would assume it to mean, that interference with the war must not be the object of his exhortation, the purpose at which he aims. Such a man would be entrapped if "intent" means an incidental, undesired, and at the most a vaguely considered consequence of his utterances. ⁵⁶ Strikes are not ordinarily illegal, and it would be startling if Congress intended to prohibit all incitement to them in war. Naturally the statute confined itself to strikes and similar measures that were specifically planned to interfere with the war.

This is not, as has been charged, a confusion of intent and motive. ⁵⁷ It is absurd to say that "interference with the war was

⁵⁵ It is significant that Justice Clarke omits this clause in quoting the indictment, and possibly he overlooked it altogether and assumed that intent to advocate curtailment of war essentials was the only intent specified in the Act.

⁵⁶ *Ibid.*, Holmes, J.: "When words are used exactly a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed — unless the aim to produce it is the proximate motive of the specific act . . ." The Sabotage Act punishes defective manufacture of war essentials only if there is intent to interfere with the war or reason to believe that the act will interfere with it. Act of April 20, 1918.

⁵⁷ "Justice Holmes' Dissent," 1 REVIEW, 636 (December 6, 1919). This article also censures Justice Holmes for not quoting the passage about keeping the armies at home. I hope I have shown reasons why it should never have been quoted by any judge.

palpably the *direct* and desired effect which these appeals were intended to produce" and aid to Russia only a motive. Justice Clarke expressly recognizes that the "primary intent" was to help Russia.⁵⁸ The defendants intended to produce certain tangible results, notably protest meetings, which in turn were intended to produce another tangible result, the end of intervention. Their motive was love for Russia. Possibly they also intended as part of their machinery of protest to produce a general strike, if intent can exist without any expectation of success. Interference with the war was at the most an incidental consequence of the strikes, entirely subordinate to the longed for consequence of all this agitation, withdrawal from Russia. It is wholly unsound to label the conjectural war consequence intent and the absorbing Russian consequence motive.

Finally, this argument of inevitable hindrance proves too much. If these defendants were guilty under the fourth count, so was every other person who advocated curtailment in the production of war essentials, no matter what his purpose. The machinists in Bridgeport who struck in defiance of the arbitration of the National War Labor Board violated the Espionage Act, although they intended to obtain higher wages. The Smith and Wesson Company violated it in refusing to continue to manufacture pistols under another arbitration, although they intended to retain an open shop.⁵⁹ The coal miners last autumn violated that Act in calling a strike. The government should have threatened all these people with the twenty-year penalty of the Espionage Act instead of acting under its general war statutes or imposing the milder rigors of the Lever Act and an injunction.⁶⁰

In other words, the Supreme Court was construing not only a criminal statute which must be applied in a fashion which the laymen who are menaced by it will readily understand, but a statute

⁵⁸ 40 Sup. Ct. Rep. 17, 19.

⁵⁹ See these two cases in REPORT OF THE ACTIVITIES OF THE WAR DEPARTMENT IN THE FIELD OF INDUSTRIAL RELATIONS DURING THE WAR (Washington, 1919), 32-35.

⁶⁰ I have not troubled to apply similar reasoning to the third count of the indictment, because for reasons already stated I do not consider the pamphlets contained any advocacy of resistance to the United States. Consequently, that count should be disregarded like the first two. Holmes, J., says: "Resistance to the United States means some forcible act of opposition to some proceeding of the United States in pursuance of the war. . . . There is no hint at resistance to the United States as I construe the phrase." 40 Sup. Ct. Rep. 17, 22 (1919).

limiting discussion and hence to be interpreted in the light of the First Amendment. It ought not to be assumed that Congress meant to make all discussion of any governmental measure criminal in war-time simply because of an incidental interference with the war. The danger of the majority view is that it allows the government, once there is a war, to embark on the most dubious enterprises, and gag all but very discreet protests against these non-war activities. To give extreme concrete examples: Irish munition workers could not have been urged to strike had our government been sending arms to Dublin Castle, because this would have lessened munitions for France, since a machinist could not be sure that any particular shell or gun was going to Ireland. Incitement to armed resistance to an executive edict nationalizing women would be opposition that might paralyze the war, and therefore easily suppressed under this Act.

On the constitutional point, little can be added to the statement of Justice Holmes. Although a dissenting opinion, it must carry great weight as an interpretation of the First Amendment, because it is only an elaboration of the principle laid down by him with the backing of a unanimous court in *Schenck v. United States*.⁶¹

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Since that case is reaffirmed by Justice Clarke this principle still remains law, greatly strengthened since the Abrams case by Justice Holmes' magnificent exposition of the philosophic basis of this article of our Constitution:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very founda-

⁶¹ 249 U. S. 47, 52 (1919).

tions of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"⁶²

The majority opinion dismisses this matter in two sentences, citing decisions on the Espionage Act of 1917 to establish the constitutionality of the far more objectionable provisions of the Act of 1918.⁶³ Furthermore, the court did not have to declare the clauses involved in the third and fourth counts void. Indeed, it cannot reasonably be doubted that they are constitutional when construed in accordance with the First Amendment. It is the same situation that Judge Hand pointed out in *Masses v. Patten*:⁶⁴ it is not a question of judicial refusal to enforce legislation, but of giving it a construction which will not limit discussion beyond the express terms of the Act. The words of the statute requiring a specific intent were presumably not meant by Congress to bear a meaning which would curb political agitation on matters unrelated to the war. The statute uses the ordinary language of criminal solicitation and attempt, and does not expressly demand the punishment of words in the absence of immediate danger or a determined purpose in itself dangerous to cause actual obstruction of the war. Therefore, it was erroneous for the court to construe it so as to make the remote bad tendency and possible incidental consequences of these pamphlets a valid basis for conviction. And even if all advocacy of curtailment of munitions be considered

⁶² 40 Sup. Ct. Rep. 17, 22 (1919).

⁶³ *Ibid.*, 18.

⁶⁴ 244 Fed. 535, 538 (1917). See 32 HARV. L. REV. 960.

dangerous, the intent clause limits the crime and should not have been ignored. While the decision of the majority has done a lasting injustice to the defendants, its effect on the legal conception of freedom of speech should be temporary in view of its meager discussion of the subject and the enduring qualities of the reasoning of Justice Holmes.

In another place⁶⁵ I have written in support of this danger-test as marking the true limit of governmental interference with speech and writing under our constitutions, but the able and thoughtful criticism of that test in a recent number of this REVIEW⁶⁶ makes it imperative to say something more on the subject. In the first place, the First Amendment is something more than "an expression of political faith." It was demanded by several states as a condition of their ratification of the Federal Constitution, and is as definitely a prohibition upon Congress as any other article in the Bill of Rights. The policy behind it is the attainment and spread of truth, not merely as an abstraction, but as the basis of political and social progress. "Freedom of speech and of the press" is to be unabridged because it is the only means of testing out the truth. The Constitution does not pare down this freedom to political affairs only or to the opinions which are held by a majority of the people in opposition to the government. A freedom which does not extend to a minority, however small, and which affords them no protection when the majority are on the side of the government would be a very partial affair, enabling the majority to dig themselves in for an indefinite future. The editor's view that the Amendment does not protect a few of the people against the force of public opinion throws us back to the English trials during the French Revolution, and the Sedition Law of 1798, for which the United States through many years showed its repentance by pardoning all prisoners and repaying to them the fines imposed. A friend of Lovejoy, the Abolitionist printer killed in the Alton riots, said at the time that we are more especially called upon to maintain the principles of free discussion in case of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed.

⁶⁵ "Freedom of Speech in War-Time," 32 HARV. L. REV. 932.

⁶⁶ "The Espionage Act and the Limits of Legal Toleration," 33 HARV. L. REV. 442 (January, 1920).

Undoubtedly, although we are not infallible, we must assume certain opinions to be true for purposes of action; but this does not make it right or desirable to assume that they are true for the purpose of crushing those who hold a contrary doctrine.

"There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation." ⁶⁷

The vote of the majority of the electorate or the legislature is the best way to decide what beliefs shall be translated into immediate action, and the government must resist if its opponents begin to carry on the conflict of opinions by breaking heads instead of counting them. But it is equally inadvisable for the government to seek to end a contest of ideas by imprisoning or exiling its intellectual adversaries. Force seems like force to its victim, whether or not it has the sanction of law. No one will question that the government must resist a revolt, however Utopian in purposes, but the inference that logically it must also condemn all utterances "aimed at such subversion or tending solely thither" ignores the difference of degree emphasized by the First Amendment. It is the unfailing argument of persecutors. The opinions to which they object are always conceived to aim at revolution, violence, and nothing else, although such utterances are usually in large part the exposition of political and economic views. The advocates of parliamentary reform in England were condemned on just such reasoning. To throw overboard the danger-test, and permit "the suppression, whenever reasonably necessary, of utterances whose aims render them a menace to the existence to the state," inevitably substitutes jail for argument, since the determination of the vague test of "menace" depends on the tribunal's abhorrence of the defendant's views. It is no answer that this tribunal (outside of the crushing powers of the post-office and of the immigration officials in deportation cases) is a jury. A fitness to apply a common sense standard to alleged criminal acts bears no resemblance to a capacity to appraise the bad political and social tendency of unfamiliar economic doctrines during panic. The *Abrams* case shows the capacity of a judge to decide such a ques-

⁶⁷ MILL ON LIBERTY, C. II.

tion. The only tribunal which can pass properly on the menace of ideas is time.

We must fight for some of our beliefs, but there are many ways of fighting. The state must meet violence with violence, since there is no other method, but against opinions, agitation, bombastic threats, it has another weapon, — language. Words as such should be fought with their own kind, and force called in against them only to head off violence when that is sure to follow the utterances before there is a chance for counter-argument. To justify the suppression of the Abrams agitation because the government could not trust truth to win out against “the monstrous and debauching power of the organized lie” overlooks the possibility that in the absence of free discussion organized lies may have bred unchecked among those who upheld the course of the government in Russia.

The lesson of *United States v. Abrams* is that Congress alone can effectively safeguard minority opinion in times of excitement. Once a sedition statute is on the books, bad tendency becomes the test of criminality. Trial judges will be found to adopt a free construction of the act so as to reach objectionable doctrines, and the Supreme Court will probably be unable to afford relief.

Most of the discussion of the Abrams case has turned on the question whether the decision of the United States Supreme Court affirming these convictions was right or wrong. It seems to me much more important to consider the case as a whole, and ask how the trial and its outcome accord with a just administration of the criminal law.

The systematic arrest of civilians by soldiers on the streets of New York City was unprecedented, the seizure of papers was illegal, and the evidence of brutality at Police Headquarters is very sinister. The trial judge ignored the fundamental issues of fact, took charge of the cross-examination of the prisoners, and allowed the jury to convict them for their Russian sympathies and their anarchistic views. The maximum sentence available against a formidable pro-German plot was meted out by him to the silly futile circulars of five obscure and isolated youngsters, misguided by their loyalty to their endangered country and ideals, who hatched their wild scheme in a garret and carried it out in a cellar. “The most nominal punishment” was all that could possibly be in-

flicted, in Justice Holmes' opinion,⁶⁸ unless Judge Clayton was putting them in prison, not for their conduct, but for their creed. The wife of one prisoner has been deported to Russia without even a chance for farewell,⁶⁹ while he and his friends are condemned for their harmless folly to spend the best years of their lives in American jails. The whole proceeding, from start to finish, has been a disgrace to our law,⁷⁰ and none the less a disgrace because our highest court felt powerless to wipe it out. The responsibility is simply shifted to the pardoning authorities, who except for the release of the unlucky Rosansky have as yet done nothing to remedy the injustice, and to Congress which can change or abolish the Sedition Act of 1918, so that in future wars such a trial and such sentences for the intemperate criticism of questionable official action⁷¹ shall never again occur in these United States.⁷²

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⁶⁸ 40 Sup. Ct. Rep. 17, 22 (1919).

⁶⁹ Letter to the writer from Harry Weinberger.

⁷⁰ See Morley's indignation at the "thundering sentences" for sedition in India. 2 RECOLLECTIONS, 269.

⁷¹ On armed intervention without Congressional authority, see the state papers of Seward and Fish, 6 MOORE'S DIGEST OF INTERNATIONAL LAW, 23 ff.; and Moorfield Storey, "A Plea for Honesty," 7 YALE REV. 260 (1918): "If any nation were to do any of these things to the United States, we should not doubt that it was making war on us."

⁷² The following material should be added to the Bibliography. In support of the majority opinion is John H. Wigmore, "Abrams v. U. S.: Freedom of Speech and Freedom of Thugging in War-time and Peace-time," 14 ILL. L. REV. 539 (March, 1920), which erroneously states that the passages about keeping the allied armies busy at home were in the pamphlets distributed by the defendants, whereas they were in unimportant manuscripts. In favor of the dissenting opinion is the note by L. G. C., in 14 ILL. L. REV. 601.

FEDERAL POWER TO OWN AND OPERATE RAILROADS IN PEACE TIME

UNQUESTIONABLY there are decisions of the Supreme Court of the United States which afford a reasonable basis for the contention that the United States is vested with the power to acquire and operate the railroads used in the transportation of interstate commerce. But as the facts involved in those cases were so different from those which would be presented should an effort be made to exercise such power, this constitutional question cannot be regarded as so firmly settled that it is not worthy of consideration.

It will hardly be insisted that such power is vested in the general government under the clause of the Constitution which authorizes Congress "to establish post-offices and post-roads," although that clause has been mentioned by the Supreme Court as one reason why Congress may construct or authorize the construction of a railroad from one state into another.¹ The carrying of mails is but a small incident to the ownership and operation of railroads; and it cannot be believed that the general government has the power to embark in an enterprise so gigantic for such an incidental purpose.

The power, if it exists, must be found in Article I, Section 8, clause 3, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In interpreting this clause the Supreme Court soon held that Congressional jurisdiction extended not only to transportation itself, but also to the goods transported, and to the ways and instruments of, and the individuals engaged in, transportation. Those cases which involved the ownership by the government of the ways and means of transportation are here of special interest.

Early in the nineteenth century Congress appropriated \$710,000 toward the construction of a highway from Cumberland, Mary-

¹ *California v. Central Pac. R. R. Co.*, 127 U. S. 1 (1887).

land, to the state of Ohio. Apparently the legality of this appropriation was not attacked; and it has been often recognized by the Supreme Court as valid because designed to promote interstate commerce.²

In *California v. Central Pacific Railroad Company*, in referring to the action of Congress in granting lands and franchises to the Atlantic & Pacific Railroad Company and the Southern Pacific Railroad Company, the Supreme Court said:

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce."³

So in *Luxton v. North River Bridge Company*, the court said:

"Although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that purpose, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water."⁴

*United States v. Jones*⁵ involved certain locks, dams, canals, and franchises situated between Wisconsin River and the mouth of Fox River, which the United States had acquired from the Green Bay & Mississippi Canal Company, and the power of the United States to own them was not questioned. *Monongahela Navigation Company v. United States*⁶ was a proceeding brought by the United States to condemn for navigation purposes certain locks and dams which had been erected by the defendant under authority granted by the legislature of Pennsylvania; and the power of the government to condemn the property for that purpose was not contested.

² *California v. Central Pac. R. R. Co.*, 127 U. S. 1, 39 (1887); *Indiana v. United States*, 148 U. S. 148 (1893); *Wilson v. Shaw*, 204 U. S. 24, 35 (1907).

³ *California v. Central Pac. R. R. Co.*, 127 U. S. 1, 39 (1889).

⁴ *Luxton v. North River Bridge Co.*, 153 U. S. 525, 530 (1894).

⁵ 109 U. S. 513 (1883).

⁶ 148 U. S. 312 (1893).

*United States v. Chandler-Dunbar Company*⁷ was one of the last cases before the Supreme Court involving the ownership by the United States of transportation ways. Congress had declared by act "that the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present St. Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith," and authorized the condemnation of the territory described for the construction of additional canals, locks, and dams. It was regarded as settled that the United States had the power to acquire and hold this property, and the important questions determined related to the elements of damages for which the United States is liable in such cases.

These are illustrative of a number of cases in which the power of the United States to own the ways along which interstate and foreign commerce is transported is recognized. But do any number of decisions of that character settle beyond doubt that the United States has the power to own and operate in times of peace all the railroads of the United States engaged in interstate commerce?

The Constitution of the United States, like all other instruments, must be construed as a whole. Consequently in determining the extent of the powers granted to the general government by one of its clauses, it is necessary to consider all other clauses bearing upon the same subject.

Again, the language of a clause may be so general that it will admit of a construction vesting unlimited power in the general government as to the matter to which the clause relates. Yet a point may be reached beyond which it is perfectly apparent that the authors of the Constitution could not possibly have intended the power to extend, and to go beyond which would throw the entire instrument out of equilibrium and thus practically create a new constitution. The courts will not write a new constitution in that way; and hence there may be some limit even to the powers conferred by the commerce clause, although the courts have very properly held that it is far reaching in its scope.

As the power is claimed under the commerce clause of the

⁷ 229 U. S. 53 (1913).

Constitution, it is not insisted that it exists as to roads engaged exclusively in intrastate commerce. But are there any such roads? In order to engage in interstate or foreign commerce it is not necessary that the road extend from one state into another. If it is the initial, intermediate, or ultimate carrier of articles, the transportation of which originates in one state with their destination in another state or foreign country, or originates in a foreign country with their destination in the United States, it is engaged in interstate or foreign commerce. Nor is it necessary that such commerce be very great as compared with the total traffic carried in order to make the road subject to congressional legislation. This is illustrated by the case of *United States v. Colorado & North Western Railroad Company*,⁸ decided by the United States Circuit Court of Appeals, Eighth Circuit. The company owned a short line of narrow gauge road situated wholly in the state of Colorado. A small shipment of hardware originating at Omaha, Nebraska, and a shipment of paper tablets originating at Kansas City, Missouri, were carried on one of its trains to points on its line in cars not equipped with safety appliances. They were not carried on through bills of lading, and there was no common control or management between this line and the lines from which the goods were received. Yet the court held that the company was subject to the provisions of the Safety Appliance Act and imposed the prescribed penalty. It is true that the Court of Appeals, Sixth Circuit, held to the contrary in a case presenting similar facts, but that decision was based primarily on the construction of the act itself, and not on the want of power in Congress to legislate upon the subject.

There is certainly no short line of road that does not carry some commerce destined to, or originating at, a point outside the state in which it is located; and, therefore, according to the advocates of government ownership, the United States can acquire by purchase or condemnation and operate all the railroad lines in the United States.

Let us assume that the United States possesses such power. If it were exercised, thereafter the states could not impose taxes of any kind upon railroad property, would have no control whatever over the operation of trains, the maintenance of ways, or

⁸ 157 Fed. 321 (1907).

the manner or methods of conducting the transportation business by railroads, and could neither prescribe nor regulate in any way the rates for carrying intrastate commerce by rail. In other words, all power of the states with reference to the regulation or control over intrastate commerce in every respect, in so far as carried by rail, would be destroyed.

This would be the necessary result, because, so far as the power of the United States extends, its sovereignty is supreme and admits of no restraints or limitations by the states. Not only is this a necessary implication arising from the granting of power to the United States, but as to the control of its property it is expressly provided by Article IV, Section 3, clause 2 of the Constitution, that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

If the power to make *all* needful rules and regulations respecting its property is in the United States, the states can possess no power to make any such rules and regulations except by consent of the United States expressed or implied. This proposition is self-evident, but a brief review of the authorities relating to the subject will show how the principle has been applied.

In *McCulloch v. Maryland*⁹ it was held that the state of Maryland had no power to impose a tax upon the operation of a branch of the Bank of the United States, the court saying:

"The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them."¹⁰

It was once supposed that property owned by the United States other than that expressly designated in Article I, Section 8, clause 17 of the Constitution, to wit, places purchased by the consent

⁹ 4 Wheat. (U. S.) 317 (1819).

¹⁰ *Ibid.*, 429.

of the legislatures of the states for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, was subject to taxation by the states in which it was located; and there were *dicta* of the Supreme Court of the United States and some decisions of state courts to that effect. But in *Van Brocklin v. State of Tennessee*,¹¹ it was held without a dissenting voice, that lands situated in a state, which are acquired by the United States through sales for direct taxes, levied pursuant to act of Congress, are not subject to state taxation while so owned by the United States. The court repeated in substance the above quotation from the opinion in *McCulloch v. Maryland*, and also said:

"The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."¹²

In *Wisconsin Central Railroad Company v. Price County*,¹³ it was held that as long as the government retained such right or interest in lands owned by it, as justified their withholding a patent from the donee or purchaser, such land was not subject to taxation by the state. After quoting Article IV, Section 3, of the Constitution the court said:

"And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."¹⁴

In *United States v. Gratiot*,¹⁵ which involved the leasing of minerals belonging to the United States, the court, in referring to this clause of the Constitution, said:

"The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And congress has the same power over it as over *any other property* belonging to the United States, and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest."¹⁶

It was thus recognized that the provision applies to all lands and all other property belonging to the United States regardless of how acquired. In fact this clause could not be otherwise inter-

¹¹ 117 U. S. 151, 156 (1886).

¹³ 133 U. S. 496 (1890).

¹⁵ 14 Pet. (U. S.) 526 (1840).

¹² *Ibid.*, 155.

¹⁴ *Ibid.*, 504.

¹⁶ *Ibid.*, 537 (italics are writer's).

puted. It has probably been applied most frequently in cases involving the public lands of the United States; and a few of those cases will illustrate how far it has been held to extend.

In 1885 Congress passed an act which prohibited the fencing of public lands; and *Camfield v. United States*¹⁷ was an action in equity to compel the removal of a fence which had been erected by the defendant around government lands situated in Colorado. With reference to the jurisdiction of the United States over these lands the court said:

"While the lands in question are all within the State of Colorado, the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to preëmption or homestead settlement."¹⁸

But later in its opinion the court said:

"The general Government doubtless has a power over its own property *analogous to the police power of the several States*, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."¹⁹

And *Camfield* was required to remove his fence, though there was no state law relating to the matter.

In *United States v. Grimaud*,²⁰ an indictment was sustained which alleged the violation in California of a regulation of the Secretary of Agriculture adopted under a statute authorizing him "to make such rules and regulations and establish such service [respecting forest reservations] as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction."

Therefore Congress may provide for the control of its property by regulations enforceable by either civil or criminal proceedings. In fact a number of sections of the criminal code relate to trespasses upon and injuries to the public lands and the robbery, larceny, and embezzlement of the personal property of the United

¹⁷ 167 U. S. 518 (1897).

¹⁸ *Ibid.* (italics are writer's).

¹⁹ *Ibid.*, 524, 525.

²⁰ 220 U. S. 506 (1911).

States, and these statutes are enforced regardless of where the property is located.

In *United States v. Chicago*,²¹ the court said:

"It is not questioned that land within a State purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain."

It appeared from this language that a state has some paramount sovereignty over property within its territory which belonged to the United States, but had not been ceded by the state for the purposes designated in Article I, Section 8, clause 17 of the Constitution. But this early dictum was disregarded in *Utah Power & Light Co. v. United States*,²² where the question whether a state has the power to authorize the condemnation of property belonging to the United States was directly presented. After citing many authorities the court said:

"And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power. 'A different rule,' as was said in *Camfield v. United States*, *supra*, 'would place the public domain of the United States completely at the mercy of state legislation.'

"It results that state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress."²³

And with reference to the respective sovereign rights of the United States and the states over such lands the court said:

"True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. Thus while the State may punish public offenses, such as murder or

²¹ 7 How. (U. S.) 185, 190, 194 (1849).

²² 243 U. S. 389 (1917).

²³ *Ibid.*, 405.

larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them."²⁴

If the United States owned the railroads, it would have the same jurisdiction over the rights of way, stations and station grounds, shops and other realty, as it has over its public lands lying within the states. And its power would be equally exclusive over all other property owned by it and used in connection with the operation of the roads, and also over their operation itself.

Therefore, if the United States can lawfully acquire, hold, and operate the railroads of the United States, under the guise of regulating interstate and foreign commerce, it can destroy absolutely the power of the states to regulate or exercise any control whatever over the enormous flow of intrastate commerce which is carried by rail.

When the Constitution is construed as a whole, can the power merely to regulate interstate and foreign commerce be so extended by construction as to exclude the states from the exercise of any control over their intrastate commerce?

It has been so generally understood that while the Congress is vested with the power to regulate interstate and foreign commerce there is reserved to the states the power to regulate intrastate commerce, that it would appear useless to comment upon the authorities relating to that subject.

The constitutional provisions relating to the subject appear to be perfectly plain. The tenth amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This amendment was really interpretative only, and was adopted to allay existing fears that an attempt might be made to invade the reserved powers of the states. But reservations which previously existed by mere implication thereafter rested also upon a positive declaration. Before the Constitution was adopted, the power to control all kinds of commerce was vested absolutely in the states. But in adopting that instrument the people divided that power between the Congress and the states; and it certainly was not intended that the one could by any device destroy the power vested in the other. And the subse-

²⁴ 243 U. S. 404 (1917).

quent adoption of the tenth amendment shows that that was especially true with reference to the invasion of the power of the states by the United States.

It is apparent, therefore, that the construction and ownership of a lock and dam at a point in a navigable stream where it is much needed, or the authorizing of and aiding in the construction of a transcontinental line of road when private capital could not be induced to undertake unaided such enterprise, are so insignificant in comparison with the ownership and operation of all the railroads of the country, that the court's action upon those questions cannot be regarded as precedents at all controlling. In those cases the ownership of the means of transportation was a mere incident; but in the contemplated case the government's business interests would be so vast, and the enterprise so complicated and of such magnitude, that the regulation of interstate and foreign commerce would become a mere incident.

But because of the enormous flow of both intrastate and interstate and foreign commerce and their necessary intermingling in transportation, and of the repeated applications to varying states of facts by the Supreme Court of the principle that the power of the United States is exclusive as far as it extends and embraces every reasonable means of enforcing or exercising a power conferred, there is some uncertainty as to how far Congress may affect by legislation commerce wholly within a state.

A few cases will illustrate how far it has been held that the power of the states over intrastate commerce has been restricted by the commerce clause.

*Louisville & Nashville R. R. Co. v. Eubank*²⁵ involved the validity, in so far as it affected interstate commerce, of the clause of the constitution of the state of Kentucky which prohibited the charging of a greater sum for a shorter than for a longer haul over the same line. The Railroad Company operated a line of road between Nashville, Tennessee, and Louisville, Kentucky, a distance of one hundred and eighty-five miles. This road passed through Franklin, Kentucky. The company had transported tobacco from Franklin to Louisville, the shorter distance entirely within the state, at the rate of twenty-five cents per one hundred pounds, while at the same time it was transporting tobacco from Nashville

²⁵ 184 U. S. 27 (1902).

to Louisville, the longer and interstate haul, at twelve cents per one hundred pounds. The twenty-five cent rate between Franklin and Louisville was conceded to be reasonable, but between Nashville and Louisville there was water competition, and a twenty-five cent charge would have destroyed the company's tobacco traffic between those two points. The Court of Appeals of Kentucky held that the provision was applicable, and that the shipper was entitled to recover the amount of the discrimination against him. The Supreme Court of the United States reversed this judgment, holding that the clause of the Constitution, in so far as construed to apply to the relationship between an intrastate and an interstate rate, directly affected interstate commerce and was invalid.

A case of the same nature, but which extended the principle farther, was *Houston, etc. Texas R. R. v. United States*.²⁶ That was an action brought by the railroad companies to enjoin an order of the Interstate Commerce Commission directing that the roads cease to discriminate in rates against Shreveport, Louisiana, and in favor of Houston and Dallas, Texas. Acting under orders of the Railroad Commission of the State of Texas, the roads had fixed very materially lower rates on certain articles shipped from Houston and Dallas to interior Texas points than they were charging on the same articles shipped from Shreveport, Louisiana, to such points. The Interstate Commerce Commission fixed reasonable maximum rates for the interstate shipments and ordered that the roads cease discriminating in favor of the intrastate shipments. It was insisted that the Interstate Commerce Commission had no jurisdiction whatever over the intrastate rates, and that any order made affecting them was a nullity. This contention was overruled, the court holding that the intrastate rates directly affected the flow of interstate commerce, and that the order of the commission relieved the railroads from the duty of observing the orders of the state railroad commission. After citing many cases the court said:

"While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate

²⁶ 234 U. S. 342 (1914).

operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."²⁷

And again:

"It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden."²⁸

This language of the court would admit of a broad application, but it should be considered in connection with the facts to which it was actually applied.

The *Minnesota Rate Cases*²⁹ was an attack upon the orders of the Railroad and Warehouse Commission and the legislative acts of the state of Minnesota prescribing maximum rates for freight and a maximum fare of two cents a mile for passengers. It was insisted that as to certain localities the rates disturbed the relationship previously existing between interstate and intrastate rates, thus imposing a burden upon interstate commerce and causing discriminations against localities outside the state.

The court in effect held that *in the absence of Congressional legislation* the states have the power to establish for intrastate commerce rates which are reasonable, that is, rates which the state could constitutionally fix, regardless of their incidental effect upon interstate commerce, and that Congress had not undertaken to deprive them of that power in the enactment of the interstate commerce laws. But after mentioning the contentions of the railroad companies that the same facilities were used for the transportation of both interstate and intrastate traffic, and that the two classes of traffic were continually intermingled, and it was practically impossible to keep them separate, the court said:

²⁷ 234 U. S. 353 (1914).

²⁸ *Ibid.*, 354.

²⁹ 230 U. S. 352, 432 (1913).

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply."³⁰

It was thus recognized that circumstances may exist under which Congress may regulate to an extent rates on intrastate traffic.

In *Reagan v. Mercantile Trust Co.*³¹ and *Smyth v. Ames*,³² the question was presented whether Congress could control intrastate commerce through the medium of a corporation organized under a charter granted by it. The insistence was that inasmuch as all of the franchises of the corporation had been derived from Congress, among which was the right to charge and collect tolls, the state had no power to limit or qualify them, and hence that Congress alone had the power to regulate the rates to be charged by the corporation. The court held in both cases that Congress had not by the act incorporating the company signified an intent to remove the corporation entirely from the control of the states, but passed over the question whether Congress had the power to do so or not. The evasion of this question by the court is somewhat surprising. It is difficult to understand how Congress can, through a corporation created by it, exercise a power which it does not constitutionally possess. Its authority to create a corporation organized for commercial purposes is derived from the commerce clause of the Constitution.³³ And it certainly cannot confer upon a corporation power over commerce which it cannot exercise itself, but which has been reserved to the states.

The power of Congress to pass legislation which affects intrastate commerce is further illustrated by the Hours of Service Act,

³⁰ 230 U. S. 432, 433 (1913).

³¹ 154 U. S. 413 (1894).

³² 169 U. S. 466 (1898).

³³ *California v. Central Pacific R. R.*, 127 U. S. 1, 39 (1888); *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529 (1894).

the safety appliance acts, the last Employers' Liability Act, and the Adamson Bill, and the decisions of the Supreme Court sustaining them.³⁴ These cases show that the power which Congress may exercise under the commerce clause is very comprehensive. Yet is there any doubt that there exists in the states a power over railroad companies engaged in interstate commerce which Congress cannot destroy or impair?

That the existence of such power has always been recognized by the Supreme Court of the United States is manifest from numerous declarations of that body to that effect. Thus in *Gibbons v. Ogden*,³⁵ in speaking of the commerce clause, it was said:

"The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself."

In *License Tax Cases* ³⁶ the court said:

"But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States."

In the *Trade-Mark Cases* ³⁷ the court said:

"While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress."

In *Northern Securities Co. v. United States*,³⁸ after citing the cases in which the state courts had held combinations in violation of state laws invalid, the court said:

"Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and inter-

³⁴ *Baltimore & Ohio R. R. Co. v. Int. Com. Com'n*, 221 U. S. 612 (1911); *Southern Ry. Co. v. United States*, 222 U. S. 20 (1911); *Second Employers' Liability Cases*, 223 U. S. 1 (1912).

³⁵ 9 Wheat. (U. S.) 1, 195 (1824).

³⁶ 5 Wall. (U. S.) 462, 470, 471 (1866).

³⁷ 100 U. S. 82, 96 (1879).

³⁸ 193 U. S. 197, 342 (1904).

national commerce is as full and complete as is the power of any State over its domestic commerce?"

Like expressions occur in numerous other cases, among them those above cited which construe most broadly the commerce clause of the Constitution.

But if any doubt had arisen that because of the intimate association of interstate and intrastate commerce growing out of modern methods of transportation the United States could assume full control over all the business and activities of a carrier of interstate commerce, that doubt was put to rest by the decision of the Supreme Court in the first *Employers' Liability Cases*.³⁹ The act there attacked was held unconstitutional because liability was made to rest on the mere fact that the employer was engaged in interstate commerce, and not upon the connection the act of negligence, upon which liability was predicated, had with interstate commerce. Upon this subject the court said:

"It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. . . . It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."⁴⁰

Four justices dissented on the ground that the act could and should have been so construed as to apply only to accidents directly connected with interstate commerce and to employees when engaged in such commerce. But all agreed that it was unconstitutional if the interpretation of the majority was correct.

The second *Employers' Liability Act* by express language applied to common carriers by railroad only "while engaging in

³⁹ 207 U. S. 463 (1908).

⁴⁰ *Ibid.*, 502.

commerce between" the states, etc., and only to persons suffering injuries while "employed by such carrier in such commerce"; and it was held without dissent to be constitutional.⁴¹ And upon the same distinction the validity of the Hours of Service Act was maintained.

It is therefore conclusively settled that the fact that a common carrier is engaged in interstate commerce does not subject it to the control of Congress in every respect and as to all of its acts, and that Congress has no authority whatever over such carriers as to matters not directly connected with interstate or foreign commerce. That every common carrier by rail has an enormous amount of traffic, which is strictly intrastate business, and that a very large per cent of its activities have no immediate connection with interstate commerce, cannot be questioned. As was said by the court in the Trade-Mark cases, perhaps the greater volume of business is thus beyond the power of Congress.

Then, if Congress has no constitutional power to regulate or control in any way intrastate rates that do not directly burden or affect interstate or foreign commerce; if it cannot prescribe hours of service for employees of carriers by rail except while employed in connection with such commerce; if it can prescribe no rule of liability between the carrier and its employees except as to accidents occurring in connection with such traffic; in short, if it possesses no power to exercise control in any respect over the traffic and transactions of such carriers which are strictly local and do not directly affect interstate or foreign commerce, how can it possibly possess the power to acquire and operate properties which will necessitate the doing of these very things which it has no power to do?

If the roads when purchased and while operated by the United States Government would remain as to local matters subject to the control of the states, of course there would be no basis for the objection. But as heretofore shown, such would not be the case. By Article IV, Section 3, clause 2 of the Constitution, whenever the United States acquires property, that government alone can exercise control over it, and the states are stripped of all power to participate in or interfere with that control except by consent of Congress. Then the situation is this: By the division of power

⁴¹ Second Employers' Liability Cases, 223 U. S. 1 (1912).

prescribed by the commerce clause and the tenth amendment, the United States is prohibited from exercising any control over carriers by rail as to strictly local matters. By the clause of the Constitution relating to the ownership of property, exclusive control over its property is vested in the United States. Therefore, the ownership of the roads would necessitate, by virtue of the one clause, the exercise of a power by the United States which it is prohibited from exercising by the other; and certainly that cannot be done which would necessarily produce a condition that cannot lawfully exist. In other words, the contention that the United States Government can own and operate the railroads rests upon the theory that by implication such power is vested in the government by the very clause which, when read with the tenth amendment and Article IV, Section 3 of the Constitution, positively prohibits it.

As no railroad system could possibly survive without carrying intrastate traffic, it is hardly conceivable that an effort will ever be made to acquire the roads for the purpose of carrying interstate and foreign commerce alone. But is Congress vested with power to acquire and operate the roads solely for that purpose?

The arguments against the power to do so, for carrying all classes of commerce indiscriminately, apply with equal force to their acquisition and use for carrying interstate commerce alone.

Regardless of the kind of traffic it carries, there are a great many activities necessary in the operation of a line of road which are purely local, and over which Congress has no control. For illustration: an employee is not engaged in interstate commerce while taking down and putting up fixtures in a machine shop operated by the company for repairing locomotives used in both intrastate and interstate commerce.⁴² Nor is an employee so engaged while removing coal from storage tracks to coal chutes, even though the coal had been previously brought from another state and was to be used by locomotives in interstate commerce.⁴³ And of course matters of like character are innumerable. Because of the constant intermingling of intrastate with interstate and

⁴² *Shanks v. Del., Lack. & W. R. R. Co.*, 239 U. S. 556 (1916).

⁴³ *Chic., Bur. & Quincy R. R. Co. v. Harrington*, 241 U. S. 177 (1916); *Lehigh Valley R. R. Co. v. Barlow*, 244 U. S. 183 (1917).

foreign commerce, in fact but few things of a strictly local character are now done in operating a road that would not be done by a road hauling exclusively interstate and foreign commerce.

Finally, the history of the times when the Constitution was adopted, the well-known conception of the proper functions of government entertained by its framers, the traditions of the government from its foundation to the present time, and the construction placed upon the commerce clause by the Supreme Court of the United States in the innumerable cases determined by it involving that clause, show beyond question that the power vested in Congress is to *regulate* interstate and foreign commerce, and not to own the instrumentalities of such commerce except in peculiar instances and to a limited extent, where such ownership may create, prevent the destruction of, or greatly promote such commerce.

While a constitutional provision expressing a fundamental principle of government may be sufficiently flexible to permit adjustment to changed conditions of society, it can admit of no radical alteration by mere interpretation.

Those who formulated the Constitution believed in individual liberty and opportunities, and regarded that government best which subjects its citizens to as few restraints, and gives them as many opportunities for success, as is consistent with the welfare of society. In other words, they believed that the true functions of government are to protect individuals against injury and oppression from others and to see that every citizen has a fair and equal chance, and that it is not a proper function to exclude the citizen from any naturally legitimate line of enterprise. This general theory of government was also entertained by those to whom the Constitution was submitted for adoption; and the course of congressional legislation and judicial decisions, and especially the utterances of the greatest statesmen, have been in harmony with it.

The class of business greater than any other one class is that of transportation. No other class has required greater initiative and ability for its development and successful operation. Certainly neither the members of the constitutional convention nor the statesmen who urged the acceptance of the Constitution by the people of the states contemplated that, under the guise of *regulating* interstate and foreign commerce, the transportation of all

kinds of commerce might be taken over by the United States and be entirely removed from the domain of private enterprise.

There was one kind of business in which it was contemplated the United States Government might engage, and that was the transportation of mails; and with reference to that it was provided that Congress shall have power "to establish post-offices and post-roads." But with reference to interstate and foreign commerce only the power "to regulate" was conferred; and a distinction must have been intended between the power "to establish" the instrumentalities for carrying the mails and the power "to regulate" interstate and foreign commerce, which includes the instrumentalities of the transportation.

J. A. Fowler.

KNOXVILLE, TENN.

THE SIXTEENTH AMENDMENT

Does the Sixteenth Amendment to the Constitution of the United States give Power to Congress to levy Taxes on Incomes from Bonds and other Securities issued by States, Cities, and other Subdivisions of States, and from Salaries and Wages paid by them?

THE original Constitution of the United States provided:¹

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

If this had been all, this would have been general power to levy taxes of all kinds, including, among others, an income tax. But the Constitution cut down what would otherwise have been a general power, so that there was not a general power to levy an income tax:²

"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken."

Also:³

"Representatives and Direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers," etc.

The Supreme Court decided in *Pollock v. Farmers Loan & Trust Company*⁴ that taxes on income or rents from real estate and taxes on income from personal property would all be "direct" taxes; and that, as these would not be taxes apportioned "in Proportion to the Census," or "apportioned among the several States . . . according to their respective Numbers," they would not be such

¹ Article I, Section 8.

² Article I, Section 2.

³ Article I, Section 9, clause 4.

⁴ 158 U. S. 601, 635 (1898).

taxes as the Constitution authorized or permitted Congress to levy. The court did not decide that there was power to levy an income tax provided it was apportioned "in Proportion to the Census," and never has decided any such thing. It would be a contradiction, an impossibility.

A tax without apportionment is no tax at all. Suppose Congress enacted, "A tax of \$2,000,000,000 is hereby levied." Who would pay it? How much would any one pay? Would any one be exonerated by paying less than all of it? It could not be collected as a tax. The very word "tax" (Greek, *τασσω* or *ταττω*, to arrange) implies arrangement, apportionment; and taxes have come to have different names according as they are apportioned in one mode or another.

Cooley on Taxation⁵ says, "Apportionment of the burden is therefore a necessary element in all taxation,"⁶ and quotes Ruggles, J., in *People v. Brooklyn*,⁷ "'The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment.'"

Therefore to state, as has been done by many recently, that prior to the sixteenth amendment there was "power to levy an income tax," and that all that was lacking was power to apportion it as an income tax, is to state a contradiction.

Thus, we have taxes named according to the bases of apportionment, as *ad valorem* tax, tax by the front foot or acre, or assessment or tax according to benefit; poll, head, or capitation tax; license, franchise, business or occupation tax; import, export tax, etc.

An "income tax" is a tax apportioned on some basis in proportion to income. It need not be at the same rate for small as for large incomes. It is not enough that a tax may be paid out of income. Most taxes of all kinds, except perhaps inheritance taxes, are paid out of income. But that does not make them "income taxes." A tax statute seldom concerns itself as to the fund out of which a tax is to be paid, but always and necessarily concerns itself with the basis of apportionment. That, and that alone, gives the name to the tax.

The state of the law at the time of the decision in the Pollock

⁵ 3 ed., 411.

⁶ Citing cases.

⁷ 4 N. Y. 419, 426 (1851).

case was that an income tax on the following incomes could not be levied by Congress:

1. Incomes from real estate.⁸
2. Incomes from personal property of all kinds, including, among others, railroad and other corporation bonds, stocks, debentures, notes, etc.⁹
3. Incomes from bonds and other securities issued by the several states, cities, or other subdivisions of states.¹⁰
4. Salaries or wages of officers and employees of all kinds of the several states or subdivisions of states.¹¹

The court said in the Pollock case that a tax on the gains or profits from business, privileges, or employments might be sustained as an "excise" tax,¹² and that such tax might not have been invalid if it had been made clear in the act that Congress intended to enact that tax without regard to the failure of the other provisions of the act.

Such was the state of the law when a demand arose in 1909 for an income tax, or at least for power in Congress to levy an income tax. An act was passed in 1909 imposing an "excise" tax upon the gains of corporations, and was held valid as such, and not as an income tax act.

President Taft, in a message read in the Senate June 16, 1909, concluded:

"I therefore recommend to the Congress that both houses by a two-thirds vote shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population."

June 17, 1909, there was introduced, read, and referred to the Finance Committee of the Senate the following proposed amendment to the Constitution:

"The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several States according to population."

⁸ Pollock case, 157 U. S. 429, 585 (1895); and 158 U. S. 630 (1895).

⁹ Pollock case, *supra*.

¹⁰ Pollock case, *supra*.

¹¹ Collector v. Day, 11 Wall. (U. S.) 113, 114 (1870), cited and approved in Pollock case, 157 U. S. 429, 584 (1895).

¹² 158 U. S. 601, 635 (1895).

June 28, 1909, the Senate Finance Committee reported the proposed amendment in a changed form, the same as finally adopted as a part of the Constitution; that is:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Note that the word "direct" was omitted, and the words "from whatever source derived" were inserted.

July 12, 1909, the same present form of amendment was reported in the House.

The proceedings of the Senate and the House show nothing further of interest as to the form of the amendment.

The state of the law as the result of the decision in the Pollock case on the above points 1 to 4 and as to "excise" tax was fresh in the minds of Congress. That decision was the reason for the amendment. When the word "direct" was stricken out and the words "from whatever source derived" were inserted, it must be presumed that Senators and Representatives knew the meaning of the word "whatever," and knew that among the "sources" of income were bonds and other securities issued by states, cities, and other subdivisions of states, and salaries and wages of officers and employees of states, cities, and other subdivisions of states. When men propose so serious a thing as an amendment to the Constitution they choose their words carefully and use them in their ordinary meaning. Any other course would make an amendment a trap and a mystery.

Congress had at times attempted to levy an income tax on all said sources 1 to 4 and had failed, as the Pollock case and the Day case had decided. The sixteenth amendment gathers up all these failures, omitting none, strikes out the word "direct," which would have made the amendment deal only with "direct" taxes, and inserts the words "from whatever source derived," which include all sources, and says, in fact and in legal effect, whatever has been the state of the Constitution and the decisions and of the law heretofore, and of traditions, politics, states' rights, state sovereignty, structure of the government, relations between the national and state governments, or anything else, for that is always the effect of an amendment to the national Constitution, — whatever

all these may have been, henceforth "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived," etc.

It will not do to argue, as some do, that the amendment was restricted in its purpose to taking away the necessity for apportionment in the case of "direct" taxes, that is, taxes on incomes from real estate or personal property; for the word "direct" was stricken out in order to prevent any such narrow construction, and at the same time the words "from whatever source derived" were inserted in order to make the amendment as broad as language can make it.

There was no exception from the amendment. Had any exception been intended as to incomes from bonds and other securities issued by states, cities, or other subdivisions of states, or from salaries or wages paid by them, it would have been easy so to provide in the amendment. Income from such "sources" is a matter of common, everyday knowledge of all men. It was not overlooked. But what would be the result if it could be shown that Congress overlooked this plain, everyday fact, a fact, moreover, that was made clear in the decision in the Pollock case, which was the decision that made the amendment necessary or advisable? Is an amendment to the Constitution couched in plain, everyday words to be cut down on any such ground? It would be interesting to learn what limit there would be upon changing the meaning of words in an amendment, if words may thus be changed.

Some of those who argue that the sixteenth amendment does not authorize Congress to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them, say that this might be done if the amendment made it plain, etc. Pray, what kind of plainness is needed? Is it necessary that the amendment should read, "incomes from whatever source derived, and also incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them?" Must our Constitution be ridiculous in order to be "plain"? Let us hold the scales even, and not permit any political ideas to affect a judicial or legal question.

It has been hinted or implied, or perhaps even asserted, in some

of the arguments on this subject, that there is no power to make an amendment authorizing the Congress to tax such incomes.

Article V of the Constitution provides:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Here is a general power of amendment with certain exceptions only. The principle of construction is clear that those are the only exceptions that exist. *Expressio unius exclusio alterius est*. It would be impossible to construe documents or language by any other rule.

Of the exceptions in said Article V the first two are limited in time, "prior to the year One thousand eight hundred and eight," which implies that after that date they might be the subject of amendment. The said "first clause in the Ninth Section of the first Article" permitted the slave trade until 1808. Congress promptly abolished it beginning January 1, 1808.

The said "fourth clause in the Ninth Section of the first Article" provided:

"No Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration hereinbefore directed to be taken."

Clearly, under this express proviso of said Article V, this fourth clause may be amended in 1808 or at any time afterwards. Obviously taxation is not a forbidden subject, on which no amendment is permitted, even if there be any forbidden subjects, and there are none except only a state's right to equal suffrage in the Senate. This power of amendment in tax matters is not limited at all after 1807.

Much has been written about the "structure of the American

Constitution," "sovereignty of the States," "the National Government and the State Governments are each Sovereign in its sphere," and other such phrases, as if they excluded the power of amendment or change. It is obvious that such phrases do not advance the argument at all.

In pursuance of the power of amendment have been made the first ten amendments, and the thirteenth, prohibiting slavery, and the fourteenth and fifteenth, all three clearly diminishing the power and sovereignty of the states in important matters reserved to them in the original Constitution.

The cases on which writers rely, that the national government cannot tax the states or their instrumentalities, and the states cannot tax the national government or its instrumentalities, were all decided in the absence of provision in the Constitution of the United States expressly authorizing such taxation. Those decisions do not rest upon any ruling that the people of the country cannot by amendment authorize such taxation. The national government has always been one of delegated powers, that is, one must look into the Constitution and its amendments in order to find out what powers it has; but once a power is found in Constitution or amendment, there can no longer be any question of its existence, and language conferring it is to be construed as words are ordinarily construed, even though its effect is to that extent to "restrain or annul the sovereignty of the States."

That the sixteenth amendment affects the "sovereignty of the States" is not an objection. In *Martin v. Hunter's Lessee*,¹³ Mr. Justice Story, giving the opinion of the court, to the effect that the Court of Appeals of Virginia must obey the mandate of the Supreme Court of the United States, said:

"It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

"It is a mistake that the constitution was not designed to operate

¹³ 1 Wheat: (U. S.) 304 342, 343, 344 (1816).

upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of State Sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. The language of the constitution is also imperative upon the states, as to the performance of many duties.

“The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power, a restriction which is not to be found in the terms in which it is given.”

The above is especially pertinent, not only as to the general power in Article V to make amendments, but also as to the general power in the sixteenth amendment to tax “incomes, from whatever source derived.”

Suppose the sixteenth amendment had contained the additional words “and also tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them.” If the argument against the power to make an amendment taxing such incomes means anything, it means that even then the amendment in this respect would be void because beyond the power of an amendment so to provide. If necessary in order to make such amendment effective, the amendment might also add, the courts shall have no power to render this amendment ineffective. But obviously such addition is not necessary, for the mere enactment of the amendment is sufficient notice to the courts that it is to be effective.

The Supreme Court itself is the creature of the same Constitution that provided the general power of amendment, and there is undoubted power to amend as to the structure and functions and even existence of the court itself, and power by amendment to prevent the court from rendering an amendment ineffective, if it were necessary to insert an express provision to that effect. This is not an instance where one who grants what in terms is an all-inclusive power may nevertheless have the grant cut down on the ground

that the grantor lacked authority to make such full grant. An amendment to the Constitution is supreme, and controlling upon the Supreme Court, as well as upon Congress, the President, the states, and the people; and the court has no more right than they to subtract anything from the ordinary meaning of the words "from whatever source derived."

The fact that an amendment changes things from what they were under the Constitution and decisions of the court prior to the amendment is nothing against the amendment, but in its favor; for the very object of an amendment is change from prior conditions.

Frequently it is said that the national government and a state is "each sovereign in its sphere." It would be more accurate, and conducive to clearer thinking, to say that sovereignty is divided between the two, each having the complement of the other's share; and, further, that the Constitution provides how these portions of sovereignty may by amendment be shifted from the state to the nation or the reverse; and that the general power of amendment in Article V puts only one limit or exception upon the power of amendment, namely, that no state without its consent may be deprived of its equal suffrage in the Senate. To deny that portions of sovereignty may be thus shifted would be to deny the power of amendment. All acts of a state are in its sovereign capacity. There are not some acts pertaining to it as a sovereign and others not. Any amendment acts upon its sovereignty.

There was power, then, to make the sixteenth amendment broad enough to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them.

The question then comes back to what the language of this amendment naturally means. If a man by will gave income to his wife for life, from his estate, "from whatever source derived," or, if a man made a contract to pay over his "income from whatever source derived," could income from state and municipal bonds, etc., be excluded?

How the words of the sixteenth amendment strike the minds of men generally may perhaps be illustrated from two examples. The *New York Times* of February 21, 1919, in an editorial, said:

"The Treasury is said to rely upon a decision of 1871, although it was rendered before the constitutional amendment taxing income 'from

whatever source derived'. . . . It requires an argument to exempt any income made taxable by plain language both of the law and the constitutional amendment," etc.

The *New York Evening Post*, in an editorial of August 20, 1918, referring to the Pollock case, said:

"This declared . . . that since a municipality was 'one of the instruments of the State Government,' 'a tax on the income from its bonds was a tax on the power of the States,' and therefore unconstitutional. . . . But the courts' objections were naturally removed, when, in 1913, the States approved the Constitutional Amendment that 'Congress shall have power to lay and collect taxes on incomes from whatever source derived,'" etc.

Have those who deny that the power of amendment of the Constitution is general considered fully what would be the conditions if the Supreme Court should decide that the power to amend is limited in some respects, other than that of equal suffrage for each state in the Senate? It would be necessary for the court to give some good and sufficient legal reason for such limitation, treating the question as a strictly legal one. A political reason would not be sufficient, for the court has nothing to do with politics, but only the law, and it would be intolerable that the court should ever undertake to decide cases on political grounds. What in the last analysis would be a remedy for any lack of general legal power to amend the Constitution except revolution? We do not like to think of such a remedy, and there is no need to, for the Constitution itself has provided a full and adequate legal remedy in the general power of amendment.

It would have been quite possible for this nation to have had its central government have all power except what was delegated to the states, as was the effect of the British Parliament Act in respect to the Canadian Government. Perhaps, if our Constitution were to be framed anew to-day, when both communication and transportation are now very much quicker and easier from Maine to California than they were in colonial days from one end of New York or Pennsylvania to the other, our central government might originally have had a much greater share of the sovereignty that was by the Constitution divided between the states and the nation. Some of the thoughtful men of our nation have wondered whether we have not paid, and are not now paying, too high a price in time

and money for all the regulations of forty-eight states as to railroads, fire and life insurance, and generally the doing of business by corporations and individuals in several states, and in a great many other respects, and by having to examine and comply with the endless statutes and multitudes of decisions of the courts in forty-eight states as well as acts of Congress and decisions of United States courts. All of this waste, expense, and burden falls on the ultimate consumer and forms part of our cost of living.

However that may be, when, pursuant to the Constitution, an amendment transfers some function or sovereignty to the national government, the words of the amendment should be read in their ordinary meaning and given full and fair effect.

Our Constitution was adopted to make us a nation: it was not a treaty among states. The Civil War settled that beyond question. But, also, this has been the view of the Supreme Court from an early date. In *Martin v. Hunter's Lessee*,¹⁴ Mr. Justice Story, giving the opinion of the court, said:

"The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either."

Equal suffrage in the Senate must be preserved, and it may readily be granted that this implies that the states must not cease to exist. But no one believes that an income tax such as Congress might levy on incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them, would destroy the states. The same income tax on United States bonds does not destroy the United States, nor does an income tax on individuals and corporations destroy

¹⁴ 1 Wheat. (U. S.) 324, 325.

them. The states are really but the people themselves who elect the very members of Congress who are to levy the taxes. The suggestion that the people cannot be trusted not to destroy themselves or their own state governments by an income tax is absurd. It is not the case of one separate and independent people taxing another and dependent people. An income tax levied by the British Parliament on incomes from bonds issued by London, Liverpool, Manchester, and other cities, would not destroy those cities, and a French income tax on incomes from bonds of Paris, Lyons, Marseilles, and other cities, would not destroy them. Let us get away a little from the provincialism of states' rights and state sovereignty; also let us remember that we have in our country a divided sovereignty, with express provisions in our Constitution by which portions of sovereignty of the states may be transferred from time to time to the national government or the reverse, and it is not the function of the Supreme Court to prevent an amendment from being effective on the ground that it might subtract from the sovereignty of the states, or on the ground that Congress might abuse its power.

On the other hand, there is danger to the nation. Hundreds of thousands of officers and employees of states, cities, counties, towns, and other subdivisions of states, pay no United States income tax on their incomes from such occupations, and billions of bonds issued by states and their subdivisions are likewise now exempt by Congress from United States income tax, and these vast numbers of persons and bonds in these tax-exempt classes are constantly increasing as the states enlarge their functions. The peril to the nation and its revenues ought to be obvious. If not, then let us consider further what would happen to the nation's revenues if all the states should follow the example of North Dakota in taking direct ownership and control, not only of public utilities so called, but also of other industries hitherto deemed private occupations. In that event, how much income would ultimately be left subject to United States income tax, and what would be the peril to the nation, especially in time of war, when an income tax is its chief reliance for revenue?

Some writers have made an argument that prior to the sixteenth amendment the Constitution conferred power to levy income taxes, and that this amendment relieved Congress from the necessity of apportioning income taxes among the states according to the census;

and they, therefore, deny that the sixteenth amendment confers power to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and salaries and wages paid by them. The premises might both be true and yet this conclusion obviously does not follow. When such writers thus state that the amendment *merely* relieved Congress from making such apportionment according to the census, they beg the question. While professing to give effect to the words "from whatever source derived," they give absolutely no effect to those words; for the amendment as first introduced into the Senate would have accomplished all that such writers say was accomplished by the amendment, and they refuse to permit those words, which were carefully inserted by the Senate after the amendment was introduced, to have not only the ordinary meaning but any meaning whatever. It will not do to say that Congress did not mean anything by the words, or did not use them in their ordinary meaning; and it will not do to say that "whatever" means only "some," and that a court has a right as a matter of law to pick out the "some" on what it may conceive to be grounds of political expediency (using the word "political" here, as elsewhere in this article, only in its dignified sense and not as relating to any party politics). Whether the amendment should be adopted was a political question; the construction of it is a strictly legal question.

Moreover, the premise of such writers is not correct that prior to the sixteenth amendment there was power to levy an income tax; for they ignore the fact that there can be no tax without apportionment, and that it is the basis or kind of apportionment that determines the kind of tax. Note how the argument is stated by some who disregard this necessary fact. For example, Mr. Albert C. Ritchie in *The American Bar Association Journal* for October, 1919,¹⁵ writes:

"The effect of this decision [Pollock] was to make a federal income tax a practical impossibility, because the rule of apportionment among the States applied to such a tax would be manifestly unfair and unjust."

Rather, the learned writer should say, the Pollock case decided that an "income" tax was impossible, but that a "head" tax was possible.

¹⁵ Pages 602, 608.

A little further on Mr. Ritchie seems to have forgotten the "impossibility," for he writes:¹⁶

"When, now, the sixteenth amendment provides that 'Congress shall have power to lay and collect taxes on incomes,' it did not confer any power to levy income taxes in a generic sense, because that was a power already possessed and never questioned."

Mr. Ritchie then proceeds to refer to the provisions of the Constitution giving power "to lay and collect taxes," and refers to the requirement that all "direct" taxes must be apportioned among the several states according to population, without seeming to realize that these two provisions of the Constitution, both taken together, as they must be, give thus only a power to levy a "head" tax and not an "income" tax. We say the provisions of the Constitution must be taken both together, not only because that is the general rule of construing a document, but also because a tax without an apportionment is an absolute (as well as a "practical") impossibility, and there is no such thing.

Mr. Ritchie continues:¹⁷

"When, therefore, the sixteenth amendment provides that the power to tax incomes—a power which was not granted by the amendment, because it had always existed—was to be a power to tax incomes 'from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration,' it becomes obvious that the purpose of the amendment was to remove the qualification which the decision in the Pollock case had placed upon income taxes which are direct, namely, that they must be apportioned, and, further, to remove the necessity of examining the source of the income in order to see whether the tax is direct or not."

Here are several erroneous statements. The Pollock case did not decide that "income" taxes which are "direct" must be apportioned (as head taxes, an impossibility), but decided that "income" taxes on incomes from all sources (except those which might be the subject of an "excise" tax, as occupations) were impossible, for they could not be apportioned as an income tax.

Since an "income" tax was impossible, the alleged "qualification which the decision in the Pollock case had placed upon income taxes which are direct, namely, that they must be apportioned"

¹⁶ Page 609.

¹⁷ *Ibid.*

as head taxes, is an alleged qualification of a thing which did not exist and could not exist; and, as the thing itself did not exist, neither did the alleged qualification; and it was not the purpose of the sixteenth amendment to "remove the qualification," but its purpose was to confer power to levy income taxes.

Also, it is a perversion of the words of the sixteenth amendment to make it read: "The sixteenth amendment provides that the power to tax incomes . . . was to be a power to tax incomes," etc. The amendment does not read "the power to tax incomes," thus implying that the power already existed. It does not recognize in any way that there was any prior power to tax incomes, and in this it agrees with the Pollock decision (and with Mr. Ritchie in a prior paragraph, "practical impossibility"); and the amendment reads: "The Congress shall have power to lay and collect taxes on incomes," etc.¹⁸

¹⁸ Some one may suggest that prior to the sixteenth amendment it would have been possible to levy an income tax as follows: first, apportion the tax among the several states "in proportion to the census," and then inside each state apportion its quota among the population according to income (either with graduated or uniform rates). That, even if possible, would not be an income tax, but a combination head tax income tax. Under such a plan Congress must first fix the total money to be raised by such tax (and not first fix the rate or rates of tax as usual), and then divide this total among the states "in proportion to the census." Thus the personal income tax for the year 1917, according to reports, produced \$675,249,450; total census, 1910, was 91,972,266; census of Alabama, 1910, was 2,138,093; and Alabama's share would have been in round figures $\frac{1}{48}$ of total, that is, over \$15,700,000. The total personal income tax paid in Alabama for 1917 was \$1,936,211, about $\frac{1}{8}$ of \$15,700,000. A person in Alabama (as elsewhere) who had an income of \$100,000 in 1917 paid a tax of \$16,180; while under the suggested head tax income tax plan he (as all others in Alabama) would have paid, for 1917, eight times as much, that is, he would have paid \$129,440 (\$29,440 more than his total income) if the same proportionate graduated rates had been levied in the state as were levied under the United States Income Tax Acts for 1917. Under the greatly increased rates for 1918, 1919, and 1920, the payments required in Alabama under such plan would have been much greater, and the results more impossible and absurd.

Under such plan, after the total quota of each state had been fixed, it would be necessary in each of the forty-eight states first to ascertain the total incomes of all persons by having returns made, and then compute the rate, with extended fraction, necessary to levy the exact amount each person must pay in order to produce the exact total quota of the state, — no more and no less than the exact "pound of flesh," for that would violate the requirement of the Constitution that "direct" taxes be laid "in proportion to the census." Graduated rates, if possible at all, would involve almost endless calculations in extended fractions.

The Pollock case, however, decided that a tax on incomes from gains or profits of business, privileges, or employments, that is, occupations, is an "excise," and the

Furthermore, even if there had been some sort of power to levy an income tax (though in the Pollock case the Supreme Court held that there was power only to levy an "excise" tax, as on occupations, etc.) yet the sixteenth amendment is good according to its terms as a plain and general grant of power in unambiguous language. It has never been the law that a second grant or deed in general words is to be cut down because there happened to be a prior grant or deed in defective, or even effective, terms, so that there would be less granted than is stated in the general terms of the second grant or deed. Did any court ever treat a confirmatory deed or statute in such a way?

It remains to consider certain cases decided by the Supreme Court, since the sixteenth amendment, that have been cited as supporting views different from those here stated, to wit: *Brushaber v. Union Pacific Railroad Co.*,¹⁹ *Stanton v. Baltic Mining Co.*,²⁰ *Tyee Realty Company v. Anderson*,²¹ and *Peck v. Lowe*.²²

It is pertinent to keep in mind the principles upon which courts act in dealing with constitutional questions. Judge Cooley states some of them as follows:²³

"Neither, as a rule, will a court express an opinion adverse to the validity of a statute, unless it becomes absolutely necessary to the determination of a cause before it. Therefore, in any case where a

Constitution requires that all "excise" taxes be "uniform." So we must revise the above calculations by excluding all such occupation incomes and all such "excise" taxes; for they cannot be apportioned "in proportion to the census." Therefore, under such head tax income tax plan there would need to be (in order to reach also occupation incomes) two sets of taxes, one a head tax income tax and the other an "excise." The effect of such revision would be a still more grotesque result in Alabama, as well as in other states.

It is no wonder that in the early case of *Hylton v. United States*, 3 Dall. 171, Mr. Justice Iredell, after considering a suggested similar double apportionment of a carriage tax and the unequal and impossible results, said: "This mode is too manifestly absurd to be supported, and has not even been attempted in debate."

Note that the Constitution says "direct" taxes shall be laid "in proportion to the census or enumeration herein before directed to be taken," and stops there, and there is no provision whatever for any second apportionment within each state in proportion to income. The Pollock case did not decide that there could be such second apportionment, but decided that an income tax on incomes from real estate and personal property would be a "direct" tax and could not be levied as an income tax, that is, apportioned according to income.

¹⁹ 240 U. S. 1 (1916).

²⁰ *Ibid.*, 103 (1916).

²¹ *Ibid.*, 115 (1916).

²² 247 U. S. 165 (1918).

²³ COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW, 2 ed., 152, 153, 154, *et seq.*

constitutional question is raised, if the record presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will adopt that course, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable."

It is to be noted that since the sixteenth amendment was ratified in 1913 no act of Congress has undertaken to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states; and, if the 1919 act of Congress undertook to tax salaries and wages paid by states and their subdivisions (as some contend), the Treasury Department has refused to take that view and has not attempted to collect such taxes. Hence no case has arisen before the Supreme Court involving the validity of such provisions of any act of Congress.

We may be sure that the learned justices of the Supreme Court would be among the first to disclaim any statement or implication that they had undertaken to decide any question of the constitutionality of a proposed act of Congress in advance of the passage of such act. Their jurisdiction extends only to cases, and to express an opinion in advance upon a bill in Congress is neither their function nor custom. As Professor Thayer and others have pointed out in their writings, the Supreme Court in 1793 declined to advise President Washington as to questions arising under treaties with France, deeming it "improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them."

The case of *Brushaber v. Union Pacific Railroad Co.*²⁴ involved the validity of the income tax provisions of the act of October 3, 1913, as taxing gains of a railroad corporation. The case did not involve any tax on incomes from bonds or other securities issued by states, cities, or other subdivisions of states, or from salaries or wages paid by them.

Mr. Chief Justice White states and numbers all the contentions made in the case, and not one of them involves in any way whatever any question of the power of Congress to tax incomes from such bonds or securities or such salaries or wages. In view of these

²⁴ 240 U. S. 1 (1916).

indisputable facts it seems unfair to the learned Chief Justice to assert that he or the court undertook in the Brushaber case to pass upon a constitutional question which (1) was not involved in the case, and (2) to do so in advance of any act passed by Congress under which the question might arise, and (3) in the absence of arguments by counsel upon such constitutional question. Such is not the custom of the Supreme Court.

In *Stanton v. Baltic Mining Company*,²⁵ the question was as to the validity of the provisions of the act of October 3, 1913, taxing incomes of mining companies, and no more involved the questions now under discussion than did the Brushaber case.

In *Tyee Realty Company v. Anderson*,²⁶ the question was as to the validity of the provisions of the same act taxing income of a realty company, and did not involve at all the questions now under discussion.

In *Peck v. Lowe*,²⁷ a corporation engaged in buying goods in the several states and shipping them to foreign countries questioned the right of the government to levy an income tax under the Act of 1913 on so much of its income as arose from shipping goods to foreign countries and there selling them, claiming that this was within the prohibition of the Constitution, that "No tax or duty shall be laid on articles exported from any State." The court said: "The Sixteenth Amendment, although referred to in argument, has no real bearing and may be laid out of view." After considering the decisions, the court held that the prohibition of an export duty on articles did not prohibit an income tax on the corporation in respect of the gains made in the business above mentioned. So the court did not need to consider whether, if the clause of the Constitution which prohibited an export tax would otherwise prohibit an income tax on such income, nevertheless an income tax could be supported by the sixteenth amendment acting as a repeal *pro tanto* of such export tax prohibition. The court did say: "As pointed out in recent decisions, it [the sixteenth amendment] does not extend the taxing power to new or excepted subjects," etc., citing *Brushaber v. Union Pacific Railroad Co.* and *Stanton v. Baltic Mining Co.*, above referred to. But this case, of *Peck v.*

²⁵ 240 U. S. 103 (1916).

²⁶ *Ibid.*, 115 (1916).

²⁷ 247 U. S. 165 (1918).

Lowe, was decided by the court, as is stated by the court itself on the ground that a tax on an exporter's income is not a "tax on exports." Furthermore, as above pointed out, neither the Brushaber case nor the Stanton case really involved any such question as these words quoted from the opinion in the case of *Peck v. Lowe* might indicate.

It is respectfully submitted that the sixteenth amendment clearly gives power to Congress to tax incomes from bonds and other securities issued by states, cities, and other subdivisions of states, and from salaries and wages paid by them.

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THE PROGRESS OF THE LAW, 1918-1919

EQUITY (*Continued*)

9. EQUITABLE SERVITUDES

SEVERAL cases decided during the past year involve incidentally the nature of restrictive agreements as to the use of property enforceable in equity.¹ In the classical decision on this subject,² Lord Cottenham considered that he was enforcing against C a contract made between A and B and that he was doing so in order to prevent unjust enrichment. Later English cases argued in the same way,³ but it is now clear that English courts regard these agreements as imposing servitudes upon the property restricted, either appurtenant to other property, or for the benefit of a particular person while owner of such other property.⁴ American courts have been coming to the same result,⁵ although the language of the decisions is not always consistent in the same jurisdiction and some courts seem committed to the contractual view.⁶ When the objection is raised that no pecuniary advantage

¹ *White v. Harrison*, 81 So. (Ala.) 565 (1919); *Werner v. Graham*, 183 Pac. (Cal.) 945 (1919); *Windemere-Grand Improvement Ass'n v. American Bank*, 172 N. W. (Mich.) 29 (1919); *Swan v. Mithskun*, 173 N. W. (Mich.) 529 (1919); *Bull v. Burton*, 124 N. E. (N. Y.) 111 (1919).

² *Tulk v. Moxhay*, 2 Phil. 774 (1848).

³ "The argument must, it would seem, go to this length, viz., that . . . a purchaser becomes entitled to the covenant even although he did not know of the existence of the covenant. . . . It appears to me that . . . this is not the law of this court and that in order to enable a purchaser as an assign . . . to claim the benefit of a restrictive covenant, this, at least, must appear, that the . . . benefit of the covenant was part of the subject-matter of the purchase." Hall, V. C., in *Renals v. Cowlishaw*, 9 Ch. D. 125, 130 (1878).

⁴ *Rogers v. Hosegood*, [1900] 2 Ch. 388; *In re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, 399, [1906] 1 Ch. 386, 401, 405, 409.

⁵ *Werner v. Graham*, 183 Pac. (Cal.) 945 (1919); *Childs v. Boston R. Co.*, 213 Mass. 91, 99 N. E. 957 (1912); *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N. E. 244 (1917); *King v. Union Trust Co.*, 226 Mo. 351, 126 S. W. 415 (1910); *Flynn v. New York R. Co.*, 218 N. Y. 140, 112 N. E. 913 (1916).

⁶ *Wiegman v. Kusel*, 270 Ill. 520, 110 N. E. 884 (1915); *De Gray v. Monmouth Beach Co.*, 50 N. J. Eq. 329, 24 Atl. 388 (1892); *Doan v. Cleveland R. Co.*, 92 Ohio St. 461, 112 N. E. 505 (1915); *Bald Eagle R. Co. v. Nittany R. Co.*, 171 Pa. St. 284, 33 Atl. 239 (1895).

to plaintiff is involved in enforcement of the covenant, courts are apt to speak in terms of the property theory. When, on the other hand, the objection is that the character of the neighborhood or surroundings of the property and conditions of application of the servitude have changed, courts which in other connections adopt the property theory are likely to talk in terms of the contract theory.⁷ This is brought out in the decisions during the past year. In *White v. Harrison*⁸ and *Swan v. Mitshkun*⁹ the defendants urged that on a balance of convenience and in view of the slight advantage or want of advantage to plaintiff, the chancellor in his discretion should deny an injunction. In granting injunctions the courts in effect took the position that they were protecting property, although the Alabama court speaks of preservation of a "plain contract right."¹⁰ On the other hand, in *Windemere-Grand Improvement Ass'n v. American Bank*¹¹ and *Bull v. Burton*,¹² where the defense was change of condition of the neighborhood, the courts talk in terms of specific performance and of the discretion of the chancellor to refuse such relief on a balance of convenience where the result would be inequitable. The real difficulty is to find a suitable theory of the effect of change of situation upon equitable servitudes. This subject will be considered presently.

How much there may be in a name is shown by the cases on creation of equitable servitudes otherwise than by express covenant. Deduction from the phrase "covenants running with the land in equity" has manifestly played a large part in too many of them. What we really have here is an equitable appendix to the common law as to servitudes. The common law recognized ease-

⁷ *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691 (1892); *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741 (1892); *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961 (1905).

⁸ 81 So. (Ala.) 565 (1919).

⁹ 173 N. W. (Mich.) 529 (1919).

¹⁰ 81 So. 566-567. It should be noted that this court turns Lord Cottenham's argument in *Tulk v. Moxhay* into a dogmatic fiction: "It [the court] was bound also to assume that the restriction of this covenant, and its effect upon property rights, had consideration when the deed from complainants' ancestor to defendant's predecessor in title was executed and remained a constant factor in subsequent transfers." Compare this with note 3, *supra*, where Hall, V. C., called for proof that the covenant had been taken into account in subsequent transfers.

¹¹ 172 N. W. (Mich.) 29 (1919).

¹² 124 N. E. (N. Y.) 111 (1919).

ments, profits *à prendre*, and covenants running with the land. To these equity has added a fourth category. In the classical case the equitable servitude was created by a covenant; but the decisive point was the declared intention of the parties, not the form in which it was declared. At law, profits and easements can be created only by deed or by adverse user, and in order that a covenant run with the land it must be a formal covenant. Equity, on the other hand, here as elsewhere, looks at the substance rather than the form, and the substance is declared intention. Hence, where there is a "building scheme"¹³ and sales are made from a plat or plan showing restrictions, it has been held that such restrictions are "implied" in fact from the plan and the circumstances of the sales.¹⁴ Two cases of the past year involve this subject. In *Farquharson v. Scoble*¹⁵ the court came to the conclusion that while "some restrictive covenants . . . were contemplated" the exact scope thereof was not fixed and that no "general scheme or plan" was ever contemplated. In this respect the case is like *Herold v. Columbia Investment Co.*¹⁶ which the court cites. Assuming such facts the result is sound enough. But the cause was disposed of on demurrer. It was alleged that the company which subdivided the tract in question and sold it in lots, "represented to all purchasers of lots that sales would be made in accordance therewith." This, it is said, is a mere statement of the alleged legal effect of filing the map. But is it not a question of fact how reasonable men in the position of the purchasers would understand the map and the sales therefrom? The crucial point would seem to be that the averments do not suffice to establish a representation that all sales to others would be made according to the same map.¹⁷ The wisdom of abolishing the demurrer in equity is illus-

¹³ See the useful classification in *Korn v. Campbell*, 192 N. Y. 490, 494-496, 85 N. E. 687 (1908).

¹⁴ *Spicer v. Martin*, 14 A. C. 12 (1888); *In re Birmingham and District Land Co.*, [1893] 1 Ch. 342; *Simpson v. Mikkelsen*, 196 Ill. 575, 63 N. E. 1036 (1902); *Allen v. Detroit*, 167 Mich. 464, 133 N. W. 317 (1911); *Tallmadge v. East River Bank*, 26 N. Y. 105 (1862); *Bimson v. Bultman*, 3 App. Div. 198, 38 N. Y. Supp. 209 (1896); *Lowrance v. Woods*, 54 Tex. Civ. App. 233, 118 S. W. 551 (1909).

¹⁵ 27 Cal. App. 653, 177 Pac. 310 (1918).

¹⁶ 72 N. J. Eq. 857, 67 Atl. 607 (1907).

¹⁷ The court says: "The covenant here claimed cannot be implied from the mere making and filing of the map showing the different subdivisions, or by selling lots in conformity therewith."

trated when such questions are decided on the face of a pleading without taking evidence.

In *O'Malley v. Smith*,¹⁸ when the land was subdivided for sale a plat was filed on which were dotted lines indicated to be twenty-five feet from the streets and expressly designated as building lines. There were no express covenants in the conveyances. The court was bound by prior decisions in Missouri¹⁹ to hold that no equitable servitudes were imposed. *Zinn v. Sidler*, the leading case in that jurisdiction, involved a tract adjacent to Kansas City which had been laid out and sold in lots for residence purposes. On the plat were lines expressly marked "building lines" and both the original conveyances and all subsequent deeds referred to the plat. The court said:

"A *covenant* as to the restricted use of the property in question is necessary to sustain the plaintiffs' contention; the creation of such a covenant may be by *express words* or by reasonable *implication from words employed* clearly indicative of such a purpose."²⁰

Also:

"It must be expressed in words, either definitely defining the covenant or making apt reference to the designated line, thus giving *formal* expression to the covenantor's purpose."²¹

In other words, the court calls for the form of a covenant, telling us that any implication must be drawn from the words used in the conveyance, not from the acts of the parties, and putting as an exception the statutory covenant for title involved in the words "grant, bargain and sell."²² All this and the citation of "cyc" as to how restrictions are to be made to appear in deeds, shows the influence of the word "covenant" at the expense of equitable principles.²³

¹⁸ 208 S. W. (Mo. App.) 849 (1919).

¹⁹ *Zinn v. Sidler*, 268 Mo. 680, 187 S. W. 1172 (1916); *Whittaker v. Lafayette Realty Co.*, 197 Mo. App. 377, 196 S. W. 109 (1917).

²⁰ *Zinn v. Sidler*, *supra*, 686-687. The italics are mine.

²¹ *Id.*, 688. Italics mine.

²² *Id.*, 689-690.

²³ The weight of authority is *contra*; *Pierce v. Roberts*, 57 Conn. 31, 17 Atl. 275 (1889); *Simpson v. Mikkelsen*, 196 Ill. 575, 63 N. E. 1036 (1902); *Rowan v. Portland*, 8 B. Mon. (Ky.) 232 (1847); *Freeman v. Island Heights Co.*, 75 N. J. Eq. 491, 77 N. J. Eq. 572, 72 Atl. 974, 78 Atl. 154 (1910); *Schickhaus v. Sanford*, 83 N. J. Eq. 544, 91 Atl. 878 (1914); *Bridgewater v. Ocean City R. Co.*, 62 N. J. Eq. 276, 49 Atl. 801 (1901);

A related question arises as to the application of the Statute of Frauds to equitable servitudes upon land. If the ground of equitable relief is not enforcement of a contract by or against one who is not a party thereto in order to prevent unjust enrichment but protection of a servitude imposed upon the property, it would seem to follow that the Statute of Frauds precludes establishment of such a servitude solely by parol evidence. Courts have differed on this question, some using the term "equitable easements" and deducing therefrom that the statute is applicable,²⁴ others arguing that there is only a contract and hence that the statute does not apply since the agreement is not one for sale of an interest in lands.²⁵ Two cases on the subject were decided during the past year. In *Ham v. Massasoit Real Estate Co.*²⁶ the court took the view that the effect of the oral contract, if enforceable, would be to create an easement and that the transaction was within the statute. In *Jones v. Wyomissing Club*²⁷ the court passes only upon a question as to notice. Apparently no point was made as to the Statute of Frauds and the opinion does not refer thereto.

It is sound on principle and well settled that covenants creating equitable servitudes are to be construed against the dominant owner.²⁸ But this cannot mean that such a covenant is to be rigidly and literally construed at the expense of the purpose and intent of the parties. An interesting phase of this question arose in *Gnau v. Filzpatrick*.²⁹ There the lots were sixty feet wide and the covenants were that there should be "but a single private dwelling with the necessary outbuildings erected on each lot" and that no dwelling should be "set nearer than ten feet to the west line of any lot." One defendant had acquired the east fifty feet of

Lennig v. Ocean City Ass'n, 41 N. J. Eq. 606, 7 Atl. 491 (1886); *Lowrance v. Woods*, 54 Tex. Civ. App. 233, 118 S. W. 551 (1909). But see *Light v. Goddard*, 11 All. (Mass.) 5 (1865); *McCloskey v. Kirk*, 243 Pa. St. 319, 90 Atl. 73 (1914).

²⁴ *Sprague v. Kimball*, 213 Mass. 380, 100 N. E. 622 (1913); *Tibbetts v. Tibbetts*, 66 N. H. 360, 20 Atl. 979 (1890); *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72 (1846); *Pitkin v. Long Island R. Co.*, 2 Barb. Ch. (N. Y.) 221 (1847); *Rice v. Roberts*, 24 Wis. 461 (1869).

²⁵ *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876 (1892); *Ware v. Langmade*, 2 Ohio Dec. 116 (1894).

²⁶ 107 Atl. (R. I.) 205 (1919).

²⁷ 261 Pa. 190, 104 Atl. 551 (1918).

²⁸ *Marsh v. Marsh*, 106 Atl. (N. J.) 810 (1919), is a recent decision in point.

²⁹ 168 N. W. (Mich.) 1007 (1918).

lot 50, while the other now owned the west ten feet of lot 50 and the east forty feet of lot 51. One of the plaintiffs owned the west twenty feet of lot 51 and the whole of lot 52. Other plaintiffs were owners of other lots in the subdivision. It will be noted that while the covenants contemplated that the lots should be sixty feet wide and that there should be but one house on each sixty-foot lot, the defendants have each but fifty feet. Thus, consistently with a literal interpretation of the covenants, a house on either of the two parts of lot 51 would not violate them, so long as but one part was built upon. But in that event, which was it to be? The one first built upon? Or could neither owner of a part build without the consent of the other or some arrangement by which it could be determined who was to build the one house which alone could stand upon the two parcels? The trial judge, whose opinion is reported, took the first position, conceiving that any other view would give the owner of one portion of the divided lot a servitude in the other part. The majority of the Supreme Court, apparently assenting to this, considered also that the proposed buildings were consistent with a literal interpretation of the restrictions. The minority (three of seven judges) held that the purpose and intent of those who imposed the restrictions was that "not less than sixty feet should be occupied for each dwelling and its appurtenant structures" and left the question as to who should build as between two owners of parts of a subdivided lot unanswered. Were the owner of lot 52, who was also owner of part of the divided lot 51, the sole plaintiff, that question would require decision. But as other lot owners were also plaintiffs, the court was only called on to construe the restrictions with reference to the new situation. As between the owner of lot 52 and the defendants, the case is like *King v. Dickeson*.³⁰ It is submitted that such cases should turn upon the question whether the original transaction contemplated resubdivision and intended the building lines or other restrictions to apply as between the newly created parcels in the event thereof.³¹ If resubdivision was not contemplated, those who take part therein must make new restrictions as between themselves with respect to the new parcels. If they do not, they are not bound as between themselves and it remains only that they do not violate the re-

³⁰ 40 Ch. D. 596 (1889).

³¹ Compare *Korn v. Campbell*, 192 N. Y. 490, 85 N. E. 687 (1908).

strictions upon which owners of other parcels of the original tract may still insist. Hence as between the owner of lot 52 and the defendants, the position of the trial judge and of the majority of the Supreme Court would seem to be sound. If in building on the part of the original lot 51 which he now owns the defendant so building was not violating the original restrictions, ownership of another part of lot 51, which could not now be built upon as between the owner thereof and other lot owners, would give the owner of such other part of the original lot no ground of complaint. But other lot owners were also plaintiffs in the present case and they ought to be allowed to insist that the restrictions be adhered to according to their spirit and intent in order to carry out the purpose for which they were imposed.

In *Booth v. Knipe* ³² a restriction was imposed upon the use of a house. Counsel argued that the restriction was nugatory and should not be enforced in equity because the owner might tear the house down and there was no restriction upon any building that might be put up in its place. Cardozo, J., answered this contention with characteristic clarity and incisiveness, as follows:

"Owners of land know that buildings are put up to be used. They are not put up to be destroyed. To fix their character at the beginning may shape the future of the neighborhood. We do not refuse to enforce a covenant while it lasts because it may not last forever. Limitations are not illusory because they are not complete. The burden clings to the land till the building loses its identity." ³³

Three cases involve change of conditions and the effect thereof upon equitable servitudes. In *Swan v. Mitschkun* ³⁴ there is the common situation in which lots restricted to residence purposes would now be more valuable if they could be used for business purposes. But the original purpose could be carried out and the court properly granted an injunction, using language that strongly suggests protection of a property right. In *Windemere-Grand Improvement Ass'n v. American State Bank* ³⁵ the same court had before it a case in which radical and unforeseen changes had transformed a quiet suburban street into an exceptionally noisy thoroughfare,

³² 225 N. Y. 390, 122 N. E. 202 (1919).

³³ 225 N. Y. 390, 395, 396, 122 N. E. 202, 203 (1919).

³⁴ 173 N. W. (Mich.) 529 (1919).

³⁵ 172 N. W. (Mich.) 29 (1919).

so that the original purpose could no longer be given effect. In properly denying an injunction the court, as is usual in such cases, speaks in terms of specific performance, saying:

"The right and duty of a chancery court to enforce restrictions under its equitable jurisdiction is not absolute. In the exercise of such jurisdiction the same general equitable considerations and rules are recognized as move the court in passing upon applications to compel specific performance of contracts."³⁶

*Bull v. Burton*³⁷ involved the question whether a title was marketable where there were such restrictions but the situation had changed radically. A majority of the Court of Appeals (four judges, three dissenting) treated the question in the same way, saying that the decisions on this subject do not hold "that the restrictive covenants should be ignored," but "do hold that a court of equity should not do inequity, and that if the granting of an injunction to enforce restrictive covenants will result in inequity it will be denied."³⁸ Yet in other connections this same court has consistently taken the view that such restrictions create servitudes and give rise to proprietary rights. Courts have hesitated to admit the proprietary theory in the present connection because while a sound instinct leads them to feel that relief should be denied, an equally sound instinct leads them to feel that a court of equity should not have discretion to deprive a man of his property. Hence some courts have sought a way out by allowing or suggesting a recovery of damages after denial of the injunction,³⁹ while others

³⁶ 172 N. W. (Mich.) 32 (1919). But in another part of the opinion we are told that the restrictions had "become obsolete." It is noteworthy that however much courts strive to think and speak of equitable interests in terms of the personal theory, they continually lapse into the language and modes of thought of a real theory.

³⁷ 124 N. E. (N. Y.) 111 (1919).

³⁸ *Id.*, 115.

³⁹ *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691 (1892); *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961 (1905); *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741 (1892).

In *Bull v. Burton* the majority of the court argue that the title was not marketable because although no injunction would be granted to enforce the restrictions yet the purchaser with notice would be liable to an action for damages upon the covenant. The proposition that damages may be recovered in these cases is open to two decisive objections. If the damages are to be recovered at law, it must be because the burden of the restrictions runs with the land on conveyance of a fee simple. If the damages are to be awarded in equity it must be on the theory that the plaintiff has something subsisting and of value in the eyes of a court of equity which is taken from him and

have turned to the contract theory and treated these cases on lines of specific performance.⁴⁰ It is submitted that the sound course is to hold that when the purpose of the restrictions can no longer be carried out the servitude comes to an end; that the duration of the servitude is determined by its purpose. If imposed for a fixed time, it will last no longer, but it may not last so long if the purpose becomes unattainable in the meantime. When the original purpose can no longer be carried out, the same reasons that established its existence are valid to establish its termination. There is then nothing left to protect by injunction and nothing for which to award damages.⁴¹

Analogous questions are raised by covenants not to compete with a business sold by covenantor to covenantee. In such cases as *Abergarw Brewery Co. v. Holmes*⁴² similar covenants for the benefit of a business impose restrictions upon the use of property and may be said to create equitable servitudes in such property appurtenant to the business. But in cases like *Francisco v. Smith*⁴³ we cannot think in such terms. *Sickles v. Lauman*⁴⁴ is a recent case of the same type as *Francisco v. Smith*. Defendant had sold a business to plaintiff's assignor with a covenant not to compete with that business in the locality in question for five years. As in *Francisco v. Smith* the plaintiff, purchaser of the business from the covenantee, took an express assignment of the covenant. Also, as in *Francisco v. Smith*, the court considered that no express assignment was necessary; that the covenant could have no existence apart from the business it was intended to protect, and that whoever acquired that business was in equity entitled to enforce the

for which he is to be compensated. In that view the judicial award of damages amounts to condemnation of the servitude without legislative authority and for a private use. When the Massachusetts legislature sought to provide for such condemnations in the Land Court, the Supreme Court was compelled to hold the proceeding unconstitutional. *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 243, 117 N. E. 244 (1917).

⁴⁰ In addition to the cases just cited see *Sanford v. Keer*, 80 N. J. Eq. 240, 83 Atl. 225 (1912); *Orne v. Fridenberg*, 143 Pa. St. 487, 22 Atl. 832 (1891).

⁴¹ *Knight v. Simmonds*, [1896] 2 Ch. 294, 297; *McArthur v. Hood Rubber Co.*, 220 Mass. 372, 109 N. E. 162 (1915); *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 243, 117 N. E. 244 (1917). See fuller discussion of this matter in 31 HARV. L. REV. 876-879.

⁴² [1900] 1 Ch. 188. Compare *Wilkes v. Spooner*, [1911] 2 K. B. 473, and the note in 24 HARV. L. REV. 574.

⁴³ 143 N. Y. 488, 38 N. E. 980 (1894).

⁴⁴ 169 N. W. (Ia.) 670 (1918).

covenant.⁴⁵ In other words, the restriction was held to be appurtenant to the business. But if we think of it in this way, what is the servient property in such a case as *Francisco v. Smith* or *Sickles v. Lauman*? Certainly we cannot talk about a restriction on the covenantor's general substance — as the French would say, upon his patrimony. Servitudes exist only in specific things. Nor can we think of such restrictions as imposing a servitude upon the name considered as property. Obviously in such a case as *Sickles v. Lauman* covenantor would not be allowed to compete in the same locality under another name. What we really have here is an application of the doctrines of equity that the incident will pass with the principal thing without any formal assignment. Hence the right to enforce the personal promise made by the vendor for the benefit of and to protect the business and good will passes to the assignee of the business without requiring any assignment of the covenant. There is no more than a personal claim against covenantor, but that claim is an incident of the business and will pass therewith because its purpose and intent can only be carried out in that way and equity looks to that as the substance, and not to its form. It is significant that continental commercial law has reached the same result.⁴⁶

In connection with equitable servitudes attention should also be called to *Barker v. Stickney*,⁴⁷ involving the question of restrictions upon chattels, which was fully discussed in a prior issue of this REVIEW.⁴⁸

10. CONVERSION

An old question came up in a new form in *Re Boshart's Estate*.⁴⁹ There vendor in North Dakota contracted to sell lands in New

⁴⁵ To the same effect, *Didlake v. Roden Grocery Co.*, 160 Ala. 484, 49 So. 384 (1909); *Fairfield v. Lowry*, 207 Mass. 352, 93 N. E. 598 (1911); *Gompers v. Rochester*, 56 Pa. St. 194 (1867); *Public Opinion Pub. Co. v. Ransom*, 34 S. D. 381, 148 N. W. 838 (1914); *Palmer v. Toms*, 96 Wis. 367, 71 N. W. 654 (1897); *Parnell v. Dean*, 31 Ont. 517 (1899).

⁴⁶ "The obligation of the first seller has an intimate relation to the business; it contributes to augment its value. One would naturally suppose that in reselling it the first buyer intended to guarantee the sub-purchaser against the acts of the first seller and to assign to the sub-purchaser his right to proceed against the vendor." 3 LYON CAEN ET RENAULT, *TRAITÉ DE DROIT COMMERCIEL*, 4 ed., § 249 *ter*.

⁴⁷ [1918] 2 K. B. 356.

⁴⁸ 32 HARV. L. REV. 278.

⁴⁹ 107 Misc. 697, 177 N. Y. Supp. 567 (1919), *aff'd* 188 App. Div. 788, 177 N. Y. Supp. 574 (1919).

York to a purchaser, the latter to take possession and pay in installments and conveyance to be made when all was paid. At vendor's death, purchaser was in default. The question was whether the land was subject to a "transfer tax" in New York as being "tangible property" left by the deceased vendor. Both courts held rightly that it was not; that the deceased left a claim against purchaser for the purchase money which was "intangible property." Although purchaser was in default, vendor could have made him take and the chose in action upon the contract went to his representative, who could assert that the legal title was held as security therefor. Moreover, although time was expressly made of the essence, the contract provided only for termination at the option of vendor in case of default and this option had not been exercised at the time of his death. As this condition subsequent had not operated to terminate the vendor-purchaser relation, in any view a court of equity must have held that vendor left a chose in action, not land, and that the tax did not attach thereto.

In *Miedema v. Wormhoudt*⁵⁰ a contract by purchaser to sell to a third person, while purchaser's contract with vendor was still executory, was treated as a conveyance of purchaser's equitable ownership, the same as an assignment. In that view, in such a case as *Bird v. Hall*,⁵¹ it would have made no difference whether purchaser in the original contract assigned his contract to the second purchaser or made a new contract with the latter to sell him the land. This ought to be the law. Such a view is also significant for cases where *cestui que trust* declares himself trustee for a second *cestui* and thereafter assigns to another.⁵² If second *cestui* became equitable owner, there was no interest to give to the assignee and, as the right of first *cestui* was equitable only, assignee got no legal power. On the other hand, we are told in *Bishop v. Barndt*⁵³ that purchaser by contracting to convey to a third person could not "create a privity of contract" between subpurchaser and vendor, and that without an assignment subpurchaser could not

⁵⁰ 288 Ill. 537, 123 N. E. 596 (1919).

⁵¹ 30 Mich. 374 (1874).

⁵² See *Phillips v. Phillips*, 4 De G. F. & J. 208 (1861); *Cave v. Mackenzie*, 46 L. J. Ch. 564 (1877); *Cave v. Cave*, 15 Ch. D. 639 (1880); *Hill v. Peters* [1918] 2 Ch. 273. But compare Dean Ames's view, "Purchase for Value without Notice," 1 HARV. L. REV. 1, 8-12.

⁵³ 29 Cal. App. Dec. 747, 184 Pac. 901 (1919).

object to a decree of strict foreclosure as entailing a forfeiture. In that case time was expressly made of the essence and under the decisions in California timely performance was a condition precedent.⁵⁴ Hence, there was no equitable ownership to convey to subpurchaser.

Conversion by condemnation proceedings was involved in *New York R. Co. v. Cottle*.⁵⁵ Land was in course of condemnation for a railroad. The owner died after accepting the report of the commissioners and confirmation of the report on his motion. Afterwards the damages awarded were claimed by creditors on the one hand and by the state on the other hand as having succeeded to the legal title of which the landowner had not been actually divested at the time of his death. The court held properly that after confirmation of the report the landowner had only a claim against the railroad company for money, that the latter was then equitable owner of the land and that the money should go to the creditors.

A group of recent cases present different aspects of the effect of conditions precedent to the vendor-purchaser relation. In *Pickens v. Campbell*⁵⁶ the purchase money was to be paid in installments and, in accordance with prior decisions in that jurisdiction, time was of the essence, although no words of that import were expressly used. Accordingly the court held payment of each installment at the time fixed a condition precedent, so that there was no vendor-purchaser relation at vendor's death when installments remained unpaid and hence the contract was not part of the vendor's personal estate. Assuming that there was really a condition precedent and not a condition subsequent working a forfeiture,⁵⁷ the case would be similar to an option contract and the result would be right. In *Vigars v. Hewins*⁵⁸ purchaser in an option contract borrowed of assignee the money with which to exercise the option by making the required payment and (1) delivered the written contract to assignee, (2) agreed with assignee to execute a written assignment to him. Three months later purchaser executed a written assignment accordingly, but in the meantime a creditor had obtained a judgment against purchaser which by statute was a lien

⁵⁴ *Glock v. Howard & Wilson Co.*, 123 Cal. 1, 55 Pac. 713 (1898).

⁵⁵ 187 App. Div. 131, 175 N. Y. Supp. 178 (1919).

⁵⁶ 104 Kan. 425, 179 Pac. 343 (1919).

⁵⁷ The position of the Kansas courts on this point will be considered later.

⁵⁸ 169 N. W. (Ia.) 119 (1918).

on his equitable interest in lands. The court held rightly that the unexercised option did not give rise to any equitable ownership upon which the judgment would be a lien;⁵⁹ that delivery of the instrument created no equitable lien upon the contract nor upon the equitable interest in the land acquired by exercise of the option, but that the agreement to execute a written assignment did create such a lien because the agreement was specifically enforceable in equity. Delivery of the written contract would not create such a lien, at least as against third persons, because possession of the instrument would not control assertion of the contract in court or exercise of the option. The contract could be proved by any note or memorandum signed by the vendor. Hence the case is not like those where a policy of life insurance or a savings bank book or, perhaps, a letter of credit⁶⁰ is delivered to the creditor or assignee, but is rather like those in which, in American jurisdictions where recording acts prevail, title deeds are so delivered.⁶¹ Possession of the paper did not give a practical control over the claim. But the contract to assign, specifically enforceable against purchaser, created an equitable lien when the option was exercised, just as a contract to procure title to Blackacre and convey to purchaser will make the purchaser equitable owner when title to Blackacre is procured.⁶² Such cases might also be put on the ground of constructive trust. If, after exercise of the option, purchaser were to keep both the equitable estate and the money paid him to enable

⁵⁹ There are *dicta* that the holder of an unexercised option is equitable owner — that there is a conversion subject to reversion if the option is not exercised. *Keep v. Miller*, 42 N. J. Eq. 100, 107, 6 Atl. 495 (1886); *House v. Jackson*, 24 Ore. 89, 99, 32 Pac. 1027 (1893); *Kerr v. Day*, 14 Pa. St. 112, 114 (1850); *McKay v. Carrington*, 1 McLean (U. S.) 50, 54 (1829). If this were so, an option contract would create a present equitable ownership and hence an indefinite option could not be held to infringe the rule against perpetuities. But it cannot be so. "It is well settled that where there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee; the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified." *Kindersley, V. C.*, in *Ranelagh v. Melton*, 2 Drew. & Sm. 278, 281-282 (1864). The *dicta* first cited all rest mediately or immediately on *Lawes v. Bennett*, 1 Cox Ch. 167 (1785), which is now held not to mean that the option contract works a conversion at once. *In re Marlay*, [1915] 2 Ch. 264.

⁶⁰ See *Hershey*, "Letters of Credit," 32 HARV. L. REV. 1, 29-30.

⁶¹ 3 POMEROY, EQUITY JURISPRUDENCE, § 1265.

⁶² *Rutland v. Brister*, 53 Miss. 683, 686 (1878).

him to exercise it and in consideration of his agreement to assign, he would be enriched unjustly at the expense of the assignee. Hence equity may well treat him as constructive trustee of the estate.⁶³ In either event the right of assignee attached to the equitable estate at its very inception, while the statutory judgment lien could only take effect upon it after it had come into existence burdened with the equity or as assignee's property.⁶⁴

Another form of the same question is presented by cases as to the risk of loss. In *Amundson v. Severson*⁶⁵ the contract was made in October, 1909. Purchaser went into possession in March, 1910. Payments were made in March, 1911. Most of the land was washed away by the Missouri River in 1913. Thereafter vendor procured a good title. As a condition precedent to the vendor-purchaser relation had not been fulfilled at the date of the loss⁶⁶ and purchaser could not have been compelled to take as things then stood, the risk was on vendor, although purchaser was in possession, and the court so held. This is a good case to bring out that possession is not a material consideration in determining upon whom the risk of loss rests in a purchase of equity. The converse situation arose in *Maudru v. Humphreys*⁶⁷ where, all conditions precedent having been fulfilled, upon review of the authorities the risk of loss by fire was held to be upon purchaser although not in possession.⁶⁸ Pur-

⁶³ It is submitted that this is the reason of the doctrine discussed in 3 POMEROY, EQUITY JURISPRUDENCE, § 1288.

⁶⁴ Compare *Eyre v. Burmester*, 10 H. L. Cas. 90 (1862).

⁶⁵ 170 N. W. (S. D.) 633 (1919).

⁶⁶ *Green v. Smith*, 1 Atk. 572 (1738); *Broome v. Monck*, 10 Ves. 597, 612-613 (1805); *Savage v. Carroll*, 1 Ball & B. 265, 281 (1810); *Newton v. Newton*, 11 R. I. 390, 394 (1876).

⁶⁷ 98 S. E. (W. Va.) 259 (1919).

⁶⁸ Possession at the time of the loss as a criterion is argued by Professor Williston, "The Risk of Loss After an Executory Contract of Sale in the Common Law," 9 HARV. L. REV. 106. There is practically no authority for this view. A *dictum* in *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 608 (1912) (contract not enforceable in equity) and an overruled decision of an inferior court in New York, *Wicks v. Bowman*, 5 Daly, 225 (1874) are most in point. It is suggested by and argued on the analogy of the law as to sales of chattels. But three important distinctions have to be noted. (1) A contract for the sale of a chattel gives rise to no real right; such a right arises only upon transfer of the legal title. In equity, on the other hand, a contract for the sale of lands gives rise to a real right from the time when the contract is in the class of specifically enforceable undertakings. Indeed to-day, when in most jurisdictions the purchaser can record his contract and thus charge every one with constructive notice of his rights, he is often better protected in his equitable ownership than *cestui que trust*. (2) In case of a chattel, it is expedient to cast the risk of loss on the one in

chaser was in possession in *Linn County Bank v. Grisham*.⁶⁹ The court held that risk of loss by fire was upon the purchaser because the contract was "lawful and binding" at the time of the fire and hence the building was purchaser's property when burned. In *Neponsit Realty Co. v. Judge*,⁷⁰ after the contract a large part of the land was washed away. Following the settled rule in New York,⁷¹ the court held purchaser liable in a suit for specific performance.⁷²

possession because that puts pressure on him to care for it. In case of a building, the one in possession exercises his possession through having his property in the building, and the presence of his property therein is enough to induce him to care for the risk of fire even if the building is at another's risk. (3) Possession is not material with respect to the passing or existence of either legal or equitable title to land. Why, then, should it be material as to the incidents of equitable title?

⁶⁹ 185 Pac. (Kan.) 54 (1919).

⁷⁰ 106 Misc. 445, 176 N. Y. Supp. 133 (1919).

⁷¹ *Sewell v. Underhill*, 197 N. Y. 168, 172, 90 N. E. 430 (1910).

⁷² Considering how much has been made of the matter since Langdell (*BRIEF SURVEY OF EQUITY JURISDICTION*, 60 ff), there is really very little authority against the doctrine of equity as to risk of loss. Of the cases that have been cited as *contra*, two, *Thompson v. Gould*, 20 Pick. (Mass.) 134 (1838), and *Gould v. Murch*, 70 Me. 288 (1879), were oral contracts unenforceable because of the Statute of Frauds, and the actions were at law; in two more, *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796 (1900) (containing, by the way, a *dictum* in favor of the equity doctrine), and *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 698 (1912), the vendor-purchaser relation had not attached at the time of the loss because conditions precedent remained unfulfilled; in two more, *Wells v. Calnan*, 107 Mass. 514 (1871), *Powell v. Dayton Co.*, 12 Ore. 488, 8 Pac. 544 (1885), 14 Ore. 356, 12 Pac. 665 (1887), 16 Ore. 33, 16 Pac. 863 (1888), the action was brought at law by the vendor. In none of these cases was the equitable doctrine as to risk of loss in any wise involved. In the first four, purchaser could not have been compelled to take regardless of the loss. In the last two, when vendor sued at law for a breach he could not claim that purchaser was equitable owner. For the rest, *Cutcliff v. McAnally*, 88 Ala. 507, 512, 7 So. 331 (1889), is not even a strong *dictum*; *Davidson v. Insurance Co.*, 71 Ia. 532, 534, 32 N. W. 514 (1887), was a question of construction of an insurance policy; *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244 (1902), and *Bautz v. Kuhworth*, 1 Mont. 133, 136 (1869), were actions at law, and in *Bautz v. Kuhworth* plaintiff did not even show a breach at law on the part of vendor. The one case thoroughly in point on this side is *Wilson v. Clark*, 60 N. H. 352 (1880), a suit in equity by purchaser. But this case relies on *Thompson v. Gould* without any discussion and without noting that the contract there was unenforceable in equity and did not raise the question which it is assumed was decided. In *Kares v. Covell*, 180 Mass. 206, 62 N. E. 244 (1902), after a bond for a deed an incumbrance was imposed by operation of law. The court decided the case as one of construction of a covenant to "convey free of incumbrances," holding it to mean free of incumbrances at the time of conveyance. It says expressly that the cases as to equitable ownership are inapplicable to such a contract. Compare Sanborn, J., in *Nixon v. Marr*, 190 Fed. 913, 921 (1911), and cases there cited, showing that the same result would be reached under such a covenant by courts which adopt the doctrine of equitable ownership. Although the language of the Massachusetts cases is against the

Difficulty of arranging insurance has been one of the objections urged against the doctrine of equity as to risk of loss.⁷³ *Carnation Lumber Co. v. Tolt Land Co.*⁷⁴ gives the answer. There the policies were payable to vendor, purchaser, and mortgagee of vendor, according to their interests. It was held that assignee of purchaser, on paying the purchase money after loss, was entitled to the insurance. In other words, the matter of insurance is to be arranged exactly as is done habitually between mortgagor and mortgagee.⁷⁵

An interesting case, somewhat like *Rayner v. Preston*,⁷⁶ is *Doty v. Rensselaer Fire Insurance Co.*⁷⁷ By oral agreement between husband and wife, who were living apart, the husband was to provide her a home by giving her the use of certain land and the buildings thereon and was to keep the house thereon in repair and insured for her benefit. The wife went into possession and made improvements, so that the contract was enforceable in equity. After twelve years the house burned and the husband, having collected the insurance, refused to repair or to provide another home. The wife then sued the husband and the insurance company which had paid him the amount of the loss with knowledge of her claims. The lower court held there was no cause of action. The Appellate Division reversed the order, holding that the oral contract coupled with possession and improvements made the wife an equitable tenant for life, and that:

prevailing doctrine, something more decisive than *Kares v. Covell* or the statement in *Thompson v. Gould* that where the contract was not enforceable in equity the court at law could not recognize the doctrine of equitable ownership, is required to commit the court to rejection of a long-settled theory of courts of equity or of a consequence thereof sustained by the overwhelming weight of Anglo-American authority. It should be remembered, moreover, that *Thompson v. Gould* was decided in 1838, and that because of the narrowly limited equity jurisdiction in that state and the tardy course of legislation with respect thereto and consequent judicial caution in applying equitable doctrines, the older decisions in Massachusetts are "exceedingly misleading as authorities upon the powers and doctrines of equity in other states." 1 POMEROY, EQUITY JURISPRUDENCE, § 312.

⁷³ Williston, "The Risk of Loss After an Executory Contract of Sale in the Common Law," 9 HARV. L. REV. 106, 122.

⁷⁴ 103 Wash. 633, 175 Pac. 331 (1918).

⁷⁵ See RICHARDS, INSURANCE, 3 ed., 394.

⁷⁶ 18 Ch. D. 1 (1881).

⁷⁷ 188 App. Div. 29, 176 N. Y. Supp. 55 (1919), reversing 171 N. Y. Supp. (Misc.) 852 (1918).

"Whatever interest in the house the plaintiff had, a corresponding interest attaches to the insurance, which is a substitute for the house."

There is no citation or discussion, but the court asserts the proposition as something obvious. It might be supported on the basis of the dissenting opinion in *Rayner v. Preston* and the cases in accord or supposed to be in accord therewith. But it is submitted that the majority of the court in *Rayner v. Preston* was right.⁷⁸ In the New York case, the husband's contract to provide a home by giving the wife use of the land for life and keeping the house repaired and insured for her benefit was specifically enforceable. *Pace* the pronouncement of the Court of Appeals in *Beck v. Allison*,⁷⁹ she ought to be able to compel him to keep the house repaired and to rebuild it if it burned down; and if he contracted to keep it in-

⁷⁸ In *Rayner v. Preston* there was a contract for the sale of land with buildings. The buildings were insured in favor of vendor before the contract. They were injured by fire before the time for conveyance and vendor collected the insurance. Purchaser sued to get the insurance money as being held in trust for him or in the alternative to compel vendor to use the money to restore the building. The bill was dismissed, James, L. J., dissenting on the ground that the insurance money was an altered form of the *res* of which purchaser was equitable owner. This cannot be so. Insurance is a contract of indemnity. It was not the buildings that were insured, but the interest of the vendor in the buildings. Vendor has a beneficial interest to protect, the same as a mortgagee, whereas trustee has no such interest and can only act for *cestui que trust*. Of the cases that are supposed to be in accord with the dissenting opinion in *Rayner v. Preston*, the most part were decided under old forms of policy and involve only the question who was insured. *E.g.*, *Gate v. Smith*, 4 Edw. Ch. (N. Y.) 702 (1846); *Insurance Co. v. Graybill*, 74 Pa. St. 17 (1873). Others are the merest *dicta*, *e.g.*, *Phinizer v. Guernsey*, 111 Ga. 346, 36 S. E. 796 (1900), where the loss fell on vendor because title was imperfect at the date of the loss and vendor was insured; *Insurance Co. v. Updegraff*, 21 Pa. St. 513 (1853), where vendor was held to have an insurable interest in his security although purchaser was equitable owner; *Reed v. Lukens*, 44 Pa. St. 200 (1863), where the policy had been assigned to purchaser. In *Skinner v. Houghton*, 92 Md. 68, 48 Atl. 85 (1900), which is more in point, the facts were similar to those in *Rayner v. Preston* except that some of the insurance companies had not paid and purchaser sued both vendor and the insurers. Some of the insurers refused to pay because vendor had represented he was owner and were released. Some offered to pay whoever was entitled. As to these, vendor was held trustee. Here the companies consented to the transfer, so that it was as if vendor and purchaser were insured as their interests might appear and hence vendor must account to the purchaser for the surplus after his claim for balance of the purchase money was satisfied.

Phoenix Assurance Co. v. Spooner, [1905] 2 K. B. 753, and *Kortlander v. Elston*, (C. C. A.) 52 Fed. 180 (1892), are in accord with the majority of the court in *Rayner v. Preston*.

⁷⁹ 56 N. Y. 366 (1874). It is significant that New York courts are driven to get around *Beck v. Allison* by such doubtful arguments as that in the present case.

sured, she ought to be able to compel him to use the insurance money in rebuilding. That is what in substance he agreed to do, and the legal remedy of damages for breach of the contract is not available because of the Statute of Frauds and would not get her what she is entitled to. But what claim has she against the insurance company? Unless the insurance money can be called an altered form of a *res* which she owned in equity, there would seem to be none.

In *Lewis v. Hall*⁸⁰ purchaser not in possession and in default gave a mortgage on crops growing on the land. He made no effort to perform and did not call for possession. It was held rightly that the mortgage did not convey anything. Because of his default he could not have held the vendor at the time when he made the mortgage and was not equitable owner unless vendor elected to treat him as such. Likewise vendor in default cannot claim that purchaser is his debtor in equity. In *Lowther-Kaufman Oil Co. v. Gunnell*⁸¹ purchaser was not in possession. Third persons claimed the land and it became necessary for vendor to sue them in order to remove the cloud on his title. Purchaser refused to complete by paying the purchase money till this had been done. It was held that he was not chargeable with interest until after the decree removing the cloud had been affirmed by the highest court of the state and the title had thus become marketable.

Text writers in cases of this sort as well as in cases of risk of loss are wont to say that when the contract is in the class of those which equity will specifically enforce, vendor is "trustee of the legal title" and purchaser is "trustee of the purchase money," or that vendor is "equitable owner of the purchase money."⁸² This unhappy mode of speech appears to begin with Lord Hardwicke in *Pollexfen v. Moore*.⁸³ It has often been repeated in judicial opinions,⁸⁴ and

⁸⁰ 27 Cal. App. 422, 176 Pac. 171 (1918).

⁸¹ 184 Ky. 587, 212 S. W. 593 (1919).

⁸² 1 STORY, EQUITY JURISPRUDENCE, § 790; 1 POMEROY, EQUITY JURISPRUDENCE, § 105.

⁸³ 3 Atk. 272, 273 (1745). The earlier case of *Davie v. Beardsham*, 1 Cas. Ch. 38, 39, says no more than that vendor "stood trusted" for the purchaser.

⁸⁴ *Estate of Dwyer*, 159 Cal. 664, 675, 115 Pac. 235 (1911); *Rhodes v. Meredith*, 260 Ill. 138, 143, 102 N. E. 1063 (1913); *Williams v. Haddock*, 145 N. Y. 144, 150, 39 N. E. 825 (1895); *Champion v. Brown*, 6 Johns. Ch. (N. Y.), 398, 403 (1822).

is to be seen in several decisions during the past year.⁸⁵ The objections to this mode of stating the equitable doctrine are clear enough. Vendor is much more like a mortgagee than like a trustee and purchaser cannot be called trustee of anything in any proper use of the term "trust." What we may say is that a court of equity regards purchaser as owner, and vendor as creditor for the purchase money, holding the legal title for his security. Some courts have put it in this way.⁸⁶ The prevailing mode of expression arose from the analogy of a covenant in a settlement to lay out certain trust moneys in land. In such case the moneys were treated as already land. Story, in discussing the effect of a contract for the sale of land,⁸⁷ cites Fonblanque,⁸⁸ and the latter is speaking not of vendor and purchaser but of covenants in a settlement.

When we speak of conversion we are not describing a condition of the property for all purposes with respect to everybody but are giving a name to a situation resulting from the application of equitable doctrines to a state of facts between certain parties. This is well illustrated by a recent litigation extending over two states.

In *Re Loyd's Estate*⁸⁹ and *Norris v. Loyd*,⁹⁰ a testator domiciled in California had property in California and lands in Iowa. He directed his executors to sell the Iowa lands and divide the proceeds among his twelve children. In a litigation in California, to which the widow and the twelve children were parties, one H had established that he was a duly acknowledged illegitimate child of the testator, and that as such, under the law of California, although not mentioned in the will, he was entitled to take two thirty-ninths of the whole estate "wherever situated." Under the laws of Iowa, on the other hand, there being a valid will, H was excluded by the gift to the twelve legitimate children. The widow and legitimate children agreed to hold the Iowa land as land and so notified the

⁸⁵ *New York R. Co. v. Cottle*, 187 App. Div. 131, 175 N. Y. Supp. 178 (1919); *Neponsit Realty Co. v. Judge*, 106 Misc. 445, 176 N. Y. Supp. 133 (1919); *Johnson v. Merritt*, 99 S. E. (Va.) 785, 788 (1919) (a contest as to priority of a statutory judgment lien); *Maudru v. Humphreys*, 98 S. E. (W. Va.) 259 (1919).

⁸⁶ *Longwell v. Bentley*, 23 Pa. St. 99, 102 (1854); *Bender v. Luckenbach*, 162 Pa. St. 18, 22, 29 Atl. 295 (1894).

⁸⁷ 1 STORY, EQUITY JURISPRUDENCE, § 790.

⁸⁸ EQUITY, Book 1, chap. 6, § 9.

⁸⁹ 175 Cal. 699, 167 Pac. 157 (1917).

⁹⁰ 183 Ia. 1056, 168 N. W. 557 (1918).

executors, who then refused to sell. In California the Superior Court ordered the executors to sell the land and removed them for disobedience of the order. These orders were reversed by the Supreme Court. In Iowa, H intervened in a partition suit between the twelve legitimate children and the widow. It was held that he had no claim. His proposition was that the provision for sale and division of the proceeds made the Iowa land personalty for all purposes and as to everybody and as such brought it within the operation of California law, and that no reconversion could be made thereafter by agreement of the widow and the devisees in prejudice of his rights unless he was a party thereto. This contention was properly rejected by both courts. As between the devisees, as between them and the widow, as between their heirs and their executors, if one of them had died after testator's death, and as between them and persons claiming against or under them thereafter, the land was to be held personalty and any one who acquired an interest on this basis would have been a necessary party to any reconversion. But H did not claim under them, nor had he acquired any interest or any claim against them after testator's death. His claim was prior to, not under or depending on, the will, and by the law of Iowa, where the land lay, the will operated to cut it off.

Another illustration that conversion is a name given to results reached on other grounds, not a fact from which we may reason for all purposes and with respect to the rights of all parties, is afforded by *Kneisley v. Kneisley*.⁹¹ Testator directed all his estate, both real and personal, to be sold, one third of the proceeds to be paid to his wife and the rest to certain named beneficiaries. The widow elected not to take under the will. It was held that the crops on the land between testator's death and the sale of the lands that remained to be sold under the will went to the heirs, who took the freehold beneficially pending the sale. As between those claiming under or through the beneficiaries, the whole blended fund was personalty. But the beneficiaries were only to take the proceeds after sale. Down to the sale they had no interest in the lands. Their claim was against the executors who were given a power to sell the land. Accordingly no one was in a position to claim against the heirs who took the legal title subject to having it divested by

⁹¹ 107 Atl. (Md.) 195 (1919).

the executors exercising their power of sale and dividing the proceeds among the beneficiaries. There is an analogous situation where vendor marries after the contract to sell land, breaks the contract in some material respect, and dies. If purchaser then elects to sue at law for the breach, vendor's widow will have dower.⁹² If in such a case we talk about conversion and reconversion, we may well find difficulty in determining whether reconversion should date from the making of the contract or from the breach or from the election to sue for damages. But if we ask, as between vendor's widow, his heir and his executor, what he left, we see that he left legal title to the land, subject to the power of purchaser to assert legal ownership if he chose, but he left no chose in action against purchaser to go to his executor, since at his death he could not sue purchaser and the latter was not in equity debtor for the purchase money. The widow acquired dower at law and there was no one in a position to make her hold it in equity for his benefit.

Foreclosure by the vendor was involved in *Hawkins v. Rodgers*.⁹³ In that case, purchaser had made improvements. It was held that he could have strict foreclosure only on condition of paying for the improvements. Otherwise the foreclosure must be by sale. The Supreme Court of Wisconsin has held that strict foreclosure is the only proper decree.⁹⁴ This holding is based on the palpably fallacious argument that "the title did not pass by the contract, but remained in the vendor;" as if the title to mortgaged land were not

⁹² See *Day v. Solomon*, 40 Ga. 32 (1869). Compare the situation in *Hopkinson v. Dumas*, 42 N. H. 296 (1861).

⁹³ 91 Ore. 483, 179 Pac. 563 (1919).

⁹⁴ *Button v. Schroyer*, 5 Wis. 598 (1856); *Nelson v. Jacobs*, 99 Wis. 547, 555, 75 N. W. 406 (1898), citing many decisions of that court to the same effect. See also *Todd v. Simonton*, 1 Colo. 54 (1867). The great weight of authority in the United States is *contra*: *Haley v. Bennett*, 5 Port. (Ala.) 452 (1837), and later cases in Alabama; *Lewis v. Boskins*, 27 Ark. 61 (1871), and later cases in that state; *Sparks v. Hess*, 15 Cal. 186 (1860); *Pleasants v. Fay*, 13 App. D. C. 237 (1898); *Andrews v. Sullivan*, 7 Ill. 327 (1845), and later cases in Illinois; *Lagow v. Badollet*, 1 Blackf. (Ind.) 416 (1826), and later cases in Indiana; *Abbott v. Moldestad*, 74 Minn. 293, 77 N. W. 227 (1898); *Walker v. Casgrain*, 101 Mich. 604, 60 N. W. 291 (1894), and later cases in Michigan; *Gaston v. White*, 46 Mo. 486 (1870), and later cases in Missouri; *Gardels v. Klope*, 36 Neb. 493, 54 N. W. 834 (1893); *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398 (1822); *Clark v. Hall*, 7 Paige (N. Y.), 382 (1839); *Vance v. Blakely*, 62 Ore. 326, 123 Pac. 390 (1912); *Whitmire v. Boyd*, 53 S. C. 315, 349, 31 S. E. 306 (1898); *Brace v. Doble*, 3 S. D. 110, 52 N. W. 586 (1892); *Wade v. Greenwood*, 2 Rob. (Va.) 474 (1843), and later cases in that state.

in the mortgagee,⁹⁵ and as if in each case vendor or mortgagee, being parties to the suit, could not be compelled to convey to the purchaser at the sale under the decree of foreclosure by sale. Strict foreclosure should only be permitted where no substantial payment has been made,⁹⁶ or where the present value of the land is less than the amount due vendor,⁹⁷ or where, as in the present case, purchaser having made improvements under the contract, vendor elects to pay for them.⁹⁸

II. CONSIDERATION

If equity gives an extraordinary complementary remedy upon contracts where the legal remedy is inadequate to secure the legal right, we should expect a court of equity to limit its inquiry to the adequacy of the common-law remedy, the advisability of exercise of the chancellor's jurisdiction, if he finds he has jurisdiction, and the most just and effective mode of applying equitable remedies under the circumstances. Yet equity has not stopped there but has established a doctrine that the chancellor will not aid a volunteer although he claims under a sealed instrument, enforceable at

⁹⁵ The court was perhaps influenced by the statute in Wisconsin whereby mortgagor has the legal title and mortgagee a lien only (1 POMEROY, EQUITY JURISPRUDENCE, § 163, note 1) and overlooked the common-law situation to which equity applied foreclosure by sale.

⁹⁶ Strict foreclosure was held improper where part payment had been made, in *Andrews v. Sullivan*, 7 Ill. 327 (1845) (\$400 paid out of \$990); *Vail v. Drexel*, 9 Ill. App. 439 (1881); *Fitzhugh v. Maxwell*, 34 Mich. 138 (1876) (one-fourth paid); *Bank v. Thornburg*, 54 Neb. 782, 75 N. W. 45 (1898) (ten per cent paid). It was held proper where no payment had been made, in *Morgan v. Dalrymple*, 59 N. J. Eq. 22, 46 Atl. 664 (1899); *State v. Sheridan*, Clark Ch. (N. Y.) 533 (1841). It was allowed in *Fairchild v. Mullan*, 90 Cal. 190, 27 Pac. 201 (1891) (one-fourth paid but form of decree not objected to); *Southern R. Co. v. Allen*, 112 Cal. 255, 44 Pac. 796 (1896) (one-fifth paid, but court divided); *Denton v. Scully*, 26 Minn. 325, 4 N. W. 41 (1879) (\$2,000 paid out of \$5,800, but decided on demurrer to bill for strict foreclosure and general relief, and the court said the decree should direct a sale if that were more equitable). In *Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109 (1899), \$3,500 had been paid out of \$50,000. Here a strict foreclosure probably did not operate inequitably under the circumstances. The Supreme Court of Oregon holds that foreclosure by sale is the rule and "strict foreclosure the exception." *Flanagan v. Land Co.*, 45 Ore. 335, 77 Pac. 485 (1904); *Vance v. Blakely*, 62 Ore. 326, 123 Pac. 390 (1912). It allowed strict foreclosure in *Trust Co. v. Mackenzie*, 33 Ore. 209, 52 Pac. 1046 (1898), and *Vance v. Blakely*, *supra*, where on consideration of all the circumstances it appeared more equitable.

⁹⁷ *Vance v. Blakely*, *supra*.

⁹⁸ *Lytle v. Scottish American Mortgage Co.*, 122 Ga. 458, 50 S. E. 402 (1905).

law, and has a legal right.⁹⁹ I discussed this subject in another place recently,¹⁰⁰ where I attempted to show that there were at least six cases where the proposition that equity would not aid a volunteer did not apply or was not wholly true, and suggested a tendency to get away from the doctrine and to enforce deliberate promises simply as promises under one pretext or another. A recent decision affords a striking illustration of this tendency. In *McCrilles v. Sutton*¹⁰¹ husband and wife in 1894 executed an instrument under seal, to which M was a party, in which they recited that M had been given them to adopt when a child, that they had mistakenly assumed that he had been adopted by them, that they had always promised him that on the death of the husband he should have the same amount of property as their own son, and that he had served them faithfully, and promised "in consideration of love and affection and of the foregoing premises," of the promises theretofore made to M and "of the services performed . . . set forth in said premises," that he should have the same share in the property of the husband and wife that he would have had if he had been lawfully adopted. In 1901 the husband conveyed all his property to the wife, reserving a life estate. The wife died intestate in 1917. Thereupon M brought a bill for specific performance against the heirs of the wife and a decree in his favor was affirmed. It could not be claimed here that there was the "consideration" of blood relationship or of "natural love and affection." Moreover that doctrine has been confined in equity to the one case of covenants to stand seized to another's use. Nor is this a case of defective conveyance to a child by way of advancement

⁹⁹ *Jefferys v. Jefferys*, Cr. & P. 138 (1841), and subsequent cases in England. In many of the American cases cited for this doctrine there was no contract at law. There was a valid instrument at law in *Barrett v. Geisinger*, 179 Ill. 240, 249, 53 N. E. 576 (1899); *Black v. Cord*, 2 Har. & G. (Md.) 100 (1827); *Selby v. Case*, 87 Md. 459, 39 Atl. 1041 (1898); *Lamprey v. Lamprey*, 29 Minn. 151, 12 N. W. 514 (1882); *Vasser v. Vasser*, 23 Miss. 378, 382 (1852); *Bosley v. Bosley*, 85 Mo. App. 424 (1900); *Burton v. Le Roy*, 5 Sawy. (U. S.) 510 (1879). But most of these cases went off on other grounds. In *Graybill v. Brugh*, 89 Va. 895 (1893), the court denied specific performance of an option under seal because there was no consideration. In a later case; however, the same court treated such an option as an irrevocable offer. *Watkins v. Robertson*, 105 Va. 269, 54 S. E. 33 (1906). Also *Lamprey v. Lamprey*, *supra*, should be compared with *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612 (1885).

¹⁰⁰ "Consideration in Equity," 13 ILLINOIS L. REV. 667.

¹⁰¹ 173 N. W. (Mich.) 333 (1919).

where equity gives reformation under circumstances amounting to specific performance. But the case is not unlike those in which, the promisor being dead, the question was between those to whom the ancestor had promised to give and his heirs who took as a wind-fall, what had been promised to another.¹⁰² Here plaintiff was neither a child nor a creditor. Yet he was something very like both and there might be said to be a "meritorious consideration" in equity.¹⁰³ It differs from the cases of the latter type in that there was no attempt made to convey. The court is squarely and avowedly enforcing specific performance of an executory promise. If the contract is valid and enforceable at law it is an unjustifiable anomaly to require something more as a requisite of the only effective remedy which the legal system affords.

Another case in which, under one pretext or another, courts of equity specifically enforce a promise under seal without consideration is illustrated by *Thomason v. Bescher*.¹⁰⁴ Here there was a formal covenant to convey certain lands, on condition of payment (at the holder's option) of a specified sum within a time fixed. The court, following the all but unanimous current of authority,¹⁰⁵ decreed specific performance. There can be no quarrel with so desirable a result. But the reasoning is suggestive. The court begins by reminding us that a covenant under seal requires no consideration. It must needs qualify this, however, by admitting that equity requires a consideration before it will enforce an executory contract, even though it be under seal. Accordingly it cites the cases in which such instruments are treated as irrevocable offers, and suggests that in cases where equity has called for a consideration as a prerequisite of enforcing an option under seal "the mind of the judges was

¹⁰² *Wright v. Goff*, 22 Beav. 207 (1856); *Mason v. Moulden*, 58 Ind. 1 (1877); *Cummings v. Freer*, 26 Mich. 128 (1872); *Huss v. Morris*, 63 Pa. St. 367 (1869); *Brock v. Odell*, 44 S. C. 22, 21 S. E. 976 (1894).

¹⁰³ *Thompson v. Attfield*, 1 Vern. 40 (1682); *Colman v. Sarel*, 3 Bro. Ch. 12 (1789); *Baker v. Pyatt*, 108 Ind. 61, 9 N. E. 112 (1886). The sound view is that a "meritorious consideration" of itself will not support an executory promise. *Landon v. Hutton*, 50 N. J. Eq. 500, 25 Atl. 953 (1892); *Matter of James*, 146 N. Y. 78, 40 N. E. 876 (1895). *Contra*, *Crawford's Appeal*, 61 Pa. St. 52 (1869). See also *Re Hoffman's Estate*, 177 N. Y. Supp. (Misc.) 905 (1919).

¹⁰⁴ 176 N. C. 622, 97 S. E. 654 (1918).

¹⁰⁵ *Willard v. Tayloe*, 8 Wall. (U. S.) 557, 564 (1869); *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580 (1898); *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602 (1896); *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612 (1885); *Watkins v. Robertsor*, 105 Va. 269, 54 S. E. 33 (1906).

not specially called to the distinctions existent and usually observable between a mere offer to sell without consideration and without seal and one that is effective as a binding agreement by reason of the seal."¹⁰⁶ Whether we speak of an irrevocable offer¹⁰⁷ or of a power,¹⁰⁸ there is a covenant enforceable at law, and no obstacle and no just objection to enforcement in equity beyond a doctrine devised for executory or defectively executed gifts, which has no legitimate application to business transactions. The holder of an option under seal is to be something more than a mere recipient of the promisor's bounty.¹⁰⁹ And yet the option in and of itself is valuable, and for that the holder of the option under seal gives nothing. After all, we cannot blink the fact that in these cases the chancellor does enforce an executory promise on no other basis than declared intention plus a seal. It is an undesirable anomaly that a valid contract at law, free from all objection on grounds of fraud, coercion, or mistake, and a fair bargain, should be unenforceable in equity.

Where the option is given for a consideration, equity need have no difficulty in following the law. It should be enough if the law has for any reason reached the desirable result that a collateral promise to keep an offer open, made under seal or upon consideration, precludes revocation. It must be enough if there is a common-law consideration. Most of the difficulty which the courts have encountered grows out of the doctrine of mutuality of remedy. In *Starr v. Crenshaw*¹¹⁰ specific performance was granted in such a case.

Roscoe Pound.

HARVARD LAW SCHOOL.

[To be concluded]

¹⁰⁶ 176 N. C. 622, 628, 97 S. E. 654, 656 (1918).

¹⁰⁷ 6 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 773.

¹⁰⁸ ANSON, CONTRACTS, Corbin's ed., §§ 32, note 2, 50, note 3.

¹⁰⁹ *McMillan v. Ames*, 33 Minn. 257, 260, 22 N. W. 612 (1885).

¹¹⁰ 213 S. W. (Mo.) 811 (1919).

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STATE REGULATION OF PRICES UNDER THE FOURTEENTH AMENDMENT. — In the devious and somewhat whimsical history of the Fourteenth Amendment, while the courts have taken glances at the possibility of a state's embarkation upon a new economic route, they have never been called upon directly to face the question which would be raised by such a departure. But with the decision of the United States District Court for Montana that a statute giving a commission power to regulate the prices of all commodities is unconstitutional,¹ the fringe of that problem has been touched.

The causes which led to the passage of the Montana statute were the great increase in prices within the last few years, the curtailing of supplies and the straitened circumstances of a large part of the population of the state brought about by three successive years of drought, and the finding by a state commission that exorbitant profits were being made. The historical background of the act reaches to the Middle Ages. In England, from the fourteenth century, there were statutes fixing the prices in businesses not within the modern conception of public utilities,² and there is evidence that such statutes were passed by American provincial assemblies.³ During the Revolution, generally at the in-

¹ *Holter Hardware Co. v. Boyle*, the District Court of the United States for the District of Montana, No. 149 (1920). See RECENT CASES, p. 261, *infra*.

² See 23 EDW. III, Stat. I, c. 6 (1349); 25 HEN. VIII, c. 2 (1533); 31 GEO. II, c. 29, sect. 7, 20 (1758). See SHEPPARD, OFFICE OF COUNTY JUSTICE, part 2, c. 7, sect. 27; and STICKNEY, STATE CONTROL OF TRADE AND COMMERCE, chapters 1 and 3.

³ See 2 ACTS OF ASSEMBLY OF PROVINCE OF PENNSYLVANIA, 327 (act of 1758).

stigation of the Continental Congress,⁴ at least eight of the thirteen states passed laws fixing the price of almost every commodity in the market.⁵ These laws were evoked by what was considered the exorbitant increase in prices. Within a few years they all seem to have been repealed, partly because there was no machinery adequate to enforce them, partly because of resentment that a few of the states did not take part in the movement. At the time the Fifth Amendment was ratified, however, at least two states had statutes providing for the regulation of the price of bread.⁶

There is little authority even bearing on the point involved.⁷ In the Supreme Court's consideration of cases under the Fourteenth Amendment, the existence of Anglo-Saxon precedent for the statute⁸ and the conditions which led to its passage⁹ have been important and sometimes controlling factors. If a generalization may be ventured of the cases as a whole, the actual decisions, despite much discussion of the extent to which the businesses regulated were affected with a public interest, seem to involve no more than a determination of whether the aim of the legislature was a legitimate aim of state government, and, if so, whether the social interest was sufficiently strong to counterbalance the interference with individual interests¹⁰ — a question primarily for the legislature.¹¹

The aim of the Montana legislature — the protection of its citizens against extortion — has been held a proper function of government.¹²

⁴ 9 JOURNALS OF THE CONTINENTAL CONGRESS, 956 (resolution of Nov. 22, 1777).

⁵ ACTS AND LAWS OF CONNECTICUT, November Session, 1776: *An Act to Prevent Monopolies and Oppression by excessive and unreasonable Prices for many of the Necessaries and Conveniences of Life*, amended in May Session, 1777, and February Session, 1778; LAWS OF MARYLAND, June, 1777, c. XI, sect. 9; LAWS OF MARYLAND, October, 1778, c. VIII, sect. 8; MASSACHUSETTS LAWS, Third Session, January, 1777, c. XIV; amended in Fourth Session, May, 1777, c. XLVI; NEW HAMPSHIRE SESSION LAWS, 1777: *An Act for regulating the Prices of Sundry Articles*, p. 43, amended in the same year, p. 55; NEW JERSEY ACTS, Fourth Assembly, First Sitting, October, 1779, c. XII; LAWS OF NEW YORK, First Session, c. XXXIV (1778); LAWS OF PENNSYLVANIA, Second Assembly, Second Sitting, April, 1778, c. LX; RHODE ISLAND LAWS: *An Act to prevent Monopolies and Oppression, etc.*, December, 1776, amended in May, 1777. The Maryland act fixed a maximum rate of profit; the other acts set out the prices at which commodities could be sold.

⁶ MARYLAND LAWS OF 1789, c. 8, sect. 2 (HERTY'S DIGEST OF THE LAWS OF MARYLAND, 1799, p. 250); 5 Statutes of South Carolina, 186 (1791); (1 SOUTH CAROLINA ACTS OF ASSEMBLY, 1791-1794, p. 88).

⁷ There is a decision that a statute providing for the regulation of the price of bread does not violate the state constitution. *Guillotte v. City of New Orleans*, 12 La. An. 432 (1857). See also *Mayor of Mobile v. Yuille*, 3 Ala. 137 (1841), for a *dictum* to the same effect. For a *dictum* that it is constitutional to fix the price of school-books, see *Polzin v. Rand, McNally & Co.*, 250 Ill. 561, 571, 95 N. E. 623, 625 (1911). There are several *dicta* that a general price-fixing law would be unconstitutional. See *American Surety Co. of New York v. Shallenberger*, 183 Fed. 636, 639 (1910); *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 345, 66 N. E. 895, 898 (1903). But see *Munn v. Illinois*, 94 U. S. 113, 125 (1876).

⁸ *Griffith v. State of Connecticut*, 218 U. S. 563 (1910) (upholding a state usury law).

⁹ *Clark v. Nash*, 198 U. S. 361 (1905) (upholding a Utah statute which permitted condemnation by individuals for the purpose of irrigating their lands).

¹⁰ See brief for the defendant in error in *Stettler v. O'Hara*, 243 U. S. 629 (1916).

¹¹ See James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 HARV. L. REV. 129.

¹² *Griffith v. State of Connecticut*, *supra*. That the protection of the buyers of goods is a legitimate motive for state action is recognized in *Central Lumber Co. v. State of*

The method employed was not regarded by the men who founded our nation as a violation of any fundamental right, and its use in modern times, in view of the circumstances, does not seem so unreasonable as to be an abuse of legislative discretion. If fixing the interest at which money can be lent is a reasonable method of preventing usury, regulation of the prices at which commodities can be sold seems to be a reasonable method of preventing exorbitant profits. The court intimates that, had the statute been confined to necessities, it might have been constitutional. But usury statutes cover all loans, whatever the purpose for which the money is to be used. Laws against monopolies and combinations in restraint of trade do not exclude monopolies and combinations in businesses which the community could do without.¹³ Certainly the Revolutionary price-fixing statutes made no distinction.¹⁴ Nor is it at all evident that the creation of the Montana commission with the general power to act where it thought action advisable was not a far more effective and more just measure than would have been an arbitrary demarcation of the ground which the commission could cover. The more elastic method of a commission is clearly preferable to the Revolutionary device of setting out the prices in the act. While the power given the commission is great, the provision for court review of any price-fixing claimed to be unreasonable would operate to prevent its abuse.

If the economic pendulum is in reality swinging back, courts should hesitate to declare the Constitution an obstacle in its path. Here the situation involves not a deliberate change in the theory of government but only a state's effort to meet a temporary and difficult problem. That the effort involved a greater swerving from the doctrine of "The Wealth of Nations" than the last few generations have seen is enough to raise the question of constitutionality, but it should not be enough to answer it. As Mr. Justice Holmes has said,¹⁵ "due process" is not synonymous with "laissez-faire"; it is more important that a state be allowed to meet its problems in its own way than it is to keep inviolate any theory of economic expediency.

EXTRATERRITORIAL ENFORCEMENT OF INHERITANCE TAX BY SUIT AGAINST BENEFICIARIES. — There are some limits to a sovereign's power to tax.¹ In our political system the power of each sovereign

South Dakota, 226 U. S. 157 (1912), where a statute making it criminal for any one engaged in the production, manufacture, or distribution of any commodity in general use to discriminate in price between different sections was held constitutional.

¹³ Central Lumber Co. v. State of South Dakota, *supra*.

¹⁴ See note 5, *supra*, and the comprehensive nature of the acts there cited. The Rhode Island Act of 1776, for instance, fixed the price of wheat, rye, corn, wool, pork, swine, beef, hides, salt, rum, sugar, molasses, cheese, butter, peas, beans, potatoes, stockings, shoes, cotton, oats, flax, coffee, tallow, turkeys, geese, charcoal, hard soap, English hay, teaming work, staves, tobacco, breeches, cocoa, beaver hats, lime, milk, and shaves.

¹⁵ "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U. S. 45, 75 (1905).

¹ "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State." Field, J., in *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300, 319 (1872).

extends only to his territorial boundaries.² His jurisdiction to tax may equal his power, but can never exceed it.³ So it has long been thought that a state cannot tax interests in foreign realty⁴ or personalty having a *situs* without its borders⁵ or a person not domiciled therein.⁶ Likewise a privilege is taxable only by the sovereign which affords the privilege.⁷

The Appellate Division of the Supreme Court of New York has lately ridden rough-shod over these doctrines of territorial limitations upon power. A resident of Colorado died in New York leaving no property of any sort in Colorado, but a great deal of personalty in New York. His will was admitted to original probate in New York as the will of a non-resident; New York transfer taxes were assessed and collected. Two years later Colorado served the New York beneficiaries by publication with notice of assessment proceedings in a county court of Colorado which by statute had jurisdiction to proceed as in an action *in rem*.⁸ No one appeared, but the court issued its order that the tax had been assessed. The state of Colorado then brought an action⁹ in New York against the beneficiaries.¹⁰ The Supreme Court dismissed the complaint,¹¹ but its judgment was unanimously reversed by the Appellate Division.¹² It is believed that the latter decision is unsupportable.¹³

There was no judgment on which Colorado could sue in New York. A tax assessment order is not a judgment.¹⁴ It can create no lien upon

² *Erie Railroad v. Pennsylvania*, 153 U. S. 628 (1894). See BEALE, CONFLICT OF LAWS, § 104; GRAY, LIMITATIONS ON TAXING POWER, § 69.

³ "The power to tax involves the power to destroy." Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 431 (1819). See Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587.

⁴ *Louisville, etc. Ferry Co. v. Kentucky*, 188 U. S. 385 (1903). See *Winnipiseogee, etc. Co. v. Gilford*, 64 N. H. 337, 10 Atl. 849 (1887).

⁵ *Hays v. Pacific Mail S. S. Co.*, 17 How. (U. S.) 596 (1854).

⁶ *Dewey v. Des Moines*, 173 U. S. 193 (1899); *On Yuen Hai Co. v. Ross*, 8 Sawy. (U. S.) 384, 14 Fed. 338 (1882); *City of New York v. McLean*, 170 N. Y. 374, 63 N. E. 380 (1902); *State v. Ross*, 23 N. J. L. 517 (1852).

⁷ *In re Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893). Inheritance taxes, being privilege taxes, may be imposed upon a single succession by two states, — the state of domicile of the deceased and the state of *situs* of the property. *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321 (1897); *Matter of Romaine*, 127 N. Y. 80, 27 N. E. 759 (1891). No other sovereign can levy such a death duty. *City of New York v. McLean, supra*. See Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 624 ff.

⁸ See COLO. SESS. LAWS 1913, chap. 136, § 18, p. 553.

⁹ "Nothing contained in this provision [authorizing, on application of the Attorney General, issue of administration with will annexed] shall be construed to prevent the enforcement of the collection of any tax provided for herein in any other manner as may be provided in this act or by law." COLO. SESS. LAWS 1913, chap. 136, § 13, p. 551. See also *Ibid.*, § 19, p. 553, and § 26, pp. 555-556.

¹⁰ The Colorado statute makes "all legatees . . . liable for . . . such taxes" from the decedent's death, and provides that "the tax prescribed by this act . . . shall be and remain a lien" on the property until paid. COLO. SESS. LAWS 1909, §§ 1, 2, pp. 460 ff. See *Palmer's Estate*, 25 Colo. App. 450, 139 Pac. 554 (1914).

¹¹ *Colorado v. Harbeck*, 175 N. Y. Supp. 685 (1919).

¹² *Ibid.*, 179 N. Y. Supp. 510 (1919). See RECENT CASES, p. 870, *infra*.

¹³ No attempt will be made to consider all the reasoning of the court, such as its reversion to the antiquated notion that "the legal *situs* of his personal property followed the domicile, although such property was physically within this state," p. 514. See *Union Transit Co. v. Kentucky*, 199 U. S. 194, 206 ff. (1905); *Hoyt v. Comm'r's of Taxes*, 23 N. Y. 224, 227 ff. (1861).

¹⁴ *Peirce v. Boston*, 3 Met. (Mass.) 520 (1842).

property outside the borders of the taxing power.¹⁵ There was no *res* in Colorado to support a judgment *in rem*.¹⁶ Over the non-resident beneficiaries who never appeared in Colorado, there was no jurisdiction to support a judgment *in personam*.¹⁷ If the Colorado assessment order be regarded as a judgment, still the New York courts should not give it faith and credit since it was rendered without jurisdiction.¹⁸ Moreover, even if personal jurisdiction had been obtained in Colorado over these defendants prior to such a judgment for taxes, the judgment would be unenforceable in New York under the well-known doctrine that penal,¹⁹ which includes revenue,²⁰ laws will not be enforced abroad even under the due faith and credit clause of the Constitution.

But the New York court says that by their conduct the defendants assumed the Colorado statutory obligation to pay a tax, "and thereby made it their contractual obligation."²¹ The imposition of such an *assumpsit* is ingenious,²² and, if sustained by the Court of Appeals, will gladden the hearts of tax collectors. But the idea is fundamentally unsound. The court, being unable to cite authorities,²³ rests upon an analogy to actions against shareholders in foreign corporations for taxes imposed by the state of corporate charter.²⁴ Personal liability, however, cannot be rested upon the non-resident shareholder, for want of jurisdiction or power over him.²⁵ So in the case before the court it is because the defendants were not residents of Colorado that no personal liability could be imposed by Colorado upon them. And the property involved was never in Colorado, from which it follows that, unlike shares in a

¹⁵ *Wabash R. v. People*, 138 Ill. 316, 27 N. E. 456 (1891). Cf. *Schwinger v. Hickok*, 53 N. Y. 280 (1873).

¹⁶ And even if there were a judgment *in rem* in Colorado, it could not be enforced in New York. *Maltbie v. Lobsitz Mills Co.*, 223 N. Y. 227, 119 N. E. 389 (1918).

¹⁷ *Pennoyer v. Neff*, 95 U. S. 714 (1878); *Dewey v. Des Moines*, *supra*.

¹⁸ *Baker v. Baker, Eccles. & Co.*, 242 U. S. 394 (1917); *Thompson v. Whitman*, 18 Wall. (U. S.) 457 (1873); *D'Arcy v. Ketchum*, 11 How. (U. S.) 165 (1850).

¹⁹ *Huntington v. Attrill*, 146 U. S. 657 (1892); *Pickering v. Fish*, 6 Vt. 102 (1834). See *Matter of Antelope*, 10 Wheat. (U. S.) 66, 123 (1825). See also STORY, *CONFLICT OF LAWS*, § 625 A.

²⁰ *Maryland v. Turner*, 75 N. Y. Misc. 9, 132 N. Y. Supp. 173 (1911). See *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 290, 291 (1888); *Henry v. Sargeant*, 13 N. H. 321, 332 (1843).

²¹ 179 N. Y. Supp. 510, 517.

²² Contrast, "Taxes do not rest upon contract express or implied." Chase, J., in *Rochester v. Bloss*, 185 N. Y. 42, 47, 77 N. E. 794, 795 (1906). "Taxes are not debts. . . . Debts are obligations for the payment of money founded upon contract, express or implied." Field, J., in *Meriwether v. Garrett*, 102 U. S. 472, 513 (1880). To the same effect, *Bradford v. Story*, 189 Mass. 104, 75 N. E. 256 (1905); *Boston v. Turner*, 201 Mass. 190, 87 N. E. 634 (1909).

²³ *Dicta* which tend to support an ill-defined contractual or quasi contractual obligation in somewhat similar situations are found in *Succession of Pargoud*, 13 La. Ann. 367 (1858); *Montague v. State*, 54 Md. 481, 487 (1880). Cf. *Goodrich v. Rochester Trust Co.*, 173 App. Div. 577, 160 N. Y. Supp. 464 (1916).

²⁴ *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489 (1900); *Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104 (1911). The language used here and elsewhere by other judges has led some to believe that the courts thought a personal liability based upon an undertaking assumed by the acquisition of shares in foreign corporations could exist. See *Corry v. Baltimore*, 196 U. S. 466 (1905).

²⁵ *Maltbie v. Lobsitz Mills Co.*, *supra*; *City of New York v. McLean*, *supra*. Cf. *Bristol v. Washington County*, 177 U. S. 133 (1900); *Dewey v. Des Moines*, *supra*.

Colorado corporation, there is no *res* on which a Colorado statute could have imposed a lien.

The court reasons further: "The defendants having invoked the aid of the state of Colorado and taken decedent's property through the operation of its laws, must comply with any conditions that state may impose in granting the benefits."²⁶ It is a well-established rule of the common law that the laws of succession of the deceased's domicile govern the distribution of the movable estate wherever found.²⁷ In accordance with this doctrine, reaffirmed by New York statute,²⁸ the Surrogate used Colorado rules in his selection of the beneficiaries. But as a matter of terminology it should be carefully noted that New York did not thereby administer Colorado law.²⁹ A New York court can administer nothing but New York law.³⁰ Yet as Colorado did furnish an ingredient to the defendants' succession, Colorado might impose a tax on the privilege of succession.³¹ But New York has no statute providing that New York shall collect taxes for other states. And Colorado never had any jurisdiction or power over any person or thing from whom or from which it could collect the tax here sought. The result of this unique decision is that a court without statutory authority to do so may enforce a foreign tax imposed by a state without jurisdiction or power itself to collect the tax.

IS HOMICIDE COMMITTED WHERE THE BLOW IS STRUCK OR WHERE THE DEATH OCCURS? — In *State v. Criqui*,¹ recently decided, we have the recurrence of a question which has been the subject of controversy from early times. A blow was struck in county A, from the effects of which the victim died in county B. The defendant was tried and convicted in the latter county under a statute which provided that in such a situation either county might entertain jurisdiction to punish the homicide. The state constitution, however, assured the accused of an impartial trial in the county where the offense was alleged to have been com-

²⁶ 179 N. Y. Supp. 510, 515.

²⁷ *Harvey v. Richards*, 1 Mason (C. C. U. S.) 381 (1818); *Lawrence v. Kitteridge*, 21 Conn. 576 (1852). See *Wilkins v. Ellett*, 9 Wall. (U. S.) 740 (1869).

²⁸ "Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other [than real] property situated within the state, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident at the time of his death." N. Y. Decedent Estate Law, § 47.

²⁹ See *Lawrence v. Kitteridge*, *supra*; *Estate of Apple*, 66 Cal. 432, 6 Pac. 7 (1885). Cf. *Howarth v. Angle*, 162 N. Y. 179, 187, 56 N. E. 489, 492 (1900).

Illinois by statute provided that Illinois statute laws should govern the descent and distribution of "estates, both real and personal, of residents and nonresident proprietors in this state dying intestate." REV. STAT. ILL., chap. 39, § 1. Yet the Illinois court still continued to look to the domicile of the deceased for rules of distribution of choses in action belonging to a non-resident. *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61 (1892).

³⁰ See BEALE, CONFLICT OF LAWS, § 112.

³¹ See *Magoun v. Illinois Bk.*, 170 U. S. 283, 288 (1898); *United States v. Perkins*, 163 U. S. 625, 628 (1896); *In re Macky's Estate*, 46 Colo. 79, 102 Pac. 1074 (1909); *In re Swift*, *supra*.

¹ 185 Pac. 1063 (Kan. 1919). See RECENT CASES, p. 863, *infra*.

mitted. The upper court sustained the conviction, holding that the statute did not contravene the constitutional provision since the homicide might be considered as having been committed in either county.

In early England it was doubtful whether the crime could be punished in either county. The old grand jury was composed solely of those who could testify to the event of their own knowledge, and they could not inquire into nor give testimony of any fact which had taken place beyond the bounds of their immediate county.² They could not indict in county A, since no evidence could be adduced of the death, a necessary ingredient of the crime; nor could they indict in the second county, since the fact of the mortal stroke could not be proved.³ To prevent, however, a complete failure of justice through the inadequacy of the judicial machinery the device was often resorted to of removing the body to the first county, when the jury could then take cognizance of the complete offense.⁴ Perhaps this practice was a recognition by the common law that the locality of the crime was fixed where the blow was struck. At any rate, according to the commentators on the criminal law,⁵ this was the common opinion at that period. Yet strangely enough Parliament as early as 1547, in a statute which we inherit as part of the common law, enacted that the venue in these cases must be laid only where the death occurs.⁶ From the early law, therefore, the locality of the homicide, though at different periods, was fixed at both places.

Speculation, however, as to "which one of the two legs the crime stands on" seems futile. If the blow occurs in one state and the death in another, events of equal significance⁷ take place in both states and there is no concurrence of stroke and death in either.⁸ Why is it not sufficient to say that events in the train of proximate causation occur in each state, for which the sovereigns of either may mete out a punishment? In state A the mortal stroke constitutes the punishable act and the state may demand retribution for the full consequences of that act. That the indictment may not be found until the death is no indication that the blow alone is not the offense. The crime is complete upon delivery of the stroke, the fact of death being necessary only as evidence to prove that the stroke was mortal.

No one has denied the right of the first state to punish the defendant.⁹

² See STEPHEN, HISTORY OF THE CRIMINAL LAW, 276 *et seq.*

³ See 1 HALE P. C. 426; 2 HAWKINS P. C. 301; BISHOP, NEW CRIMINAL LAW, 8 ed., 62, note.

⁴ *Idem.*

⁵ *Idem.*

⁶ 2 & 3 EDW. VI, c. 24.

⁷ "The stroke without the death of the party stricken, nor the death without the stroke or other violence, makes not the homicide or murder, for the death consummates the crime." 1 HALE P. C. 423.

⁸ The overwhelming weight of opinion, today, undoubtedly is to the effect that the homicide is committed where the stroke occurs and the death is but a consequence. But such a view, it seems, can only be supported on the theory that the mortal blow alone constitutes the homicide.

⁹ See *Gessert v. State*, 21 Minn. 369 (1875); *State v. Bowen*, 16 Kan. 476 (1876); *Hunter v. State*, 41 N. J. L. 495 (1878); *Green v. State*, 66 Ala. 40 (1880); *Robertson v. State*, 42 Fla. 212, 28 So. 427 (1900). In some of the cases cited, statutes specifically made punishable the offense if part thereof was committed within the state though the offense was consummated without the state. The other cases proceeded on the ground that the blow constituted the homicide.

Vigorous opposition, however, has been raised to the right of the second state to punish.¹⁰ In *Commonwealth v. Macloon*,¹¹ the Massachusetts court upheld a conviction under a statute which made the homicide punishable where the death occurred, though the wounds were given in a different jurisdiction.¹² Mr. Bishop in his treatise on criminal law¹³ contends, first, that no act is committed within the territory of the Massachusetts sovereign and therefore no basis is created upon which he may inflict punishment; and secondly, that the statute violates the law of nations inasmuch as it in effect makes the defendant answer for an act which took place without the state. Neither objection seems tenable. True, no new independent act takes place in the second state, yet the force which the defendant set in motion outside the jurisdiction continues to operate unabated within the state until the death. The forces have not come to rest and the state may punish for what the defendant has caused within its territorial limits. Again, the statute in its true interpretation does not attempt to make striking the blow the crime — causing the death is the event which it seeks to punish. A California case¹⁴ can be supported only on this line of reasoning. A box of poisoned candy was sent from California to the victim, who partook of it in Delaware and there died from the effects. He was tried and convicted for murder under a statute in California. In this case the first event in the train of causation was made punishable by the legislature; in *Commonwealth v. Macloon* it was the last event. Furthermore, no rule of law prevents the legislature from calling either event murder or manslaughter and affixing to it the punishment and consequences that flow from either crime. Undoubtedly the defendant in these cases is open to double punishment since both state A and state B may bring separate indictments. Yet no established principle of international law denies the right of more than one state to punish the defendant, when his act constitutes a violation against the peace and dignity of several states.¹⁵

The principal case, though devoid of the international aspect, is governed by the above discussion in view of the constitutional provision limiting the right to change the venue in criminal prosecutions. The statute laying the venue either in county A or county B can be properly interpreted as making either the blow or the death the punishable offense, a trial in one county precluding further prosecution in the other. Taking that view, the trial in the principal case did take place where the offense was committed and the constitutional provision was in no way violated.

¹⁰ See BISHOP, NEW CRIMINAL LAW, 8 ed., 60, note; *State v. Carter*, 27 N. J. L. 499 (1859); *State v. Kelly*, 76 Me. 331 (1884).

¹¹ 101 Mass. 1 (1869).

¹² Similar statutes have been passed in other jurisdictions and have been sustained. See *Reg. v. State*, 7 Cox C. C. 277; *Tyler v. People*, 8 Mich. 320 (1860); *Ex parte McNeely*, 36 W. Va. 84, 14 S. E. 436 (1892); *State v. Caldwell*, 115 N. C. 794, 20 S. E. 523 (1894).

¹³ See BISHOP, NEW CRIMINAL LAW, 8 ed., 65, note.

¹⁴ *People v. Botkin*, 132 Cal. 231, 64 Pac. 286 (1901).

¹⁵ *Cross v. North Carolina*, 132 U. S. 131 (1889); *Marshall v. State*, 6 Neb. 120 (1877); *State v. Stevens*, 114 N. C. 875, 19 S. E. 861 (1891).

ARE BONUSES TO SOLDIERS AND SAILORS GIVEN FOR A PUBLIC PURPOSE? — A tax may only be levied for a public purpose.¹ The government may take its citizens' property for its own requirements, but it may not take from one to give to another. However, like most general principles, the doctrine of public purposes is easy to state but hard to apply. In each case whether a tax is levied and the proceeds spent for a public purpose depends upon how far the public will be ultimately benefited. For instance, the government may pay salaries to its officials, but it may not loan money to private businesses.² In the former case the public is directly benefited; in the latter, the ultimate public profit in the increased power of the private concerns to pay taxes is considered too remote. In one case the private benefit is incidental; in the other it is primary. But certain classes of appropriations are upheld where the public is only indirectly and indefinitely benefited. Such are gifts to charity.³ The promotion of patriotism is well recognized as a public purpose.⁴ And the legislature has generally been allowed a wide discretion in satisfying the moral obligations of the state, either where individuals have relied upon a promise extended by the government,⁵ or where civil employees have been injured, financially⁶ or physically,⁷ in the course of their service.

Gratuities to soldiers and sailors constitute an intermediate class of public appropriations which aroused considerable discussion at the time of the Civil War and are once again confronting the courts. If these gratuities take the form of bounties to encourage enlistments, they are clearly valid.⁸ Such bounties were very common in the Civil War, where each town had to raise a fixed quota either by enlistment or by draft. There was a definite public purpose in relieving other citizens from the draft and in aiding in the defense of the nation. A second type

¹ *Loan Association v. Topeka*, 20 Wall. (U. S.) 655 (1874). This principle is either actually embodied or has been read into the Fourteenth Amendment and every state constitution. See 21 HARV. L. REV. 277.

² *Loan Association v. Topeka*, *supra*; *Cole v. La Grange*, 113 U. S. 1 (1884); *Allen v. Inhabitants of Jay*, 60 Me. 124 (1872). On the other hand, subsidies to railroads have generally been upheld on the ground that they constitute public highways. See GRAY, LIMITATIONS OF TAXING POWER, § 194, note 34, for a collection of cases.

³ *Hager v. Kentucky Children's Home Society*, 119 Ky. 235, 83 S. W. 605 (1904); *State v. Edmondson*, 89 Ohio St. 351, 106 N. E. 41 (1914); *Denver & R. G. Ry. v. Grand County*, 170 Pac. (Utah) 74 (1917); *State v. Nelson County*, 1 N. D. 88, 45 N. W. 33 (1890). See COOLEY ON TAXATION, 2 ed., 124. *Contra*, *Lowell v. Boston*, 111 Mass. 454 (1873).

⁴ *United States v. Gettysburg Electric Ry.*, 160 U. S. 668 (1896); *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51 (1891); *Parsons v. Van Wyck*, 56 App. Div. 329, 67 N. Y. S. 1054 (1900). See JUDSON ON TAXATION, 2 ed., § 386.

⁵ *United States v. Realty Co.*, 163 U. S. 427 (1896); *Woodall v. Darst*, 71 W. Va. 350, 77 S. E. 264 (1912).

⁶ *Leonard v. Inhabitants of Middleborough*, 198 Mass. 221, 84 N. E. 323 (1908); *Earle v. Commonwealth*, 180 Mass. 579, 63 N. E. 10 (1910). See 21 HARV. L. REV. 625.

⁷ *Munro v. State*, 223 N. Y. 208, 119 N. E. 444 (1918).

⁸ *Taylor v. Thompson*, 42 Ill. 1 (1866); *Commissioners of Vermillion County v. Hammond*, 83 Ind. 453 (1882); *Lowell v. Oliver*, 8 Allen (Mass.), 247 (1864); *Crowell v. Hopkinton*, 45 N. H. 9 (1863); *Cass Township v. Dillon*, 16 Ohio St. 38 (1864); *Speer v. Blairsville*, 50 Pa. St. 150 (1865); *Brodhead v. City of Milwaukee*, 19 Wis. 624 (1865). Bounties to drafted men were upheld in *Booth v. Town of Woodbury*, 32 Conn. 118 (1864).

of these gratuities that has never been questioned is the federal pension to those who have been disabled in the service of the United States.⁹ These pensions can be upheld¹⁰ on two grounds: because they were promised before the war¹¹ and so tended to encourage enlisting, and because the government is morally bound to aid those men who relied on its promise or were injured in its service. A third class of gratuities is represented by a recent Wisconsin statute,¹² upheld in *State v. Johnson*,¹³ granting a bonus to every soldier or sailor who served in the late war on his discharge.¹⁴ These bonuses were not promised before the war, nor are they limited to those who have been disabled. They cannot, therefore, be supported on the same grounds as the bounties to encourage volunteers or the federal pensions. It is not a case of charity,¹⁵ since the bonuses are given to rich and poor alike. If the Wisconsin statute can be sustained at all, it must be on the ground that it tends to promote patriotism by encouraging others to follow the example of those who served.¹⁶ But it is a far cry to argue that the state's generosity will result in more volunteers for the next war,—such a public benefit is altogether too remote. In any case, from a pecuniary point of view there would be every reason to follow the example of the profiteer, no matter how large the bonus. As a means of encouraging patriotism a medal would seem more effective and permanent. In short it is difficult to see how such a statute will benefit the public in any way, directly or indirectly. It looks very much as if the state were taking from one citizen to give to another. It must, of course, be remembered that taxation is a prerogative of the legislature and that it should be sus-

⁹ See 37 STAT. AT L. 112-113, 12 STAT. AT L. 566-569, 1 STAT. AT L. 95, 129, 244.

¹⁰ *United States v. Hall*, 98 U. S. 343 (1878); 1 Abb. 74 (1867). Cf. *O'Dea v. Cook*, 176 Cal. 659, 169 Pac. 366 (1917); *People v. Abbott*, 274 Ill. 380, 113 N. E. 696 (1916), in which police pensions were upheld as part compensation for services.

¹¹ The Continental Congress originally declared its intention to grant pensions on August 26, 1776. See 5 JOURNALS OF CONTINENTAL CONGRESS, 702-705.

¹² 1919 WISCONSIN LAWS, c. 667.

¹³ 175 N. W. 589 (Wis.) (1919). For a more complete statement of the facts, see RECENT CASES, p. 871.

¹⁴ Massachusetts has passed a similar act. See 1919 MASSACHUSETTS LAWS, c. 283. Other states have provided for the distribution of medals or certificates. See 1919 DELAWARE LAWS, 673; 1919 NORTH CAROLINA LAWS, 503; 1919 NEBRASKA LAWS, 1030; 1919 NEW JERSEY LAWS, 711; 1919 NEW YORK LAWS, 220; 1919 VERMONT LAWS, 236. Others have exempted veterans from certain taxes. See 1919 CALIFORNIA STAT., 305; 1919 NEW JERSEY LAWS, 86, 91. Others have provided for free tuition. See 1919 MINNESOTA LAWS, 362; 1919 OREGON LAWS, 809; 1919 WASHINGTON LAWS, 129. And two states have urged Congress to provide a bonus. See ARIZONA LAWS, 397; 1919 INDIANA ACTS, 870. It is not stated whether financial or constitutional reasons prevented the latter two states from providing for their veterans themselves.

Compare 40 STAT. AT L. 1151, giving each soldier or sailor \$60 on discharge. These bonuses may be justified as part compensation, a sort of "month's notice," or as an allowance to buy civilian clothes. A similar allowance is made for uniforms to those entering the service.

¹⁵ Compare *Bosworth v. Harp*, 154 Ky. 559, 157 S. W. 1084 (1913); *Board of Education v. Bladen County*, 113 N. C. 379, 18 S. E. 661 (1893).

¹⁶ See Opinion of the Justices, 211 Mass. 608, 98 N. E. 338 (1912), holding that a bounty as such was bad, but a testimonial to encourage patriotism was valid. The court further held that the declaration of purpose in the statute practically determined which the gratuity was.

tained by the courts unless clearly unconstitutional.¹⁷ It is one thing for the courts to consider a statute unwise and quite another to hold that the legislature has overstepped the limits of its discretion. But, as held by the slight weight of authority,¹⁸ there seems to be no sound ground upon which a bonus statute can be supported.

ESTOPPEL OF AN ATTORNEY TO ACT AGAINST HIS CLIENT.—In few fields has human inability to serve two masters been more clearly recognized or more scrupulously regarded than in the relation of attorney and client. The duty of an attorney to abstain from inconsistent employment was recognized very early in our law¹ and, to the credit of the profession, few reported cases are found which involve a departure from professional faith and duty.² Nor has this obligation been restricted merely to the duration of the relation.³ While the fact alone that he has once acted as counsel for a man will not bar an attorney from thereafter representing that man's adversary,⁴ this is true only when such service is consistent with, and not hostile to, the interests of the former.⁵ The test of consistency is ". . . whether accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection."⁶ If the new service is inconsistent, he cannot act. And this rule is applicable to criminal as well as to civil proceedings. Thus, one who acted as counsel for a plaintiff in an action for malicious prosecution is disqualified to serve as prosecuting attorney against him upon a subsequent indictment for the alleged crime which was involved in that action.⁷ Conversely, a defendant in a criminal prosecution cannot be represented by an attorney who had previously, as solicitor-general of the state, instituted the proceeding against him.⁸ The recent

¹⁷ *Jones v. Portland*, 245 U. S. 217 (1917). See 21 HARV. L. REV. 277.

¹⁸ *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413 (1885); *Bush v. Board of Supervisors*, 159 N. Y. 212, 53 N. E. 1121 (1899); *Beach v. Bradstreet*, 85 Conn. 344, 82 Atl. 1030 (1912). See 26 HARV. L. REV. 92. *Contra*, *Brodhead v. City of Milwaukee*, 19 Wis. 624 (1865); *State v. Handlin*, 38 S. D. 550, 162 N. W. 379 (1917). It should be noted that *Brodhead v. City of Milwaukee*, *supra*, relied principally upon *Speer v. Blairsville* and *Booth v. Town of Woodbury*, *supra*, note 8, neither of which seem in point.

¹ *MIRROUR OF JUSTICES*, chap. 2, sec. 5.

² *Hatch v. Fogerty*, 40 How. Pr. 492, 504 (1871).

³ *In re Boone*, 83 Fed. 944 (1897); *People v. Gerold*, 265 Ill. 448, 107 N. E. 165 (1914); *Hatch v. Fogerty*, *supra*.

⁴ *Purdy v. Ernst*, 93 Kan. 157, 143 Pac. 429 (1914); *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480 (1903).

⁵ *In re Boone*, *supra*; *Purdy v. Ernst*, *supra*. See 1 FERGUSON, IRISH PRACTICE, 57, 58.

⁶ *In re Boone*, *supra*, 952. See also CANONS OF ETHICS, AM. BAR ASS., Sec. II (6).

⁷ *State v. Rocker*, 130 Ia. 239, 106 N. W. 645 (1906). And see *Wilson v. State*, 16 Ind. 392 (1861).

⁸ *Gaulden v. State*, 11 Ga. 47 (1851).

decision, *People ex rel. Livers et al. v. Hanson et al.*,⁹ shows that the same principle applies in the case of the hybrid proceeding of *quo warranto*.

Assuming then a case in which the attorney ought not to act, there still remains the problem of procedure. How is the client to protect himself against the adverse activity of his former counsel? An injunction will lie against the attorney.¹⁰ If he attempts to appear in court, he may be excluded by the court in the exercise of its plenary power over its officers, upon the motion of the former client.¹¹ The *Livers* case,¹² however, seems to have raised the point in a novel way. There, the fact of the state's attorney's prior inconsistent employment was set forth in the plea, and the Supreme Court of Illinois held the plea good. It seems going rather far to hold that it raises a good defense to a proceeding brought in the name of the people of the state, when the defendant pleads merely that the attorney presenting the claim of the people is disqualified. If an ordinary action at law were brought by A against B, surely a plea by B that A's attorney was disqualified would not be considered a good defense to A's action. And the fact that A is in this case the state, should not change the principle.

No authority is cited for the procedure in the Illinois case. Cases which in the past seem to have tended in that direction fall far short of its result, and are clearly to be distinguished. The case of *Berry v. Jenkins*¹³ is very unsatisfactorily reported, but it seems clear that the plaintiff in that case must have assented to the dismissal of the proceedings, which distinguishes the case. In the case of *Provident Institution for Savings v. White*,¹⁴ a bill of interpleader filed by the attorney for one of the defendants, who purported to act for the plaintiff as well, was dismissed by Gray, C. J., the equity rules of the Massachusetts court forbidding an attorney to act in this dual capacity. But that case, too, is distinguishable, since it expressly goes upon the ground that the attorney was not authorized by the particular plaintiff to file the bill in his behalf, whereas this state's attorney had clear authority to act for the people of the state.¹⁵ Perhaps a North Carolina case¹⁶ is more closely analogous to the case in hand. There an attorney acted for both parties to a controversy and upon his motion judgment was entered against one of them in favor of the other. The former was allowed to vacate the judgment. Yet the distinction between the cases is surely clear. In that case, the attorney acted for both parties at the same time and the defendant did not have the benefit of independent counsel;

⁹ 125 N. E. 268 (Ill. 1919). See RECENT CASES, p. 859.

¹⁰ *Earl Cholmondeley v. Lord Clinton*, 19 Ves. 261 (1815).

¹¹ *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422 (1899); *Commonwealth v. Gibbs*, 4 Gray (Mass.), 146 (1855).

¹² *Supra*, note 9.

¹³ 3 Bing. 423 (1826). The complete report of that case is, "The attorney for the plaintiff having put in bail for the defendant, and having acted on both sides, deluding the parties and preventing an interview, the court, on the motion of Wilde, Serjt., set aside the proceedings, and made the attorney pay the costs."

¹⁴ 115 Mass. 112 (1874).

¹⁵ ILL. REV. STAT. 1874, p. 787.

¹⁶ *Wilson Cotton Mills v. Randleman Cotton Mills*, 116 N. C. 647, 21 S. E. 431 (1895).

in this case, neither of those circumstances existed. And while it was necessary for the ends of justice to undo the whole transaction, in the North Carolina case, no such heroic treatment seems called for here. But, finally, there is the case of *State v. Rocker*.¹⁷ In that case, the prosecuting attorney who appeared before the grand jury and procured the indictment of the defendant had learned the facts of the defendant's case while acting as his counsel, previously. These facts appearing, a motion to quash the indictment was sustained on the ground that the indictment was improperly brought.¹⁸ That result may have been proper in that case, but there is no reason to extend its application to a case where there is no suggestion that there was anything improper in the action of the state's attorney in presenting the petition and filing the information in *quo warranto*, without any reliance upon his own knowledge but entirely at the instance of individual relators. On the whole, there seems to be no interest of the defendants which required forcing the state to file an entirely new information. They would have been fully protected, it is believed, if they had been restricted to their recognized right, by way of motion or injunction, to have the state's attorney excluded from appearing against them at the trial, and by having the proceeding conducted by the attorney-general or by a special state's attorney appointed for the purpose.

A JUDGMENT AS EVIDENCE IN A LATER PROCEEDING. — Every judgment has a double aspect: it is first an indication that the tribunal has made a finding as to the facts and rights upon which the applicant predicates his cause of action; it is also the *fiat* of the sovereign with reference to the cause of action, *res* or *status* before the court. In its aspect as a *fiat* of the sovereign, the judgment operates directly upon the subject matter of the action; in a personal action the cause of action is transmuted into a right;¹ in a divorce proceeding, *status* is determined;² while in an action of probate, the will is established.³

The first principle of *res judicata*,⁴ that a plea of former judgment is a

¹⁷ *Supra*, note 7.

¹⁸ *Cf. State v. Will*, 97 Ia. 58, 65 N. W. 1010 (1896). In this case, the improper conduct of the judge toward the grand jury was similarly held, in the same jurisdiction, to render an ensuing indictment invalid.

¹ As instances of this effect, note that a judgment, though without satisfaction, against one of two joint tort-feasors, or joint obligors, is a bar to an action against the other, for the cause of action, being single, is extinguished by the first judgment. *Brinsmead v. Harrison*, L. R. 7 C. P. 547 (1872); *King v. Hoare*, 13 M. & W. 494, 504 (1844).

² *Hood v. Hood*, 110 Mass. 463 (1872).

³ "The proceeding is, in form and substance, upon the will itself. . . . The judgment . . . determines the *status* of the subject matter of the proceeding . . . and makes the instrument, as to all the world, . . . just what the judgment declares it to be." Hall, J., in *Woodruff v. Taylor*, 20 Vt. 65, 73 (1847).

⁴ "The doctrine of *res judicata* is plain and intelligible, and amounts simply to this: that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterward be litigated by new proceedings either before the same or any other tribunal." *Foster v. The Richard Bus-teed*, 100 Mass. 409, 412 (1868).

complete bar to a second action upon the same cause, is a necessary corollary of the principle that the judgment operates upon the cause of action; it is a recognition of the legal effect of the prior judgment. If the judgment was rendered in a personal action, the plea of former judgment will be available only as between parties to that action, or their successors, for a right between two persons was thereby established. If, however, the judgment was rendered in an *in rem* action, all those interested in the property or *status* must respect the judgment, for their rights were thereby determined.

The second doctrine of *res judicata*,⁵ that the finding of the court as to facts and rights shall, under certain circumstances, be conclusive if the same matters come into issue in a later action upon a different cause, is not, as is the first doctrine, a necessary consequence of the legal effect of the prior judgment. It cannot be said that the facts which gave rise to the cause of action, as well as the cause itself, are merged in the judgment. This doctrine, then, is dictated by a policy of repose, for, though the primary interest of the sovereign is in doing justice between litigants, practical justice has been done, and the truth of a matter satisfactorily established, if the very matter now in issue was actually a point of controversy in a prior adversary proceeding *inter partes*, and the present parties were parties to that action or in privity with them.⁶ If the proceeding was *ex parte*, the guaranty of truth and justice inherent in an action *inter partes* is not present, and the judgment should not be conclusive as to any one, as to the facts upon which it is based.⁷ If the action was *in rem*, the judgment may establish a right or a *status* which is binding upon the world, but the decree should be conclusive as to the facts upon which it proceeds, coextensively with the dispute *inter partes* only. So, in a prize proceeding in admiralty, all those who were parties through their interest in the *res*, but no others, should be concluded;⁸ and a stranger to a probate proceeding, though obliged to recognize the rights created by the decree, should not be precluded as to the facts upon which the decree was founded.⁹

The function of a judgment in evidence will be perceived through an application of the preceding principles. The judgment record is proper evidence of the fact of judgment, and the finding of the court upon the

⁵ "It is a principle lying at the foundation of all well-conducted jurisprudence, that when a right or fact has been judicially tried or determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties and those in privity with them, in law or estate. . . . It must be an averment of a fact precisely stated on one side and traversed on the other, and found by the jury affirmatively or negatively in direct terms, and not by way of inference." Shaw, C. J., in *Sawyer v. Woodbury*, 7 Gray (Mass.), 499, 502 (1856). See also *Outram v. Morewood*, 3 East, 346, 355 (1803); *Duchess of Kingston's Case*, 20 How. St. Tr. 355, 537 (1776).

⁶ See 1 GREENLEAF, EVIDENCE, 16 ed., §§ 522, 523.

⁷ *Salem v. Eastern R. R. Co.*, 98 Mass. 431, 448 (1868).

⁸ *The Mary*, 9 Cranch (U. S.), 126 (1815). See *De Mora v. Concha*, 29 Ch. Div. 268 (1855).

⁹ "We may lay on one side, then, any argument based on the misleading expression that all the world are parties to the proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or *status* which the judgment establishes." Holmes, J., in *Brigham v. Fayerweather*, 140 Mass. 411, 413 (1886).

facts in issue.¹⁰ It will therefore be introduced when either of the doctrines of *res judicata* is invoked. However, the judgment itself is, in neither of these cases, evidence: in one case it operates to terminate the action, in the other it excludes evidence as to the matter formerly litigated. The fact of judgment may, however, have a true evidentiary value, as when a prior conviction is shown for the purpose of impeaching the credibility of a witness.¹¹ And the judgment, or even a verdict, being the solemn determination of the tribunal as to facts in issue, may be given in evidence even against strangers, in proof of a fact concerning which reputation would be admissible.¹² But in such a case the judgment would have only a *prima facie* effect,¹³ and it would seem that only a judgment rendered in a controversial proceeding *inter partes* has the requisite guaranty of truth.

A recent case, *Illinois Steel Co. v. Industrial Commission*,¹⁴ raises the questions involved in this discussion. A common-law marriage was in issue, and the court held it improper to admit, in proof of this fact, the order of a probate court, between different parties, reciting the finding of the court in that matter. Obviously neither of the doctrines of *res judicata* can be invoked. Nor can the judgment be admitted as evidence, for it seems that reputation is inadmissible in proof of a common-law marriage in the absence of supporting evidence of cohabitation as husband and wife.¹⁵ In the principal case this was not only lacking, but there was evidence that the intercourse between the parties was adulterous in its inception. Under these circumstances, the judgment of the probate court might well tend to prejudice, rather than aid, the jury.

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A PARTNERSHIP AND A JOINT ADVENTURE DISTINGUISHED. — In the recent case of *Brown v. Leach*,¹ a joint adventurer sued for contribution of profits earned by his colleague after the latter had ostensibly withdrawn from the enterprise with a view to excluding the plaintiff from participation in the profits which he was reasonably certain could be made. It was declared that the plaintiff was entitled to share in these profits in accordance with the terms of the joint adventure. In the course of this opinion the court said: "A joint adventure is subject to the same rules as a technical partnership." With regard to the issue before the court this statement is true, since in both there is a fiduciary relation between the parties and a consequent duty to share all profits accruing from the subject matter of the undertaking.² But as a general

¹⁰ See *Littleton v. Richardson*, 34 N. H. 179, 187 (1856); *Spencer v. Dearth*, 43 Vt. 98, 105 (1870).

¹¹ See 1 GREENLEAF, EVIDENCE, 16 ed., § 527.

¹² *Pile v. McBratney*, 15 Ill. 314, 319 (1853); *Chirac v. Reinecker*, 2 Pet. (U. S.) 613 (1829); *Reed v. Jackson*, 1 East, 355 (1801).

¹³ See 2 BLACK, JUDGMENTS, 2 ed., § 606.

¹⁴ 125 N. E. 252 (Ill.). See RECENT CASES, p. 865.

¹⁵ See 1 WHARTON, EVIDENCE, 3 ed., § 84.

¹ 178 N. Y. Supp. 319 (1919). See RECENT CASES, *infra*, p. 868.

² *Reid v. Shaffer*, 249 Fed. 553 (1918); *Ingram v. Johnston*, 176 Pac. (Cal. App.) 54 (1918); *Calkins v. Worth*, 215 Ill. 78, 74 N. E. 81 (1905); *Nelson v. Lindsey*, 179 Iowa, 862, 162 N. W. 3 (1917); *Irvine v. Campbell*, 121 Minn. 192, 141 N. W. 108

statement it is not entirely accurate. For instance, ordinarily one partner cannot maintain an action at law against his colleague on a claim growing out of firm transactions until there has been an accounting in equity;³ but there is no such limitation on the right of a joint adventurer.⁴ Likewise, under the ordinary statutes a corporation cannot enter a partnership,⁵ though it may participate in a joint adventure.⁶

These considerations suggest the inquiry: In what respect does a joint adventure differ essentially from a partnership? The New Jersey court has intimated that the distinction lies in the fact that there is no mutual agency in the former, as there is in the latter.⁷ But this distinction seems unsatisfactory, since it assumes that mutual agency is a test of a partnership, while it would seem to be merely an incident attached to that relation.⁸

A joint adventure has been defined as an association of two or more persons to carry out a single business enterprise for profit.⁹ The Uniform Partnership Act defines a partnership as an association of two or more persons to carry on as co-owners a business for profit.¹⁰ Two possible distinctions are apparent: (1) that while a partnership is formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, (2) that in a partnership each member is co-owner of a *business*, — a fact that does not exist in a joint adventure. The former has sometimes been expressed by the courts as the main difference.¹¹ But there are numerous decisions to the effect that there can be a partnership for a single transaction.¹² Even though this distinction did exist it is difficult to see how it could be a useful guide to the courts.

The real difference appears in the second suggestion. A partnership

(1913); *Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705 (1910); *Selwyn & Co. v. Waller*, 212 N. Y. 507, 106 N. E. 321 (1914); *Knudson v. George*, 157 Wis. 520, 147 N. W. 1003 (1914).

³ *Wills v. Andrews*, 75 So. (Fla.) 618 (1917); *Kelley v. Ramsey*, 176 Ky. 584, 195 S. W. 1111 (1917); *Dalury v. Rezinaz*, 183 App. Div. 456, 170 N. Y. Supp. 1045 (1918); *Cobb v. Martin*, 32 Okl. 596, 123 Pac. 422 (1912). See LINDLEY, *PARTNERSHIP*, 8 ed., 635.

⁴ *Hurley v. Walton*, 63 Ill. 260 (1872); *McIntire v. Carr*, 164 Mich. 37, 128 N. W. 1079 (1910); *Petersen v. Nichols*, 90 Wash. 398, 156 Pac. 406 (1916); *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576 (1906).

⁵ *Whittenton Mills v. Upton*, 10 Gray (Mass.), 582 (1858); *Bishop v. American Preserver's Co.*, 157 Ill. 284, 41 N. E. 765 (1890).

⁶ *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855 (1895); *C. & A. R. R. Co. v. Mulford*, 162 Ill. 522, 44 N. E. 861 (1896); *Mestier & Co. v. Chevalier Paving Co.*, 108 La. 562, 32 So. 520 (1901).

⁷ *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130 (1909).

⁸ *Meehan v. Valentine*, 145 U. S. 611 (1891); *Webster v. Clark*, 34 Fla. 637, 16 So. 601 (1894); *Boreing v. Wilson*, 128 Ky. 570, 108 S. W. 914 (1908); *Pooley v. Driver*, 5 Ch. D. 458 (1876).

⁹ See 2 ROWLEY, *MODERN LAW OF PARTNERSHIP*, § 975.

¹⁰ *UNIFORM PARTNERSHIP ACT*, § 6.

¹¹ *Saunders v. McDonough*, 191 Ala. 119, 67 So. 591 (1914); *Goss v. Lanin*, 170 Iowa, 57, 152 N. W. 43 (1915); *Reece v. Rhoades*, 25 Wyo. 91, 165 Pac. 449 (1917).

¹² *Shackleford v. Williams*, 182 Ala. 87, 62 So. 54 (1913); *Milligan v. Mackinlay*, 209 Ill. 358, 70 N. E. 685 (1904); *Grant v. McArthur's Ex'rs*, 153 Ky. 356, 155 S. W. 732 (1913); *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484 (1899); *Rush v. First Nat'l Bank*, 160 S. W. (Tex. Civ. App.) 319 (1913); *Williamson v. Nigh*, 58 W. Va. 629, 53 S. E. 124 (1906).

involves the conception of a business, — an entity, in a mercantile sense at least, separate and distinct from the individual affairs of the members.¹³ Such an entity cannot be created by the doing of a single act.¹⁴ It is the performance of a series of acts, all done for the same ultimate purpose of profit under the joint agreement so as to be bound together into a unit, that underlies the conception in the minds of mercantile men of an entity quite distinct from their individual affairs; and this entity the law recognizes to a certain extent and to it attaches certain incidents. But if the joint agreement is such that it does not contemplate the creation of such an entity, there is no need of turning to the complex law of partnership for a guide, but each problem arising thereunder can be solved by the ordinary law of contracts.

This distinguishing feature is consistent with incidental differences which the cases recognize. Mutual agency of partners is an established necessary incident of a partnership, though it may be restricted *inter se*. It is a sensible rule which gives the creators of an entity equal authority to act for it.¹⁵ In a joint adventure, however, there is no question as to the relation of several individuals to a distinct entity, but merely of the relation of several individuals *inter se*; and obviously, to find that one is agent of the other, we should find that authority so to act was given by that other by agreement, express or implied.¹⁶ So also on the insolvency of partners, by the law of partnership, firm creditors have priority over the separate creditors as to the firm property.¹⁷ But the insolvency of joint adventurers should not give the creditors of the joint debtors any priority over their separate creditors to the joint property since the credit has not been extended to, or enriched, a distinct entity, but the individuals alone.

OBLIGATION OF AGGRIEVED CONTRACTING PARTY TO ACCEPT NEW OFFER OF DEFAULTER TO OBVIATE AVOIDABLE DAMAGE. — The funda-

¹³ See BURDICK, *PARTNERSHIP*, 3 ed., 21-25.

¹⁴ Compare cases holding that the doing of a single act within a state is not "transacting or carrying on business within the state." *Penn. Collieries Co. v. McKeever*, 183 N. Y. 98, 75 N. E. 935 (1905); *Ammons v. Brunswick-Balke-Collender Co.*, 141 Fed. 570 (1905); *Kirven v. Va.-Car. Chemical Co.*, 145 Fed. 288 (1906); *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724 (1903); *State v. Robb-Lawrence Co.*, 15 No. Dak. 55, 106 N. W. 406; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 680 (1903). See 5 THOMPSON, *CORPORATIONS*, 2 ed., § 6674.

The same thought is found in cases in which it is held that credits acquired in the course of business of lending are taxable as business stock having a *situs* at the place of business, though intangible credits can have no actual *situs*. The series of credits is regarded as creating an entity, the stock in trade. *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S. 395 (1907); *Adams v. Colonial & U. S. Mortgage Co.*, 82 Miss. 263, 34 So. 482 (1903). See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 609-613.

¹⁵ Under the legal-person theory of a partnership, each is agent for the legal person, the firm. See the remarks of Jessel, M. R., *Pooley v. Driver*, *supra*, note 8, at page 476. Under the aggregate theory, each acts for the individuals composing the firm. *Cox v. Hickman*, 8 H. L. Cas. 268 (1860).

¹⁶ *Strohschein v. Kranich*, 157 Mich. 335, 122 N. W. 178 (1900); *Smith v. First Nat'l Bank of Albany*, 151 App. Div. 317, 135 N. Y. Supp. 985 (1912); *Jones v. Gould*, 123 App. Div. 236, 108 N. Y. Supp. 31 (1908).

¹⁷ See 1 ROWLEY, *MODERN LAW OF PARTNERSHIP*, § 535 and note.

mental principle of indemnification which underlies the law of damages is qualified by a second, which imposes on the injured party the burden of taking all reasonable steps to mitigate whatever loss is likely to result from the wrong and which refuses to regard that which he might reasonably have avoided as damage flowing from the injury.¹ Hence, whether the injured party has or has not forestalled injurious consequences of this nature his recovery is limited to the expense incurred or which would have been incurred in avoiding them.² Does the principle of avoidable consequences demand that we treat a new offer to perform, coming from a party guilty of a substantial breach of contract, on a par with offers of third parties?

Often when the party guilty of a breach makes a new offer he intends an accord and satisfaction. If the offer discloses such to be its purpose the aggrieved party need not accept it, since to do so would rob him of his legitimate contract rights.³ Some courts go further and say that the acceptance of a new offer, even though nothing is said as to the old contract, might subject the plaintiff to the risk of being considered to have abandoned his claim to damages.⁴ This is not sound law.⁵ No accord should be presumed in the absence of an agreement to that effect, which can fairly be inferred from the words used or from the circumstances.⁶ The wronged person by accepting the defaulter's offer merely does what the law insists he do to avoid detrimental consequences of the breach.⁷

Obviously the aggrieved party need not accept the new offer if he is in no position to comply with its terms.⁸ The same would be true should it necessitate a departure from his ordinary course of business.⁹ It has been held that an employee might refuse another offer from a contractor

¹ *Hall v. Paine*, 224 Mass. 62, 112 N. E. 153 (1916); *Beymer v. McBride*, 37 Iowa, 114 (1875); *Clark v. Marsiglia*, 1 Denio (N. Y.), 317 (1845). See *Brace v. Calder*, [1895] L. R. 2 Q. B. D. 253, 261; *Dunkirk Colliery Co. v. Lever*, [1878] 9 Ch. D. 20, 25; *Frost v. Knight*, [1872] L. R. 7 Ex. 111, 115.

² *Western Union Tel. Co. v. Southwick*, 214 S. W. 987 (1919 Tex. Civ. App.); *Collins v. Twin Falls Co.*, 28 Idaho, 1, 152 Pac. 200 (1915); *Erie County Natural Gas & Fuel Co. v. Carrol*, 1911 A. C. 105; *Benton v. Fay*, 64 Ill. 417 (1872). See *Beymer v. McBride*, *supra*, 118. "The principle is that if the party does not perform his contract the other may do so for him, as near as may be, and charge him for the expenses incurred in so doing." *Hamblin v. Great Northern Ry. Co.*, 26 L. J. (Ex.) 20, 23 (1856).

³ *Campfield v. Sauer*, 189 Fed. 576 (1911); *People's Cooperative Ass'n v. Lloyd*, 77 Ala. 387 (1884); *Jackson v. Independent School District, etc.*, 110 Iowa, 313, 77 N. W. 860, 863 (1899); *Whitemarsh v. Littlefield*, 46 Hun (N. Y.), 418 (1888); *Hirsch v. Georgia Iron & Coal Co.*, 169 Fed. 578 (1909).

⁴ *Waldrip v. Hill*, 70 Wash. 187, 126 Pac. 409 (1912); *Chisholm v. Preferred Bankers, etc. Co.*, 112 Mich. 50, 56, 70 N. W. 415, 417 (1897); *People's Cooperative Ass'n v. Lloyd*, *supra*; *Havemeyer v. Cunningham*, 35 Barb. (N. Y.) 515 (1862).

⁵ *Phillips v. Todd*, 180 S. W. 1039 (Mo. 1915); *Garfield Co. v. Railway*, 166 Mass. 119, 44 N. E. 119 (1886); *Lawrence v. Porter*, 63 Fed. 62, 65 (1894); *Warren v. Stoddart*, 105 U. S. 224 (1881); *McKnight v. Dunlap*, 5 N. Y. 537 (1851).

⁶ *Smith v. Carter & Co.*, 136 Mo. App. 529, 118 S. W. 527 (1909).

⁷ *Ibid.*

⁸ *Lawrence v. Porter*, *supra*, 64; *Cook Manufacturing Co. v. Randall*, 62 Iowa, 244, 249, 250, 17 N. W. 507, 510 (1883).

⁹ *Waldrip v. Hill*, 70 Wash. 187, 126 Pac. 409 (1912); *Brazell v. Cohn*, 32 Mont. 556, 81 Pac. 339, 343 (1905); *Dunkirk Colliery Co. v. Lever*, 9 Ch. D. 20, 25 (1878).

guilty of reprehensible conduct,¹⁰ and it is reasonable to suppose that in such case a like result would obtain in mercantile contracts.

In cases involving employment contracts a refusal by a wrongfully discharged employee to accept an offer of his former employer to re-engage him may be introduced in reduction of damages.¹¹ But the offer will not be considered if it substantially varies the terms of employment,¹² if the offered services are more menial,¹³ if anything has occurred to render further association between the parties offensive or degrading,¹⁴ or if the employee has in the interval obtained a position elsewhere.¹⁵

It sometimes happens where a mercantile contract has been broken that the party breaking it makes a new offer whose terms are more advantageous than those of the market generally, or else he is the only one capable of supplying the subject matter of the original agreement. A recent English case, *Payzu, Ltd. v. Saunders*,¹⁶ in accord with the better view in the United States,¹⁷ applies the analogy of employment contracts and holds that the rejection of the offer, provided its acceptance would not entail substantial inconvenience, disentitles the plaintiff from recovering the loss he might reasonably have avoided by accepting it. His damages are limited to the additional expense he would have incurred had he accepted it.¹⁸ Slight weight should attach to the element of personal pique and to the fact that the opportunity to lessen the plaintiff's loss comes at the hands of one who has been guilty of a breach.¹⁹ The aim, in treating his offer like any other on the market,

¹⁰ *Levin v. Standard Fashion Co.*, 16 Daly (N. Y.) 404 (1890).

¹¹ *Brace v. Calder*, *supra*; *Bigelow v. The American Forcite Powder Mfg. Co.*, 39 Hun (N. Y.), 599 (1886); *Birdsong v. Ellis*, 62 Miss. 418 (1884); *Mitchell v. Toole*, 25 S. C. 238 (1886).

¹² *Jackson v. Independent School District, etc.*, 110 Iowa, 313, 77 N. W. 860 (1899). See *Birdsong v. Ellis*, *supra*, 420.

¹³ *Cooper v. Strange & Warner Co.*, 111 Minn. 177, 126 N. W. 541 (1910) (manager of department to saleslady).

¹⁴ *Levin v. Standard Fashion Co.*, *supra*.

¹⁵ *Birdsong v. Ellis*, *supra*, 420.

¹⁶ [1919] 2 K. B. 581. See RECENT CASES, *infra*, p. 863. It is possible that in the United States a different result might have been reached on the question whether the defendant was guilty of a breach. The English court, while referring to Sec. 31, SALE OF GOODS ACT, which is substantially like Sec. 45 (2) of our SALES ACT, takes pains expressly to reaffirm the rule concerning divisible contracts as laid down by Lord Coleridge in *Freeth v. Burr*, [1874] L. R. 9 C. P. 208. This rule stresses the intent to abide by the contract as the all-important factor. The great weight of authority in the United States following *Norrington v. Wright*, 115 U. S. 189 (1885), considers the materiality of the failure of performance as the telling element. See WILLISTON'S *WALD'S POLLOCK ON CONTRACTS*, 3 ed., 327.

¹⁷ *Borden & Co. v. Vinegar Bend Lumber Co.*, 7 Ala. App. 335, 62 So. 245 (1913); *Lawrence v. Porter*, *supra*; *Warren v. Stoddart*, *supra*; *Deere v. Lewis*, 51 Ill. 254 (1869).

¹⁸ The American cases err in limiting the plaintiff's damages to the interest on the credit period where he is wrongfully denied credit to which his contract entitles him. To a business man the use of the capital during the credit period is worth considerably more than the current interest rate. Else, he would not borrow for investment. This fact is recognized in *Payzu, Ltd. v. Saunders*, [1919] 2 K. B. 581.

¹⁹ *Parsons v. Sutler*, 66 N. Y. 92 (1876); *McCurdie, J.*, in *Payzu, Ltd. v. Saunders*, *supra*, 586: "I feel no inclination to allow in a mercantile dispute an unhappy indulgence in far-fetched resentment or an undue sensitiveness to slights or unfortunately worded letters. Business often gives rise to certain asperities." See *Ibid.*, 589; *Lawrence v. Porter*, *supra*, 66.

is to prevent the imposition of forfeitures and penalties.²⁰ The aggrieved party may refuse the offer which would mitigate his loss, but if he does that he pursues a course not necessary to his own protection and must bear the consequences.

Several cases are apparently in conflict with the above view;²¹ but of these only two seem to be irreconcilable.²² The others can be explained on the ground that the plaintiff was in no position to accept the new offer; that the offer called for a surrender of rights under the old contract; or that it involved a radical departure from the terms of the old agreement.²³ It is argued that the defaulter can not call upon the wronged party to make a new contract for his benefit; that to deny the plaintiff damages for loss he might have avoided by accepting the defendants' new offer would encourage bad faith. But the acceptance of the new offer does not work to the defendant's advantage,²⁴ except in so far as the damage which might result from his breach is thereby held down to a smaller compass. And if there be any weight in these objections, they apply with equal force to the whole doctrine of mitigation of damages, which is fundamental in the common law.

RECENT CASES

ABATEMENT — PENDENCY OF AN ACTION IN WHICH PRESENT CLAIM MIGHT BE SET UP AS COUNTERCLAIM. — In an action for damages caused by a collision between the plaintiff's and the defendant's motor trucks, the defendant pleaded in abatement the pendency of an action by the defendant against the plaintiff for damages caused by the same collision. *Held*, that the action be dismissed. *Allen v. Salley*, 101 S. E. 545 (N. C.).

When a pending action will settle all issues between the parties, its pendency is ground for abatement of a subsequent action. *Stevens v. Home Savings Ass'n*, 5 Idaho, 741, 51 Pac. 779; *Disbrow Mfg. Co. v. Creamery Mfg. Co.*, 115 Minn. 434, 132 N. W. 913. But when the pending action will not in itself determine all issues, the defendant is generally allowed to elect whether to plead a cross demand by way of counterclaim or to bring a separate action on it. *Welch v. Hazelton*, 14 How. Pr. 97; *Douglas Co. v. Moler*, 3 Misc. 373, 22 N. Y. Supp. 1045. See 1 SUTHERLAND, DAMAGES, 4 ed., § 187. The principal case compels the defendant to use his remedy of counterclaim. The

²⁰ "To excuse the injured party from dealing with the party in default would enable the injured party to adopt a course possibly dictated by a desire to injure another rather than to save himself." See *Borden & Co. v. Vinegar Bend Lumber Co.*, 7 Ala. App. 335, 62 So. 245, 248 (1913). See J. H. Beale, Jr., "Damages upon Repudiation of a Contract," 17 YALE L. JOUR. 444.

²¹ *Frohlich v. Independent Glass Co.*, 144 Mich. 278, 107 N. W. 889 (1906); *Cox v. Anoka Waterworks, etc. Co.*, 87 Minn. 56, 91 N. W. 265 (1902); *Coppola v. Marden Orth & Hastings Co.*, 282 Ill. 281, 118 N. E. 499 (1917); *Cook Manufacturing Co. v. Randall*, 62 Iowa, 244, 17 N. W. 507 (1883).

²² *Cox v. Anoka Waterworks, etc. Co.*, *supra* (but thirty days had elapsed between the breach and the new offer); *Frohlich v. Independent Glass Co.*, *supra*.

²³ See *Cook Manufacturing Co. v. Randall*, 62 Iowa, 244, 250, 17 N. W. 507, 510; *Coppola v. Marden, etc. Co.*, 282 Ill. 281, 284, 118 N. E. 499, 500.

²⁴ Suppose A refuses to deliver on credit per agreement and he later offers to deliver for cash. If B pays him cash he gets the very thing he wanted and has his cause of action for the added expense involved, — in this case the loss of the value of the credit period. What does A gain thereby?

argument in favor of the result is that it prevents duplication of legal proceedings. In the principal case, the result is reached without injustice. The claims of the parties arose in the same transaction, and both would require the same evidence and witnesses. Both parties have evinced their readiness to bring their cases to trial at this time. But the decision cannot be supported on authority. See *Woody v. Jordan*, 69 N. C. 189; *Asher v. Reizenstein*, 105 N. C. 213, 10 S. E. 889. And a general application of a rule compelling counterclaim would be unjust. A plaintiff is not compelled to join two causes of action against the same defendant. *Brunsdon v. Humphrey*, 14 Q. B. D. 141; *Reilly v. Sicilian Asphalt Paving Co.*, 170 N. Y. 40, 62 N. E. 772. There would seem an even greater hardship in always compelling a defendant to try his cross action at the place of the plaintiff's choosing.

ADMIRALTY — JURISDICTION — EQUITABLE JURISDICTION — ACCOUNTINGS. — By the terms of a charter party, a demise of two ships for a term of years, the charterer was to pay the owner a certain sum each month and one half the net earnings after deducting these sums. At the end of the period the charterer was to return the ships in good repair with an equal amount of furniture and apparel. In a libel for the breach of the charter party it appeared that an accounting was incidentally involved. *Held*, that admiralty has jurisdiction. *Metropolitan S. S. Co. v. Pacific-Alaska Navigation Co.*, 260 Fed. 973 (Dist. Ct. S. D. Me.).

In adjusting the rights of litigants, courts of admiralty proceed on equitable principles. They may deny full recovery to a sailor guilty of misconduct during the voyage in which the wages in dispute were earned. *Macomber v. Thompson*, 1 Sumn. 384. And they may refuse to entertain libels in tort for assault when the libellants because of their wrongful conduct could recover only trivial damages. *Barnett v. Luther*, 1 Curtis, 434. Where, however, the relief asked in its nature involves the exercise of equitable jurisdiction, admiralty refuses to act. It does not, therefore, entertain a bill for the reformation of an instrument. *Williams v. Prov. Co.*, 56 Fed. 159. Nor does it adjudicate a libel brought mainly for an accounting, however simple. *Martin v. Walker*, Abb. Adm. 579; *The Zillah May*, 221 Fed. 1016. But if the accounting is incidental to the main cause of action, maritime in nature, admiralty gives complete relief, even if, as in the principal case, the accounting seems complex. *The Emma B.*, 140 Fed. 771. On principle, there is no reason why admiralty, in spite of its pride in its simple procedure, should make this distinction. Indeed, admiralty is obviously a court better fitted than equity to take jurisdiction of accountings arising out of maritime transactions. However, this distinction seems firmly established by judicial decision.

APPEAL AND ERROR — APPELLANT'S RIGHT OF DISMISSAL DENIED WHERE PREJUDICIAL TO APPELLEE. — The plaintiff in a replevin suit appealed from an adverse judgment in a county court to the district court. By statute the latter court had jurisdiction to try the cause *de novo*. (1907 NEB. COMP. STAT., § 7514.) By an order of the district court, he also regained possession of the chattel which had been restored to the defendant by execution on the county court's judgment. Five months later, the plaintiff, against the objection of the defendant, moved to dismiss the appeal and claimed an absolute right to have the motion granted. There is a statute providing that an appellant may dismiss without the consent of the appellee at any time before submission. (1913 NEB. REV. STAT., § 8547.) *Held*, that the motion to dismiss be denied. *Lemer v. Hunyak*, 175 N. W. 605 (Neb.).

Even in the absence of statute, the appellant has a right to have his appeal dismissed. *Hart v. Minneapolis, St. Paul, etc. Ry. Co.*, 122 Wis. 308, 99 N. W. 1019; *Derick v. Taylor*, 171 Mass. 444, 50 N. E. 1038. But this right is sub-

ject to the discretion of the court and must be exercised through its order. *In re City of Seattle*, 40 Wash. 450, 82 Pac. 740; *Cloak Co. v. Oreck*, 134 Minn. 464, 157 N. W. 327. Before the court will allow the appellant to withdraw its appeal, it must be satisfied that no prejudice will thereby result to the appellee. This prejudice may consist in the loss of some right to which appellee has become entitled by reason of the appeal. *Acequia Madre v. Meyer*, 17 N. M. 371, 128 Pac. 68; *Sweeney v. Coulter*, 109 Ky. 295, 58 S. W. 784. In the principal case, the court properly held that the appellant's statutory right is not absolute, but is merely declaratory of the right to dismiss which would have existed independently of the statute. Sufficient ground for denying the motion is to be found in the fact that the appeal gave the district court original jurisdiction by virtue of which it might have assessed larger damages for the appellee than those secured in the lower court. See *Yell v. Outlaw*, 14 Ark. 164, 165; *McKinley v. Wilmington, etc. Co.*, 7 Ill. App. 386, 390. On principle, stay of execution in itself, if it involves damage to the appellee, should bar appellant's right of dismissal.

ATTORNEYS — RELATION BETWEEN ATTORNEY AND CLIENT — ADVICE OF ATTORNEY TO A DESERTER AS ASSISTANCE UNDER A STATUTE. — The defendant, an attorney, was consulted by a sixteen year old deserter from the army, and by his father, who wished to secure the son's release from military service. The attorney advised the boy to remain away from the authorities, to leave the state, and if apprehended, to deny his identity. A federal statute made it a crime to "harbor, conceal, protect, or assist any soldier . . . who may have deserted" from the military service of the United States, "knowing him to have deserted" (35 STAT. AT L. 1097). The defendant was indicted under this statute, and from a verdict of guilty and judgment thereon he appealed. *Held*, that the judgment be reversed. *Firpo v. United States*, 52 Chicago Leg. News, 210 (Circ. Ct. App.).

The duty of an attorney toward his client is limited by a counter duty as an officer of the court not to perpetrate any fraud upon the court, nor to obstruct the administration of justice, nor to bring the court into contempt by advising a client to disobey its orders. *In re Dubose*, 109 Fed. 971; *Leber v. United States*, 170 Fed. 881. See 30 HARV. L. REV. 642. While the conduct of the attorney here was therefore unprofessional, he was not guilty of the crime charged unless the advice given was equivalent to assistance. Advice has been characterized as mere words, as distinguished from assistance, which implies some affirmative act in aid of the principal. *Wiley v. McRee*, 2 Jones (N. C.), 349. But an accessory has been defined as one who procures, advises, or assists. *United States v. Wilson*, 28 Fed. Cas. 699. And the test of whether one is an accessory seems to be the rendering of some personal help to the principal to elude punishment. *Lloyd v. The State*, 42 Ga. 221. Advice which points out ways and means of escape may be far more valuable to a criminal than the loan of a horse or money, which will make the lender an accessory. Accordingly, such advice as was given in the principal case ought to have been held to constitute assistance, and to make the advising attorney guilty of the crime created by the statute.

ATTORNEYS — RELATION BETWEEN ATTORNEY AND CLIENT — PROCEEDING IN *QUO WARRANTO* DISMISSED BECAUSE STATE'S ATTORNEY DISQUALIFIED. — An information in the nature of *quo warranto* was filed in the name of the state, on the relation of third persons, by the state's attorney against the members of a board of education because of alleged irregularities in the establishment of the school district. The defendants pleaded that the now state's attorney had acted as their attorney in the organization of the school district and that he was estopped to present and file this information. A de-

murrer to the plea was sustained. The defendants appealed. *Held*, that the information be dismissed. *People ex. rel. Livers et al. v. Hanson et al.*, 125 N. E. 268 (Ill.).

For a discussion of this case, see NOTES, p. 848, *supra*.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — RIGHT OF ACTION FOR TORT CAUSING PERSONAL AND PROPERTY DAMAGE. — The defendant so negligently discharged its duties under a contract to maintain the bankrupt's credit as a trader during his absence in the army that his estate was forced into bankruptcy and its assets depleted. The bankrupt and the trustee join as parties plaintiff, the former claiming for damage to his credit and business reputation, and the latter claiming for injury to the estate. *Held*, that both may recover. *Wilson & Another v. United Counties Bank, Ltd.*, [1920] A. C. 102 (House of Lords).

It is well settled that a right of action for personal injuries remains in the bankrupt, while one for property damage vests in the trustee. *Sibley v. Nason*, 196 Mass. 125, 81 N. E. 887. See **BANKRUPTCY ACT** 1898, §§ 70*a* 5, 6. But where the same wrongful act causes both personal and property damage, the relative rights of the bankrupt and the trustee are as yet not well defined. An earlier English case took the view that the right should be confined to the party representing the interest chiefly damaged. *Rose v. Buckett*, [1901] 2 K. B. D. 449. See 15 HARV. L. REV. 229. Theoretically unsatisfactory, this is practically inapplicable where each interest has sustained material injury. In justice, both should be compensated, but the difficulty lies in apportioning the cause of action occasioned by the single tortious act. It would seem that the Bankruptcy Act established a right in the trustee, for in him are vested the bankrupt's "rights of action arising . . . from injury to his property." **BANKRUPTCY ACT**, §§ 70*a*, 6. If so, the bankrupt must proceed on the theory that the action is divisible to recover for the personal injury. Such a dual cause of action has been held divisible even outside of bankruptcy. *Brunsdon v. Humphrey*, 14 Q. B. D. 141; *Reilly v. Sicilian, etc. Paving Co.*, 170 N. Y. 40, 62 N. E. 772. But see *Doran v. Cohen*, 147 Mass. 342, 17 N. E. 647; *Von Fragstein v. Windler*, 2 Mo. Ap. 598. And various *dicta* of the English courts in bankruptcy cases foreshadowed the decision in the principal case. *Rogers v. Spence*, 12 Cl. & F. 700, 720; *Beckham v. Drake*, 2 H. L. C. 578, 628. See also *Darley, etc. Co. v. Mitchell*, 11 A. C. 127, 144. Even though, in general, such a cause of action should be held indivisible, it would seem practically desirable to allow an apportionment between the bankrupt and his trustee under the special circumstances of bankruptcy. It is to be hoped that the American courts, as yet undecided, will follow the principal case, despite their varying views on the divisibility of actions. There are cases pointing the other way, however. See *Epstein v. Handwerker*, 29 Okla. 337, 116 Pac. 789; *Remmers v. Remmers*, 217 Mo. 541, 117 S. W. 1117; *Sibley v. Nason*, *supra*.

BANKRUPTCY — PROPERTY PASSING TO THE TRUSTEE IN BANKRUPTCY — RIGHT TO RECOVER SECURITIES PLEDGED FOR A USURIOUS LOAN. — The defendant loaned money to a borrower at a usurious rate of interest. A statute permitted the borrower an action for the recovery of the securities without any tender of the loan. (1909 LAWS OF NEW YORK, c. 25, § 377.) The plaintiff, receiver in bankruptcy of the borrower, claims the same right. *Held*, that the defendant have judgment. *Rice v. Schneck*, 179 N. Y. Supp. 335.

The Bankruptcy Act provides that the assets of the bankrupt, including rights of action arising from contract and detention and injuries to property, shall pass to the trustee of the estate. **BANKRUPTCY ACT** of 1898, § 70*a* (6). Actions for fraud in inducing a sale or an acceptance of a contract will pass,

under this section. *In re Harper*, 175 Fed. 412; *In re Gay*, 182 Fed. 260. So, of an action for malicious attachment of property: *Hansen v. Wyman & Partidge Co.*, 105 Minn. 491, 117 N. W. 926. The right to revest one's self with property, held as security for a usurious loan, seems equally to be in protection of property. The principal case, however, took the view that the right under the usury statute was personal to the borrower, following previous, decisions. *Wheelock v. Lee*, 64 N. Y. 242; *In re Fishel*, 198 Fed. 464. However the trustee in bankruptcy of the borrower may to some extent avail himself of the usury statutes. He may use the defense of usury to defeat a claim against the estate. *In re Kellogg*, 121 Fed. 333; *Broach v. Mullis*, 228 Fed. 551. He may recover usurious interest paid. *Reed v. National Bank*, 155 Fed. 233; *Wheelock v. Lee*, *supra*. He may recover a penalty to which the lender is liable. *Tamplin v. Wentworth*, 99 Mass. 63; *First National Bank v. Lasater*, 196 U. S. 115. Furthermore, the property in the pledge will pass to the trustee subject only to the creditor's lien. *Rode & Horn v. Phipps*, 195 Fed. 414. And normally a creditor would have no standing to rely on a lien obtained by a usurious contract. *Thompson v. Van Vechten*, 27 N. Y. 568; *Vickery v. Dickson*, 35 Barb. 96. The result of the principal case is undesirable since it enables the bankrupt, by pledging property to a usurious creditor, to prevent it from going to his legitimate creditors unless the trustee in bankruptcy pays the usurious creditor in full.

CONFLICT OF LAWS — CONCURRENT JURISDICTION — RULE OF FEDERAL COURTS AS TO BURDEN OF PROOF APPLIED IN AN ACTION IN A STATE COURT UNDER A FEDERAL STATUTE. — In an action in a state court based on the federal Employers' Liability Act, the question was presented whether the rule of the state court or that of the federal court regarding the burden of proof on the issue of assumption of risk should govern (35 STAT. 65). *Held*, that the federal rule should be applied. *Crugley v. Grand Trunk Ry. Co.*, 108 Atl. 293 (N. H.).

State courts of general jurisdiction must take cognizance of an action to enforce a right of recovery arising under the federal Employers' Liability Act. *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1. In such an action in a state court, the decisions of the federal courts as to the construction of the statute are binding. *Southern Ry. Co. v. Gray*, 241 U. S. 333. As to matters of procedure, the law of the forum governs. *Ches. & Ohio Ry. Co. v. Kelley's Adm'r*, 161 Ky. 655, 171 S. W. 185; *Bombolis v. Minn., etc. R. Co.*, 128 Minn. 112, 150 N. W. 385; *St. Louis, etc. R. Co. v. Brown*, 45 Okla. 143, 144 Pac. 1075. The question of who has the burden of proof of an issue is ordinarily one of procedure. *Duggan v. Bay State St. Ry. Co.*, 230 Mass. 370, 119 N. E. 757; *Sackheim v. Pigueron*, 215 N. Y. 62, 109 N. E. 109; *So. Ind. Ry. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722. But a statute which creates a cause of action may impose limitations on it which become a part of the substantive right, although apart from the statute they would be remedial only. *Phillips v. Grand Trunk Ry.*, 236 U. S. 662; *Partee v. St. Louis, etc. Co.*, 204 Fed. 970; *Whealland v. Boston*, 202 Mass. 258, 88 N. E. 769. The United States Supreme Court has ruled that the statute in question makes the burden of proof a part of the substantive right. *Central Vt. R. R. v. White*, 238 U. S. 507. Since the state court is bound by this construction of the statute, the decision in the principal case follows logically.

CONSTITUTIONAL LAW — DUE PROCESS — REGULATION OF PRICES. — The Montana legislature passed an act giving a commission power to supervise the charges made for all commodities sold within the state, and to establish maximum prices or a reasonable margin of profit; the act made provision for court review of any prices claimed to be unreasonable or unjustly discriminatory..

(1919, MONTANA SESSION LAWS SIXTEENTH LEGISLATIVE ASSEMBLY, EXTRAORDINARY SESSION, c. 21). An injunction was asked against the enforcement of the act. *Held*, that the act is unconstitutional. *Holter Hardware Co. v. Boyle*, the District Court of the United States for the District of Montana, No. 149 (January, 1920).

For a discussion of this case, see NOTES, p. 838, *supra*.

CONSTRUCTIVE TRUSTS — MISTAKE OF FACT — MONEY LOANED IN IGNORANCE OF THE PREVIOUS INSTITUTION OF BANKRUPTCY PROCEEDINGS AGAINST THE BORROWER. — The defendant was appointed receiver in bankruptcy for a debtor. The next day the plaintiff loaned the debtor £1000, neither party knowing of the receiving order. The money came to the hands of the defendant, and the plaintiff applied for an order requiring the defendant to return the money. *Held*, that the order be made. *Re Thellusson*, 122 L. T. R. 35 (Court of Appeal).

It is occasionally asserted that the courts will require court officers to act strictly in accordance with honesty and fairness irrespective of the obligations of private litigants in similar circumstances. *Ex parte James*, 9 Chan. App. 609; *Ex parte Simmonds*, 16 Q. B. D. 308; *Gillig v. Grant*, 23 App. Div. 596, 49 N. Y. Supp. 78. Thus court officers are not allowed to take advantage of the anomalous rule that money paid under a mistake of law cannot be recovered. See 32 HARV. L. REV. 283. Under the influence of this line of thought, the court in the principal case avoided a discussion of the rights of the parties. But it would seem that this reasoning assumes the point at issue, for surely the receiver should not be held to an ethical standard inconsistent with the rights of the creditors whom he represents. However, as between the creditors and the plaintiff, the latter is entitled to the money. For money paid under a mistake of fact becomes subject to a constructive trust and can be followed as long as it can be identified into the hands of all but a *bona fide* purchaser. *In re Berry et al*, 147 Fed. 208. See 3 POMEROY, EQ. JURIS., 4 ed., §§ 1047, 1048.

It is true that ordinarily a man's financial condition is an extrinsic fact, ignorance of which is no ground for equitable relief. *Dambmann v. Schulting*, 75 N. Y. 55; *In re Hunter-Rand Co.*, 241 Fed. 175. But in the principal case the mistake involved more than the risk of insolvency assumed in every transaction. By the provisions of the English Bankruptcy Act the plaintiff's claim against the debtor is postponed until all the debtor's assets have been applied to claims existing at the date of the receiving order. See ACT 4 & 5 GEO. V., c. 59, § 30. The question is one of degree. See WILLISTON, SALES, § 656. It is submitted that equity should allow recovery to prevent a gratuitous addition, at the plaintiff's expense, to the fund available to creditors.

CORPORATIONS — LIABILITY OF STOCKHOLDER UPON SUBSCRIPTION-CALLS — WHETHER DATE OF PAYMENT NECESSARY FOR VALIDITY OF RESOLUTION FOR A CALL. — The plaintiff corporation sued the defendant stockholder to recover the amount of a call made in respect of the defendant's shares. The defense was that the resolution of the board of directors for the call fixed no date upon which it should be payable. *Held*, that the action be dismissed. *Canadian Motor Sales Corp., Ltd. v. Wilson*, [1920], 1 W. W. R. 282 (Saskatchewan).

In the English cases, upon the authority of which the court rested its decision, either the articles of association or a statute required the resolution to specify the date of payment of the call. *In re Cavoley & Co.*, 42 Ch. D. 209; *Johnson v. Lytle's Iron Agency*, 5 Ch. D. 687. But in the principal case there was no intimation that such a provision was contained in any statute, in the articles of association, or in the subscription agreement. The doctrine propounded, therefore, seems to be that a resolution for a call is invalid, as a

matter of general law, unless it fixes the time of payment. Undoubtedly it is convenient that the resolution should specify the date of payment, since interest will run from that time. *McCoy v. The World's Columbian Exposition*, 186 Ill. 356, 57 N. E. 1043; *Gould v. Town of Oneonta*, 71 N. Y. 298. But the effect of a call is merely to mature the liability upon the subscription. *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 88 N. W. 583. See 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., §§ 143, 144. And there is no strong reason why, in the absence of a date, the resolution should not be treated as fixing the time of payment to be upon demand. This view has been taken in this country and would seem to give a more sensible result. *Western Improvement Co. v. Des Moines National Bank*, 103 Iowa, 455, 72 N. W. 657. See 1 COOK, CORPORATIONS, 6 ed., §§ 115, 116.

CRIMINAL LAW — JURISDICTION — BLOW IN OWN COUNTY AND DEATH IN ANOTHER. — Blows were struck by the defendant in county A, from the effects of which the victim died in county B. The defendant was tried and convicted in county B under a statute which provided that where a homicide was committed over two counties that the venue might be laid in either. The state constitution, however, assures the accused of a fair trial in the county where the offense was committed. *Held*, that the conviction be sustained. *State v. Criqui*, 185 Pac. 1063 (Kan.).

For a discussion of the principles involved, see NOTES, p. 843, *supra*.

DAMAGES — MEASURE OF DAMAGES — DUTY OF INNOCENT PARTY TO ACCEPT OFFER OF DEFAULTING PARTY IN MITIGATION OF DAMAGES. — The defendant contracted to sell the plaintiff a quantity of silk "delivery as required" during a period of nine months, payment to be made for each installment within one month of delivery. Owing to a mishap, payment for the first installment delivered was delayed about three weeks and the defendant thereupon refused to go ahead with future deliveries unless cash were paid. This the plaintiff refused to do; and he brought an action for breach of contract, claiming as damages the difference between the contract price and the market price at the time for performance. *Held*, that his damages be limited to the expense he would have incurred had he accepted the defendants' offer. *Payzu, Ltd. v. Saunders*, [1919] 2 K. B. 581.

For a discussion of this case, see NOTES, p. 856, *supra*.

DOMICILE — EVIDENCE OF INTENT TO CHANGE AS BETWEEN TWO RESIDENCES. — The testator, having both a city and a country residence, with domicile at the latter, instructed his attorney to declare the former his residence in a will reading: "I, William D. Winsor, of the city of Philadelphia, etc." A statute required wills to be probated within the county where the testator had his "family or principal residence" (1917 PENN. LAWS, 148, § 4). Probate was granted in Philadelphia and the register of wills of the county where the country home was situated appealed. *Held*, that the appeal be dismissed. *In re Winsor's Estate*, 107 Atl. 888 (Pa.).

However many residences the testator may have, there is but one domicile. *Somerville v. Lord Somerville*, 5 Ves. 750; *Hairston, Jr. v. Hairston*, 27 Miss. 704. To change the domicile three things must concur: first, an abandonment of the former domicile; second, actual residence; third, the intention to establish a home. See STORY, CONFL. LAWS, § 44. Residence in fact without more, however, does not constitute that "family or principal residence" which in such a statute should be construed to mean domicile. See JACOBS, DOMICILE, § 73. Nor between two residences can the mere willing change the domicile, for the intent is a fact determinable from all the circumstances and a declaration is of slight weight as evidence. *In re Harkness' Estate*, 183 App.

Div. 396, 170 N. Y. Supp. 1024; *Smith v. Smith's Ex'r*, 122 Va. 341, 94 S. E. 777. Where the testator has paid taxes, has his family home, exercises the rights of citizenship, and makes his will describing himself as a citizen of that place, there undoubtedly is his domicile. *Carey's Appeal*, 75 Pa. St. 201. In the absence of these substantiating acts, however, there would seem to be no evidence sufficiently strong to indicate a change of the domicile. Even an unequivocal declaration of intent would not rebut the presumption against abandonment of the prior domicile. *Forbes v. Forbes*, Kay, 341; *Gilman v. Gilman*, 52 Me. 165; *Pickering v. Cambridge*, 144 Mass. 244, 10 N. E. 827.

EQUITY — JURISDICTION — ADEQUACY OF LEGAL REMEDY WHERE THERE IS A RECOVERY IN QUASI-CONTRACT — ACCOUNT. — The defendants, stockholders in a corporation, fraudulently induced the plaintiff, another stockholder, to sell his shares to them and to promise not to reëngage in a similar business for five years. The defendants having sold the stock to a competing concern at a profit, the plaintiff brings an action in equity to rescind the transaction and to have an accounting of the proceeds. *Held*, that the complaint states no ground for equitable relief. *Falk v. Hoffman*, 179 N. Y. Supp. 428 (App. Div.).

In England, when property has been procured by actual fraud, equity has freely exercised its jurisdiction to impose a constructive trust upon the proceeds, even though an adequate remedy could be had at law in quasi-contract. *Hill v. Lane*, L. R. 11 Eq. 215. See *Slim v. Croucher*, 1 De G., F. & J., 518, 523, 528; *Anderson v. Eggers*, 49 Atl. 578, 580 (N. J.). The reason seems to be that, originally, all cases of fraud were in the exclusive jurisdiction of equity, and equity refuses to be ousted of a jurisdiction exercised before the legal remedy was devised. See 1 POMEROY, EQ. JURIS., 4 ed., § 278; 2 *Id.*, § 912. However, the contrary doctrine obtains generally in the United States. *Buzard v. Houston*, 119 U. S. 347; *Curriden v. Middleton*, 232 U. S. 633. See 2 POMEROY, EQ. JURIS., 4 ed., § 914. But where special circumstances exist, such as insolvency, which will cause the legal remedy to be clearly inadequate, equity will exercise its jurisdiction. *Bosley v. The National Machine Co.*, 123 N. Y. 550, 25 N. E. 990; *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552, 40 N. E. 206. The principal case is in accordance with the American doctrine. *Equitable Life Assurance Society v. Brown*, 213 U. S. 25. But the doctrine seems unfortunate in that it leads to unnecessary and prolonged litigation; equity has a legitimate ground for granting relief and should do so. The accounting in the instant case is properly held not to be sufficient of itself to give equity jurisdiction, for no mutual accounts, complication, or fiduciary relationship appear. *Stitzer v. Fonder*, 214 Pa. St. 117, 63 Atl. 421; *Taff Vale Railway Co. v. Nixon*, 1 H. L. Cas. 110; *Harvey v. Sellers*, 115 Fed. 757. See Langdell, "A Brief Survey of Equity Jurisdiction," 3 HARV. L. REV. 236, 246. See also 23 HARV. L. REV. 304. But a decree for an accounting would have been possible, as incidental to other equity relief, if the court had imposed a constructive trust. See 5 POMEROY, EQ. JURIS., 4 ed., § 2354.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — EVIDENCE OF TRAILING OF ACCUSED BY BLOODHOUNDS. — The defendant was on trial for arson. A witness was permitted, over defendant's objection, to testify that dogs trained in the art of trailing human beings were set on to a well-defined track near the burned lumber yard and followed the tracks to the defendant's bed. *Held*, that there was no error. *State v. Yearwood*, 101 S. E. 513 (N. C.).

Evidence of trailing by bloodhounds is, by the weight of authority, admissible as a circumstance tending to connect the defendant with the crime. *Hargrove v. State*, 147 Ala. 97, 41 So. 972; *State v. Adams*, 85 Kan. 435, 116

Pac. 608. See 1 WIGMORE, EVIDENCE, § 177 (2). However, a proper predicate must first be laid showing the training and accuracy of the dog, the freshness of the trail, and that the tracks at the starting point were made by the guilty party. *State v. Dickerson*, 77 Ohio St. 34, 82 N. E. 969. See *Pedigo v. Commonwealth*, 103 Ky. 41, 50, 44 S. W. 143, 145. But even so, such evidence is rather unsatisfactory. Though the dog is impartial, his action may be influenced by the personal attendant and other factors, and, being spectacular, it tends to exert an undue influence on the minds of the jury. See J. C. McWhorter, "The Bloodhound as a Witness," 54 AM. L. REV. 109. Consequently juries should be particularly cautioned to weigh such evidence discriminately. *State v. Rasco*, 239 Mo. 535, 144 S. W. 449. It has been held that in the absence of other evidence tending to implicate the accused, the testimony of the bloodhound will not sustain a verdict of guilty. *Carter v. State*, 106 Miss. 507, 64 So. 215. And a few jurisdictions reject such evidence altogether. *Ruse v. State*, 186 Ind. 237, 115 N. E. 778; *Brott v. State*, 70 Neb. 395, 97 N. W. 593. It would seem, however, that the objections made go rather to the weight of the evidence than to its admissibility and do not warrant a rule of absolute exclusion.

EVIDENCE — JUDGMENT AS EVIDENCE OF A FACT — DECREE OF PROBATE COURT. — An action was brought under the Workmen's Compensation Act to recover for the death of an employee. An order of the probate court, reciting a finding that the applicant was the wife of the deceased, was admitted in the lower court as evidence of that fact. On appeal, *held*, that this evidence should not have been admitted. *Illinois Steel Co. v. Industrial Commission*, 125 N. E. 252 (Ill.).

For a discussion of the principles involved in this case, see NOTES, p. 850, *supra*.

EVIDENCE — STATEMENTS IN PUBLIC DOCUMENTS — ADMISSIBILITY OF CENSUS REPORT. — The accused in a criminal prosecution had made an affidavit of juvenility. As evidence tending to show the untruthfulness thereof, the prosecution produced a school census report, and the census taker testified that he had made the report offered, but he was unable to identify the person whose name was signed to the report, or state of his own knowledge that she was the mother or guardian of the accused. *Held*, that the evidence was properly admitted. *Jefferson v. State*, 214 S. W. 981 (Tex.).

Courts admit, as evidence of the truth of the facts stated, records made in the performance of public duty where the recorder had some opportunity of verifying the facts recorded. *The Irish Society v. The Bishop of Derry*, 12 Cl. & F. 641; *Evanston v. Gunn*, 99 U. S. 660. The purpose of a census is to secure data, under legislative authority, of general facts, such as the population of a district and similar facts of sociological interest, and to make such information public. As evidence of the population of a county or town, therefore, the federal census is properly received. *State v. Neal*, 25 Wash. 264, 65 Pac. 188; *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652. But census memoranda as to the ages of individuals are not meant to be made public, nor is the purpose of a census, usually, the registering of ages. As evidence of the minority of individuals a school census should not be received. *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201. See also *Edwards v. Logan*, 114 Ky. 312, 329, 70 S. W. 852, 857. In the principal case the statement in the report as to the age of the accused was the unverified statement of some person whose identity could not be ascertained. Its admission seems improper.

FRAUDULENT CONVEYANCES — RIGHTS OF CREDITORS — TORT CLAIMANTS AS CREDITORS WITHIN THE STATUTE — TIME OF ACCRUAL OF RIGHT TO ATTACK THE CONVEYANCE. — The plaintiff brought an action against the

defendant for criminal conversation. While the action was pending, the defendant conveyed all his property to his wife. Thereupon the plaintiff brought a second action to set aside the conveyance as fraudulent. During the pendency of the second action he recovered judgment in the tort action. The trial court dismissed the second action, and the plaintiff appealed. *Held*, that the judgment be reversed and the conveyance set aside. *Hopkinson v. Westerman*, 48 D. L. R. 597 (Ontario).

The term "creditor" within the meaning of the statutes against fraudulent conveyances has been held to include owners of contingent claims arising out of contract, as well as holders of unliquidated contract claims. *Yeend v. Weeks*, 104 Ala. 331, 16 So. 165; *Hatfield v. Merod*, 82 Ill. 113; *McVeigh v. Ritenour*, 40 Ohio St. 107; *Johnson v. Blomdahl*, 90 Wash. 625, 156 Pac. 561. And by the great weight of authority it includes tortfeasors who have not yet reduced their claims to judgment. *Walratt v. Brown*, 6 Ill. 397; *Bishop v. Redmond*, 83 Ind. 157; *National Bank v. Beatty*, 77 N. J. Eq. 252, 76 Atl. 442. In attacking a fraudulent conveyance, a creditor may have both a legal and an equitable remedy. Pursuing the former, he may, upon obtaining judgment against the fraudulent grantor, levy execution on the property conveyed, on the theory that as to him the conveyance was void and the title is still in the grantor. *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Willard v. Masterson*, 160 Ill. 443, 43 N. E. 771. If he proceeds by a bill in equity to set aside the conveyance, a prerequisite at common law was a judgment at law and a return of execution unsatisfied. *Angell v. Draper*, 1 Vern. 399; *Austin v. Bruner*, 169 Ill. 178, 48 N. E. 449. This rule has been changed by statutes in a considerable number of states, so that a creditor may proceed in equity in the first instance. *Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602; *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 134, 20 So. 84. The principal case was decided under a statute which held void conveyances made with the intent to defeat creditors and others. See 1914 ONTARIO REV. STAT., c. 105, § 3. The court brought the plaintiff within the word "others" of the statute, and held that it was not necessary that he should be a creditor at the time when the action was brought to set aside the conveyance.

GRAND JURY—SELECTION OF MEMBERS—EFFECT OF EXEMPTION OF JURORS BY COURT ON ITS OWN MOTION.—By statute there were certain classes of persons exempt from grand jury duty. The trial judge, after examining the first twelve men drawn from the panel as to their qualifications, of his own motion excused six of them. Three of the six clearly would have been entitled to exemption had they claimed it. The defendant was convicted under an indictment returned by the jury subsequently impaneled. *Held*, that the indictment be quashed. *State v. Smith*, 83 So. 264 (La.).

An indictment by a grand jury illegally constituted will not support a conviction. *Crowley v. United States*, 194 U. S. 461; *State v. McGarrity*, 140 La. 436, 73 So. 259. But it is not every departure from prescribed methods of selecting a grand jury that will lead to this result. Generally, where the irregularity complained of does not prejudice the defendants' cause it is not fatal to the indictment. *State v. Keating*, 85 Md. 188, 36 Atl. 840; *State v. Fidler*, 23 R. I. 41; *State v. Cooley*, 72 Minn. 476, 75 N. W. 729. The statute involved appears to have left the court some latitude. Assuming, however, that the judge exceeded his discretionary power, the error does not appear material. No allegation of bias was made, and the defendant's contention that the judge's act reduced unduly the element of chance which might have worked in his favor seems too remote. But where there is strong policy behind the strict enforcement of the letter of a statute, non-compliance of any sort is fatal. *Dunn v. United States*, 238 Fed. 508. Therefore, if the view be taken that undeviating procedure in the selection of the grand jury is essential the principal case can be sustained.

HUSBAND AND WIFE — COMMUNITY PROPERTY — RIGHT OF WIFE TO SUE FOR INJURIES WHEN HUSBAND REFUSES TO JOIN. — A statute gave the husband the sole power of managing and disposing of community property and made him a necessary party in suits concerning the community when the couple are living together and the action is against a third party. (1915 REM. & BAL. WASH. CODE, §§ 5917, 181.) The wife brought an action for injuries to herself sustained through the alleged negligence of the defendant and joined her husband as a party defendant because he refused to join her in the action. The defendant demurred on the ground of defect of parties plaintiff. *Held*, that the demurrer be sustained. *Hynes v. Colman Dock Co. et al.*, 185 Pac. 617 (Wash.).

At common law, both husband and wife were necessary parties plaintiff in such a suit. *Pennsylvania R. Co. v. Goodenough*, 55 N. J. L. 577, 28 Atl. 3; *Long v. Morrison*, 14 Ind. 595. The husband alone, however, could effectually release the action. *Beach v. Beach*, 2 Hill (N. Y.), 260. A refusal on his part to sue, therefore, would, it seems, bar recovery. Under the community system, such a right of action is clearly a part of the community, since it is property acquired during coverture by neither gift, devise, nor inheritance. *Ezell v. Dodson*, 60 Tex. 331; *Hawkins v. Front St. Ry. Co.*, 3 Wash. 592, 28 Pac. 1021. As the sole active agent of the community, the husband is the only necessary party plaintiff. *Hawkins v. Front St. Ry. Co.*, *supra*; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. 223. Whether the wife is even a proper party is in dispute. *T. C. R. Co. v. Burnett*, 61 Tex. 638; *Warner v. Steamer Uncle Sam*, 9 Cal. 697. See BALLINGER, PROPERTY RIGHTS OF HUSBAND AND WIFE UNDER THE COMMUNITY SYSTEM, §§ 180 *et seq.* However, the wife may sue alone if the husband has permanently abandoned her. *Baldwin v. Second St., etc. Ry. Co.*, 77 Cal. 390, 19 Pac. 644. Also, she may recover community goods wrongfully and wastefully disposed of by the husband. *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111. Similarly, an unreasonable refusal on his part to institute a suit required in the interest of the community should eliminate him as a necessary party. Since the parties are in effect joint obligees, the husband's refusal to sue should not necessarily bar recovery. *Harris v. Swanson & Bro.*, 62 Ala. 299; *Cunningham v. Carpenter*, 10 Ala. 109. But since his refusal to join in the suit may be legitimate, the wife should establish its unreasonableness to escape the general rule. Accordingly, as this was not shown, or even alleged, in the principal case, her suit necessarily failed. *Ezell v. Dodson*, *supra*.

INDICTMENT AND INFORMATION — SUFFICIENCY OF ACCUSATION — NECESSITY OF ALLEGATION OF SPECIFIC INSTANCES OF PRACTICING WITHOUT A LICENSE. — The defendant was indicted under a New York statute making it a misdemeanor to practice medicine without a license. (PUBLIC HEALTH LAWS, § 161.) The indictment alleged the crime in the language of the statute, but contained no allegations of specific acts or names of persons whom the accused had treated. The defendant's demurrer was overruled and he appealed from a judgment of conviction. *Held*, that the indictment was defective. *People v. Devinny*, 125 N. E. 543 (N. Y.).

An indictment charging a statutory offense in the very words of the statute is sufficient, unless the statute itself is too general or fails to define the necessary elements of the crime. *Ledbetter v. United States*, 170 U. S. 606; *State v. Munsey*, 114 Me. 408, 96 Atl. 729. Thus, if the crime is a continuous one, a general allegation in the words of the statute is enough. *Donovan v. State*, 170 Ind. 123, 83 N. E. 744; *Commonwealth v. Pray*, 30 Mass. 359. But where the crime may consist of a single unlawful act, as the sale of liquor without a license, some courts require the name of the buyer as a necessary particular. *Fletcher v. State*, 2 Okla. Cr. 300, 101 Pac. 599; *State v. Delancey*, 76 N. J. L. 462, 69 Atl. 958. Such a rule is necessary, they urge, to enable the accused to

prepare his defense and to preserve for him the plea of double jeopardy upon a second prosecution. Other courts, including New York, are satisfied, in the liquor cases, with an indictment in general terms. *People v. Pulhamus*, 8 App. Div. 133, 40 N. Y. Supp. 491; *State v. Duff*, 81 W. Va. 407, 94 S. E. 498. See JOYCE ON INTOXICATING LIQUORS, § 643. Because of the nature of the crime, the latter seems the preferable view. In the principal case, the court decided that the crime was not continuous and, further, refused to follow the precedent of the liquor cases. Even under this questionable interpretation, the prisoner's interests could be adequately secured by a bill of particulars in jurisdictions where such is allowed. *State v. Duff*, *supra*.

JOINT ADVENTURES—FIDUCIARY RELATION BETWEEN CO-ADVENTURERS—DUTY TO DIVIDE SECRET PROFITS.—The plaintiff and the defendant were joint adventurers in an enterprise to secure credit for an oil company. The defendant ostensibly withdrew from the undertaking, and the oil company induced the plaintiff to release it from its agreement by representing that the defendant had definitely dropped out of the negotiations. Immediately after, the defendant entered into a new agreement with the oil company on the same terms as originally, but with the plaintiff eliminated. The plaintiff seeks an account of profits made under the second contract, and a division according to the terms of the joint adventure. *Held*, that the relief be granted. *Brown v. Leach*, 178 N. Y. Supp. 319 (App. Div.).

For a discussion of this case, see NOTES, p. 852, *supra*.

LIENS—PRIORITY OF COMMON-LAW LIEN OVER CONDITIONAL VENDOR'S LIEN.—An automobile was leased monthly by the plaintiff to X and the agreement between the parties contained a provision by which X was permitted at any time to purchase the automobile outright. X while in possession delivered the automobile to the defendant for repairs, which were performed by the latter. The defendant claimed the right to retain a lien on the automobile for value of his repairs. *Held*, that no lien attached. *De Witt v. Gardner*, 76 Leg. Int. 824 (Pa.).

Subject to exceptions made in favor of innkeepers and carriers, no common-law lien attaches to chattels delivered without the authority of the owner. *Small v. Robinson*, 69 Me. 425; *Robins v. Gray*, [1895] 2 Q. B. 501. In conformance with this rule, it has been held generally that no lien can be acquired by an artisan as against the mortgagee or conditional seller of a chattel where repairs have been made at the request of the mortgagor or conditional buyer. *Sargent v. Usher*, 55 N. H. 287; *Storms v. Smith*, 137 Mass. 201; *Baumann Co. v. Roth*, 67 Misc. 458, 123 N. Y. Supp. 191. Considerable authority, however, holds that where the continued use of the chattel contemplates repairs, as in the principal case, the common-law lien prevails. *Keene v. Thomas*, [1905] 1 K. B. 130; *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680; *Hammond v. Danielson*, 126 Mass. 294. It is argued that in such cases the mortgagee impliedly authorizes the making of repairs and thereby voluntarily subjects the property to the acquisition of a lien. Again, the improvements benefit not only the mortgagor but also the mortgagee by preserving his security, and in justice the lien should take priority. Several jurisdictions, however, refuse to adopt this reasoning and make no exception of these cases to the general rule. *Baughman Auto. Co. v. Emanuel*, 137 Ga. 354, 73 S. E. 511; *Small v. Robinson*, *supra*; *Denison v. Shuler*, 47 Mich. 598, 111 N. W. 402. The latter cases, it seems, represent the better view. The authority that the courts above imply in these cases is clearly contrary to the understanding of the parties—the mortgagee never consents that his security shall be impaired in the absence of express agreement. Furthermore, the recording of the mortgage or the

conditional sale fixes the repairer with notice that a valid lien has already been acquired and no injustice results if he is confined to a personal action against the mortgagor.

PARTNERSHIP — RIGHTS OF PARTNERS *INTER SE* — FIDUCIARY RELATION AFTER DISSOLUTION. — A partnership, composed of A and B, was offered the timber rights in certain realty, and cut and took possession of some of the timber. On dissolution, A assigned his rights in all partnership timber to B, who continued the business. A then purchased the timber rights in this same property for his son, who knew all the circumstances. The son sues B for conversion of the timber. *Held*, that the defendant have judgment. *Carey v. Wilsey*, 185 Pac. 600 (Wash.).

The court assumed that there was no binding contract made by the partnership for the timber, and rested its decision on principles of estoppel. But assuming that there was no contract, the fiduciary relation between partners would seem to be a sounder basis for the result. Partners owe a duty to deal openly and fairly with each other in all matters touching their business. That this duty exists during the continuance of the partnership is certain. *Hurst v. Brennen*, 239 Pa. St. 216, 86 Atl. 778; *Deutschman v. Dwyer*, 223 Mass. 261, 111 N. E. 877. There seems to be the same duty as to dealings in the formation of the partnership. *Selwyn & Co. v. Waller*, 212 N. Y. 507, 106 N. E. 321; *Bloom v. Lofgren*, 64 Minn. 1, 65 N. W. 960. And so, as to transactions in contemplation of dissolution. *Knappp v. Reed*, 88 Neb. 754, 130 N. W. 430; *Mitchell v. Read*, 84 N. Y. 556. It is improper to dissolve the partnership for the purpose of excluding certain partners from expected profits or for the purpose of competing with the partnership for a particular contract. *Stem v. Warren*, 185 App. Div. 823, 174 N. Y. Supp. 30; *Williamson v. Monroe*, 101 Fed. 322. Where a partnership has been dissolved by the death of one partner, the survivor is under certain duties and disabilities peculiar to fiduciary relations. *Western Securities Co. v. Atlee*, 168 Iowa, 650, 151 N. W. 56; *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473. It would seem that on theory there should be a duty of fair and open dealing, after the dissolution, as to matters relating to prior joint business. At least one recent case has taken this view. *Stevenson & Sons, Ltd. v. Aktiengesellschaft*, [1918] A. C. 239.

SEARCHES AND SEIZURES — VALIDITY OF JUDICIAL ORDER REQUIRING PRODUCTION OF PAPERS DISCOVERED BY UNLAWFUL SEARCH. — In a criminal prosecution by the United States, the indictment was framed on information obtained from papers seized in an unlawful search of the premises of the defendants at the instigation of the district attorney. Before trial the government returned the papers, but at the trial a subpoena was served, ordering the defendants to produce the same papers. The defendants refused on the ground, *inter alia*, that the order violated the Fourth Amendment and they were attached for contempt. *Held*, that they were not guilty. *Silverthorne Lumber Co. v. United States*, U. S. Sup. Ct. No. 358, October Term, 1919.

The admission as evidence of testimony obtained in violation of a privilege is error, for the law provides no other means to protect the privilege. *People v. Mullings*, 83 Cal. 138, 23 Pac. 229; *Hearne v. State*, 50 Tex. Crim. Rep. 431, 97 S. W. 1050. But courts admit as evidence documents obtained by police officials or private individuals, even if obtained in violation of the constitutional guarantees against unreasonable searches and seizures, the law supplying other legal and equitable remedies against the wrongdoers in such cases. *Adams v. New York*, 192 U. S. 585; *Williams v. State*, 100 Ga. 511, 28 S. E. 624; *Gindrat v. The People*, 138 Ill. 103, 27 N. E. 1085. To this general rule the Supreme Court seems to make two exceptions. A refusal to return papers unlawfully seized is reversible error, if the application was made before

trial. *Weeks v. United States*, 232 U. S. 383. And in the principal case the court places its decision on the ground that a court cannot compel the production of papers if the existence thereof has been revealed to the court as a result of information gained from papers unlawfully seized. Since the particular papers seem to have been incriminatory, a simpler ground for the decision seems to be that the privilege of the defendants against self-incrimination would be violated by the order in question. *Boyd v. United States*, 116 U. S. 616.

STATUTE OF FRAUDS — SALES OF GOODS, WARES, AND MERCHANDISE — CHECK AS PART PAYMENT. — The plaintiff made an oral contract with the defendant for the sale of lambs which were worth more than \$50 and gave the defendant a check. There was no agreement that the check should be absolute payment. The defendant repudiated the contract and destroyed the check. The plaintiff sued for damages. The defense was the Statute of Frauds. *Held*, that the contract is unenforceable. *Gay v. Sundquist*, 175 N. W. 190 (S. D.).

Whether a negotiable instrument is given in absolute or in conditional payment of the debt is determined by the intent of the parties. *Ely v. James*, 123 Mass. 36; *McLure v. Sherman*, 70 Fed. 190. In the absence of any express understanding, a negotiable instrument is in most states presumed to be conditional payment; *i. e.*, valid payment, subject to the condition subsequent that if it is not paid when duly presented the old debt revives. *Burkhalter v. Second National Bank*, 42 N. Y. 538; *Holmes v. Briggs*, 131 Pa. St. 233, 18 Atl. 928. In others the presumption is one of absolute payment. *O'Conner v. Hurley*, 147 Mass. 145. As to whether a negotiable instrument is part payment under the Statute of Frauds, in the absence of expressed intent, the presumption of absolute payment seems preferable — giving a negotiable instrument is itself an overt act easily proved. But in a jurisdiction where conditional payment is presumed, if the instrument is duly presented but not paid at maturity, it would seem that the statute is not satisfied. But since part payment must be contemporaneous with the bargain and there is a valid part payment even in these jurisdictions, if the instrument is paid when presented, the condition must be a condition subsequent. *Hunter v. Wetsell*, 84 N. Y. 549; *Case v. Kramer*, 34 Mont. 142, 85 Pac. 878. Accordingly if the drawer stops payment, thus preventing the performance of the condition subsequent, there is a valid part payment. *Hessberg v. Welsh*, 147 N. Y. Supp. 44. The same should be true if the instrument is not duly presented. *Contra*, *Groomer v. McMillan*, 143 Mo. Ap. 612, 128 S. W. 285; *Johnson v. Morrison*, 163 Mich. 322, 128 N. W. 243. Therefore, though in line with the cases just cited, it seems that the principal case cannot be defended on principle, whether the check is presumed to be absolute or conditional payment.

TAXATION — INHERITANCE TAX — COLLECTION AND ENFORCEMENT — PERSONAL ACTION IN ANOTHER STATE AGAINST THE BENEFICIARIES. — A resident of Colorado died in New York leaving no property in Colorado but a great deal of personality in New York. Colorado served the New York beneficiaries, by publication, with notice of assessment proceedings in a Colorado court which by statute had jurisdiction to proceed as in an action *in rem*. No one appeared, but the court issued its order that the tax had been assessed. The state of Colorado then brought an action in New York against the beneficiaries. The Supreme Court dismissed the complaint. On appeal, *held*, that the judgment be reversed. *Colorado v. Harbeck*, 179 N. Y. Supp., 510 (App. Div.).

For a discussion of this case, see NOTES, p. 840, *supra*.

TAXATION — PURPOSES FOR WHICH TAXES MAY BE LEVIED — GRATUITIES TO WAR VETERANS. — A Wisconsin statute provided for a special tax in order to pay a bonus of ten dollars for each month of service to all soldiers and sailors who had taken part in the war (1919 WISCONSIN LAWS, c. 667). *Held*, that the statute is constitutional. *State v. Johnson*, 175 N. W. 589 (Wis.).

For a discussion of the principles involved in this case, see NOTES, p. 846, *supra*.

TORTS — LIABILITY OF OCCUPIER OF PREMISES — LESSEE LIABLE FOR INJURIES TO INVITEE ON PORTION OF PREMISES NOT COVERED BY LEASE. — A municipal ordinance required barber shops to maintain lavatories for the use of customers. The only lavatory provided by the defendant barber was located in the cellar of the building, a part of the premises not covered by his lease. His customers frequently used this lavatory, the passageway to which was dark and dangerous, as the defendant knew. The plaintiff, a customer, was injured while going along this passageway. *Held*, that the defendant is liable. *McCallum v. Hemphill Trade Schools, Ltd.*, [1920] 1 W. W. R. 114 (Alberta).

The duty of an occupier of premises towards an invitee is to use ordinary care and prudence to have those premises reasonably safe. *Indermaur v. Dames*, L. R. 2 C. P. 311; *Pauckner v. Walkem*, 231 Ill. 276, 83 N. E. 202. A patron of a shopkeeper is normally an invitee. See *Schnatterer v. Bamberger*, 81 N. J. L. 558, 79 Atl. 324. But the customer is not an invitee on every part of the premises. *Menteer v. Scalzo Fruit Co.*, 240 Mo. 177, 144 S. W. 833; *Herzog v. Hemphill*, 7 Cal. App. 116, 93 Pac. 899. In the absence of the ordinance, there would be some difficulty in the principal case in determining whether the customer was an invitee or licensee on that portion of the premises where the injury occurred. He would probably have been a licensee. *Herzog v. Hemphill*, *supra*. An owner's constantly permitting people to use a portion of premises not devoted to business purposes is indicative of a license rather than of an invitation. *Rooney v. Woolworth*, 74 Conn. 720, 52 Atl. 411. But the ordinance requiring the furnishing of a lavatory would clearly make the customer an invitee, if the defendant could be said to be the occupier of the premises in which the lavatory was situated. And there would seem to be no objection to considering one who has a license to use premises an occupier for a particular purpose. But even assuming that the defendant cannot be held as an occupier of premises, the decision seems correct, because the ordinance imposes affirmative duties which may serve as the basis of liability. See *Willy v. Mulledy*, 78 N. Y. 310. Whether it is said that the defendant has omitted to comply with the ordinance or that in complying he has been negligent, he should be liable for proximately resulting injuries.

WAR — SUIT BY ALIEN ENEMY — EFFECT OF PAYMENT OF JUDGMENT TO ALIEN PROPERTY CUSTODIAN. — The plaintiff, a citizen of Germany resident at Bremen, sued the defendant, a United States corporation, in the District Court and recovered judgment. Then war broke out between the United States and Germany and the defendant appealed. The Circuit Court affirmed the judgment but directed that it be paid to the clerk of court, to be handed by him to the alien property custodian. *Held*, on *certiorari*, that the judgment of the Circuit Court be affirmed. *The Birge-Forbes Co. v. Heye*, U. S. Sup. Ct. No. 76, October Term, 1919.

The general rule is that an alien enemy resident abroad cannot sue as plaintiff in the courts of the home country. *Speidel v. Barstow Co.*, 243 Fed. 621; *Hutchinson v. Brock*, 11 Mass. 119. The reason for the rule is that a judgment for an alien enemy increases the resources of the enemy country

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while diminishing those of the home country. England applies the doctrine to appeals by a plaintiff who has become an alien enemy since judgment. *Porter v. Freudenberg*, [1915] 1 K. B. 857. But where the judgment directs payment to the alien property custodian, our resources will not go to Germany and there seems no valid reason for refusing to settle the rights of the parties. See *Rothbar v. Herzfeld*, 179 App. Div. 865, 869, 167 N. Y. Supp. 199, 202. Even in the absence of an alien property custodian, it has been held that a plaintiff who has become an alien enemy since judgment can appeal. See *Taylor v. Albion Lumber Co.*, 176 Cal. 347, 352, 168 P. 348, 350. At any rate, the result of the principal case is a necessary one, because it is a loyal defendant who is seeking relief in the Appellate Court. *Owens v. Hanney*, 9 Cranch (U. S.), 180.

WATERS — NAVIGABILITY — NECESSITY OF ACTUAL USER. — By the act of 1890 Congress prohibited the building of any dams across navigable waters of the United States without authority of the Secretary of War. (26 STAT. AT L. 454.) The defendant company constructed a dam across the Desplaines River in Illinois without obtaining such authority. The United States filed a bill of complaint seeking its removal and an injunction against further action. The evidence showed that the river had been used by fur traders with canoes and flatboats as late as 1830. Since then, however, due to natural obstacles to navigation and the construction of a canal near-by, it had not been used for commerce. *Held*, that the relief be granted. *Economy Light & Power Co. v. United States*, 256 Fed. 792 (Circ. Ct. App.).

Navigable waters of the United States are those which form, by themselves, or by their connections with other waters, a continuous channel for commerce with foreign countries or among the states. *The Daniel Ball*, 10 Wall. 557; *Müller v. Mayor of New York*, 109 U. S. 385. Navigability does not depend on the character of the craft, however propelled, or the nature of the commerce. *The Montello*, 20 Wall. (U. S.) 430; *Heyward v. Farmers' Mining Co.*, 42 S. C. 139, 19 S. E. 963. It is not necessary to prove long and continuous user nor adaptability for commercial use during all the seasons of the year. *Moore v. Sanborn*, 2 Mich. 519; *Lewis v. Coffey County*, 77 Ala. 190. *Cf. State v. Gilmanton*, 14 N. H. 467, 480. A stream is not rendered non-navigable because of temporary obstructions or because of difficulties caused by natural barriers such as rapids and sand bars. *The Montello*, *supra*; *Atty. Genl. v. Harrison*, 12 Grant, Ch. 466. But a stream not naturally navigable cannot be made so by artificial means so as to deprive riparian owners of their vested property rights. *Yates v. Milwaukee*, 10 Wall. 497; *Murray v. Preston*, 106 Ky. 561, 50 S. W. 1095. A navigation which is temporary, precarious, and unprofitable is insufficient. *Harrison v. Fite*, 148 Fed. 781; *North American Co. v. Mintzer*, 245 Fed. 297. The true criterion is one of sound business common sense, — natural useful capacity as a public highway of transportation. *Little Rock, etc. R. R. v. Brooks*, 39 Ark. 403. It would seem clear that the power of Congress under "the commerce clause" extends to potential agencies of interstate commerce, regardless of their actual usage, and to the preservation of natural highways for the public. Accordingly the principal case seems correct despite the contrary decision reached by the Illinois Supreme Court in regard to the identical situation. See *People v. Economy Power Co.*, 241 Ill. 290, 89 N. E. 760.

WILLS — REPUBLICATION — INCORPORATION BY REFERENCE — VALID CODICIL REFERRING TO WILL PROCURED BY UNDUE INFLUENCE. — The testator made a holographic will and some years later a holographic codicil referring to his will. The jury found that the will was procured by undue influence but that the codicil was valid and not so procured. *Held*, that both

the will and the codicil be admitted to probate. *Taft v. Stearns*, 125 N. E. 570 (Mass.).

A valid testamentary instrument may be made to speak as of a later date by a codicil. *Goods of Truro*, L. R. I. P. & D. 201. Moreover, in most jurisdictions any existing writing may be made part of a will by an express reference to it in the will. *Allen v. Maddock*, 11 Moo. P. C. 427. It is often immaterial whether a will or codicil is considered as republished by a later codicil, or as incorporated by reference. See *Ingoldby v. Ingoldby*, 4 Notes of Cases, 493; *Gordon v. Lord Rea*, 5 Sim. 274. But to preserve accuracy of terminology, a distinction might be drawn as follows: Any document that was once the valid will or codicil of the testator is republished; all other documents are incorporated by reference. The last named class would thus include wills made by married women, infants, and lunatics, wills procured by fraud, duress, or undue influence, as well as documents not properly executed. Accordingly, the court in the principal case should have spoken only of incorporation by reference and not of republication. The result reached by the court is undoubtedly correct. *Pope v. Pope*, 95 Ga. 87, 22 S. E. 245. Cf. *Taylor v. Kelly*, 31 Ala. 59.

WITNESSES — PRIVILEGE OF HUSBAND AND WIFE — USE FOR PURPOSE OF IMPEACHMENT OF TESTIMONY OBTAINED IN VIOLATION OF PRIVILEGE. — A wife testified in favor of her husband, who was the defendant in a criminal prosecution. For the purpose of impeachment the state introduced one of the grand jurors, who testified that the wife had made prior inconsistent statements before the grand jury, and who related what she had said on that occasion. *Held*, that this testimony should not have been received. *Doggett v. State*, 215 S. W. 454 (Tex.).

Two distinct common-law doctrines have often been confused: the disqualification of one spouse as a witness for the other; and the privilege of one not to be testified against by the other. See WIGMORE, EVIDENCE, §§ 600, 601, 2228, 2333, 2334. Statutes have almost universally removed the disqualification but the privilege generally remains. *Talbot v. United States*, 208 Fed. 144. The courts, nevertheless, sometimes deal with the matter on the assumption that a spouse is incompetent to testify against the other except in criminal actions against one for injury to the other. *Barber v. People*, 203 Ill. 543, 68 N. E. 93; *Brock v. State*, 44 Tex. Cr. Rep. 335, 71 S. W. 20. On the theory of incompetency the instant decision is obviously correct. But it seems more desirable as well as more accurate to regard the matter as simply one of privilege. A privilege connotes the possibility of waiver, so that by calling his wife as a witness for him the husband should be regarded as waiving this privilege not to have her testify against him. *National German-American Bank v. Lawrence*, 77 Minn. 282, 80 N. W. 363. Thus, when a wife testifies for her husband, she may ordinarily be impeached in the same manner as any other witness. *Bell v. State*, 213 S. W. (Tex.) 647. But a present waiver cannot, of course, cure any violations of the privilege in prior proceedings. And since the statements which, in the principal case, the wife made to the grand jury were improperly obtained in violation of the privilege, proper protection of the privilege demands that their use thereafter be prohibited even for purposes of impeachment. *Johnson v. State*, 66 Tex. Cr. Rep. 586, 148 S. W. 328. The decision is therefore not inconsistent with the theory of privilege.

BOOK REVIEWS

RESERVATIONS TO TREATIES: THEIR EFFECT, AND THE PROCEDURE IN REGARD THERETO. By David Hunter Miller, Special Assistant in the Department of State. 1919. pp. 171.

This is a careful exposition of the practice pursued by the government of the United States in agreeing to an international treaty subject to reservations. The author undertakes to show that in every case of a real reservation the reservation became part of the final act prior to or at the time when that act was legally perfected; in other words, it was accepted by the other party or parties to the treaty. Generally, the reservation is made by the Senate; the President incorporates it in the instrument of ratification, and proper acknowledgment is made by the other party, either by its instrument of ratification or by exchange of notes, or in the protocol of exchange. The effect is, as Mr. Miller points out, that the Senate merely initiates an amendment to the treaty which the other party agrees to. One-sided declarations not acted on by the other party occur now and then with reference to matters exclusively of domestic cognizance and not concerning the other party; they are therefore not real reservations. The author (page 89) mentions the case of an explanation filed by Russia in connection with a treaty with the United States in 1824, which was not submitted to the Senate, and which the American government simply received as an interpretation, placed upon the treaty by the Russian government. Clearly, Russia could not have founded any claims upon this explanation, although later on the United States used it in support of its own contentions in the Bering Sea controversy. Where a convention leaves it open to others not parties to the original act to adhere to it by subsequent declaration, it may occur that such an adhesion is encumbered by a reservation; that simply means that the adhesion counts for what it is worth, and no question of international faith is involved.

For some reason, the author fails to comment on the Treaty with the New York Indians proclaimed by the President April 4, 1840, which was the subject of a decision by the Supreme Court (170 U. S. 1 (1898)). Here it appears that the Senate had passed a resolution qualifying its assent to the treaty, which did not appear in the President's final proclamation, and which apparently was not brought to the notice of the Indians. The Supreme Court held that the resolution was merely directory to the President and did not affect the treaty.

The question of practical interest in connection with the entire subject is the application of the conclusions reached, to possible reservations made by the Senate in consenting to the Treaty of Versailles. Mr. Miller says that such reservations would in effect constitute new proposals to be submitted to the other parties to the treaty.

However, he concludes the entire exposition with the following statement:

"The distinction is, therefore, highly technical, and is this: A condition which is made a part of the instrument of ratification must be recited therein. A condition precedent to the exchange or deposit of the instrument of ratification need not be so recited.

"To state the case suppositiously in regard to the Treaty with Germany, if the conditions of the Senate resolution were that certain understandings should be made part of the Act of Ratification they would have to be recited in the instrument of ratification and would require the consent of the other signatory Powers. If, on the other hand, the resolution required that the instrument of ratification should not be deposited until certain *notes* had been exchanged with three of the Great Powers stating an 'understanding' regarding

the Treaty, the instrument of ratification might be executed without containing any reference to the condition, and upon the fulfillment of the condition might be deposited at Paris.

"Another possibility which may be noticed is that the Senate resolution might contain *recitals*, as did the resolution with Japan of 1911. Such recitals are not strictly conditions at all, and consequently may be omitted, as in the case mentioned they were omitted, from the instrument of ratification.

"Recitals of such a character, even if declaratory in their nature, would not, by means of our instrument of ratification, be formally communicated to the other Parties signatory to the Treaty, but, as a matter of fact, they would control our policy in the future and as they would in reality be known to all the other Powers they would have the same result in the future as if formally communicated.

"The precise form, therefore, of the resolution adopted by the Senate regarding the ratification of the Treaty of Peace with Germany is of the utmost importance. If the resolution is drafted so as to require fresh negotiations, delays and difficulties will inevitably result. If, on the other hand, proper attention is given to form, the substantial result reached by reservations of an interpretative character can be obtained without involving the postponement of the formal state of Peace."

In the case cited of Japan, 1911, the Japanese government formally expressed its concurrence in the Protocol of Exchange (page 63). The reservation thus appears to have been formally communicated and noted. What importance, then, attaches to the author's statement that recitals "would not, by means of our instrument of ratification, be formally communicated to the other Parties"? The truth is that in accordance with previous practice they would have to be not only communicated in some way but also accepted, or, if either not communicated or not accepted, would be misleading, and possibly not honorable. For, though not communicated, they might nevertheless control our policy in the future. The other party, suffering from the terms of the treaty, would not be heard to contend in an American court, that there was no treaty in force, but would be told that the reservation was legally of no account; on the other hand, the government of the United States would as a matter of fact have the benefit of any reservations of a *political* character to which the other party had not assented; for these reservations by their very nature could never become matter of judicial cognizance, and would naturally control the diplomatic action of the government. In a treaty which would be the basis of pecuniary claims running into many millions, all the benefits would go to the United States, which at its option would escape burdens of a political nature.

Mr. Miller's exposition seems to have been printed without a responsible publisher. It makes very difficult reading, — no orderly arrangement, nothing to distinguish text from comment, no headings, no index — a poor piece of bookmaking. The value of the material is seriously impaired by this defect.

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INTERNATIONAL LAW. By Sir Frederick Smith. Fifth edition, revised and enlarged by Coleman Phillipson. New York: E. P. Dutton & Company. 1918. pp. 456.

As the author's preface says, this book "began its existence as a volume in Dent's Primer Series in 1899." The author was admitted to the bar in that year. When the present edition was prepared, he was Attorney General of Great Britain. He is now Lord Chancellor, with the title of Baron Birkenhead. As he has long been too busy to rewrite his book, the fifth edition, like the

fourth, has been largely the work of an editor. The fifth edition is three times the size of the first. The author's share in the latest changes has been, in the words of the preface, "mainly consultative."

Even as thus enlarged the book does not compete in size with the work of Wheaton the American, or of Bonfils the Frenchman, nor with the British Westlake or Hall or Oppenheim. Nevertheless, for reasons to be explained, it fills a temporary need, and it may also be found to have permanent interest of a peculiar sort.

The title to permanent interest lies, paradoxically enough, in the offices temporarily filled by the author. The Attorney General of Great Britain is a high executive official of the British Government. The Lord Chancellor is a still higher executive official; for, odd as it seems to Americans, he is both a judge and a member of a partisan cabinet. Hence the possibility that both now and hereafter some one may consider it worth while to ascertain whether expressions in this edition are attributable to the author or to one of the successive editors, to the end that by the higher criticism it may be learned what are the views of a member of the British Government at this important time.

In the preface, dated September 18, 1918, the author, then Attorney General, says: "For the correction of specific infamies International Law does not exclude the castigation of guilty individuals, however highly placed. Material injuries may be made good by the payment of pecuniary indemnity. And if it be objected that an impoverished nation has no money wherewith to make good the consequences of its crimes, it may be answered that the claims of a guilty nation to be repaid interest on the money it supplied, for the purpose of those crimes, may be justly postponed to the complaints of the victims. . . . The ordinary assumption that the Central Powers will be represented, in the sense that the Allies are, at the Peace Conference would seem to require very considerable qualification. They should be present in the later scenes to hear, but not to contribute to, the discussions of the Allies. . . . I wholly misread the temper and the minds of my countrymen if they are not implacably resolved that the guilty shall pay for their crimes to the uttermost ounce in their bodies and in their purses. And the doctrines of International Law afford abundant warrant and precedent for both these demands."

Those extracts from the preface make such an accurate prophecy that they increase the reader's interest in such other parts of the book as seem to throw light on British sentiment. A few of those parts will be mentioned, and as to each of them the question must be asked whether the text does express the attitude of the official class.

One of the interesting passages is the comparison of British treatment of Denmark in 1807 with German treatment of Belgium in 1914; for the words of the book are that "it can hardly be said, however, that a state would never be justified in violating the sovereignty of another state, unless that other had actually done, or threatened to do, it harm," and also that "it is surely better to admit that there may be circumstances in which, in self-defense, a state is entitled to violate the sovereignty of another, even though that other is in no way at fault," and then the distinction emphasized between the Danish and Belgian cases is merely that in the latter instance "the plea of military necessity and self-preservation is not tenable, when the act had long been planned beforehand and formed part of a programme" (pp. 89-92).

Other interesting passages discuss the Declaration of London of 1909 and the partial acceptance and partial abrogation of its provisions by some belligerents on each side in the World War; and, though it is stated that, as the provisions "were the result in many cases of a compromise, concessions by one nation being conditional on concessions made by others, it was agreed that they must be ratified, if at all, as a whole," and it is also stated that they have not been "ratified by the powers concerned," nevertheless the book appears to

approve partial acceptance and partial abrogation, a practice against which the United States made in October, 1914, protests not mentioned (pp. 330-333, 360, 393).

Passing from matters of interest to citizens of all countries, it becomes necessary to call attention to three topics upon which it has been supposed that British and American opinions have at last reached harmony, namely, Major André, the Monroe Doctrine, and the special message of President Cleveland, December 17, 1895, regarding the Venezuelan boundary dispute. Of Major André's case the book says, not to mention less important errors, that "he was not seeking information" (p. 231); but, if it be important to distinguish between seeking and finding, the book should have added that he found information and in disguise was carrying back to the British concealed papers which contained intelligence for the enemy. (Major André's Case, 2 Chandler's Criminal Trials, 155, 162, 164, 165, 168, 169, 171.) Of the Monroe Doctrine the book says — and again it seems unnecessary to point out all defects — that the doctrine arose out of a suggestion by Canning in 1823, and that in 1824 Canning so acted that "the English view was unequivocally placed on record that Great Britain considered the whole of the unoccupied parts of America as being open to *her* future settlements in like manner as heretofore" (pp. 94-95); and it does not mention that the Canning suggestion of 1823 said of the Spanish American colonies "*we* aim not at the possession of any portion of them ourselves" (6 MOORE'S DIGEST OF INTERNATIONAL LAW, 389), though it does narrate that President Monroe — taking the British Foreign Secretary at his word, so to speak, — caused the doctrine to include the provision that "the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects of colonization by *any* European powers;" and it does not appreciate that a comparison of the words herein italicized creates wonder whether the author intends to suggest that the British Foreign Secretary attempted to deceive the President. Finally, as to the Venezuelan boundary dispute the book must appear to any American both inadequate and misleading; and it seems enough to specify that though, to be sure, it does not quote Lord Salisbury's instructions to the effect that Her Majesty's Government cannot "admit that the interests of the United States are necessarily concerned in every frontier dispute which may arise between any two of the States who possess dominion in the Western Hemisphere," and still less can "accept the doctrine that the United States are entitled to claim that the process of arbitration shall be applied to any demand for the surrender of territory which one of those States may make against another" (6 MOORE'S DIGEST OF INTERNATIONAL LAW, 564), nevertheless the book clearly takes that old British view and also fails to appreciate that the arbitration which occurred was an acquiescence in the position taken by the United States (pp. 95-97).

In short, considered as a possible side light on the minds of the British official class, this book is disquieting. Hence the statement at the outset that this edition may be found to have permanent interest of a peculiar sort.

It was also said, as may be recalled, that this edition fills a temporary need. It is indeed pleasant to be able to specify that in the notes are cited as many as one hundred and forty of the cases decided in British courts during the World War. As a rule neither those cases nor the earlier ones are discussed in the text. Some are discussed, however, and in a way that is enlightening. For example, *The Zamora*, [1916] 2 A. C. 77, is chiefly presented not as illustrating a doctrine of International Law but as illustrating a doctrine of Constitutional Law, the text carefully quoting from the opinion of the Judicial Committee of the Privy Council these essential passages: "It cannot, of course, be disputed that a Prize Court, like any other court, is bound by the legislative enactments of its own sovereign state. . . . The fact, however, that the Prize

Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive Orders of the King in Council" (pp. 50-51, 192). As this edition is the earliest book to give these recent citations and these discussions, however short, of the more important recent decisions, it is clearly of at least temporary use both to the student and to the practitioner.

It is perhaps proper to add that the tone of the book is not intended to give offense to Americans. Surely no one was angered by the statement in the first edition, the primer of 1899 (p. 52), that "the lawyer is not concerned with the wild speech of President Grant in 1870: 'he hoped that the time was not far distant when in the natural course of events the European connection with the continent would cease'"; and now that passage is mellowed thus: "with some of the extravagant utterances of President Grant in favor of a cessation of relationships between Europe and America — a consummation impossible of achievement — we are not here concerned" (p. 94). Again, the treatment of *The Trent* episode of 1861 is not unfriendly; and an attractive olive-branch is found in the statement retained from the youthful primer that "Mr. Seward, however, in a long dispatch which illustrates very happily the inconveniences to which a politician exposes himself who gets up his international law for the occasion, maintained that the seizure was in other respects good, and that Messrs. Mason and Slidell were a species of contraband" (p. 405).

E. W.

THE CORPORATION AS A LEGAL ENTITY. By James Treat Carter. Baltimore: M. Curlander. 1919. pp. 234.

This is a study growing out of an essay originally presented as a thesis at the Law School of the University of Maryland, subsequently "broadened to embrace the philosophical and legal aspects of the corporate entity." Part I contains, *inter alia*, chapters on "Theories and Concepts of the Corporation," "The Corporate Entity as Citizen and Person," and "The Extent to which the Courts Disregard the Corporate Entity." Part II is devoted to Maryland laws and decisions.

The work evidences much reading, and largely consists of extracts from decisions and treatises, with running comment.

The main thought of the author is that a corporation is not a fiction but a reality. But he nowhere defines, with satisfying clearness, what he means by a corporation, or what he means by reality. On page 13 he says: "From all these various definitions, it may be said at least that a corporation is an association of individuals acting as a unit, and exercising rights and powers designated by an Act of the State." But at page 223 he says that a one-man corporation introduces "no really new problems into the law of corporations." And in pages 130 to 131 he says that "it seems inevitable that the denial of citizenship to corporations within the meaning of the Comity Clause and the Fourteenth Amendment will be abandoned at some time in the future. . . . It is true that not everything which a state could see fit to call a corporation must be deemed a citizen. There must be the human substratum." Thus three possibilities are opened, — first, a corporation consisting of two or more human beings; second, a corporation consisting of one human being; third, a corporation without "human substratum." Does the author mean that all three sorts of corporations are realities?

The word "corporation" seems to have been usually used at the common law as a term broad enough to include any legal unit not a human being. Such a legal unit was usually predicated upon an association of human beings, but was not necessarily so predicated, — sometimes, for example, it was predicated upon an office.

Assume for the moment that "corporation" is used to designate an association of persons. Is such a corporation a "reality"? Most of us conceive of an association of persons as a unit, — a composite unit but nevertheless a unit. Possibly this conception is a delusion — but it is a wise lawyer who leaves it to the philosophers to argue about that. An association of persons is a unit in popular conception. The unit is real in the sense that it is popularly conceived to exist. If the law recognizes such unit as a legal unit, it simply confirms a popular conception.

Lord Coke said that a corporation "is only in abstracto, and rests only in intendment and consideration of the law." Chief Justice Marshall said that it existed "only in contemplation of law." As applied to corporations predicated upon an association of persons, these pronouncements are plainly wrong. Of course the law creates all legal units, which is merely to say that there are no *legal* units except such as the law itself permits, — a human being is not a legal unit unless the law says he or she is, and equally an association is not a legal unit unless the law says it is. But nevertheless it is not true that the human being exists solely in legal contemplation, and it is not true that the association exists solely in legal contemplation.

Consequently if the term "corporation" is used as the equivalent of "an association of persons recognized as a legal unit" most of the comments on reality made by Mr. Carter are sound. And most corporations are of that kind. But the troublesome fact remains that there are corporations which are not of that kind, and it is a serious defect in Mr. Carter's study that he has given no adequate attention to such corporations. If a legislature passed an act, to be effective upon its passage, creating the corporation (its stock to be thereafter issued to persons who might subscribe therefor with a designated official), it is submitted that a legal unit would forthwith exist. The words of Coke and Marshall would be true of such a corporation. It would be a mere legal fiction. And there are other intermediate cases which must not be ignored, — thus all of the stock of a corporation might be owned by a single stockholder, or the legislature might authorize a single person to incorporate, or might predicate a legal unit upon an office, or a business, or the estate of a deceased person.

Mr. Carter is not content with the doctrine that corporations are to be created only by the state. There is no reason in the nature of things why courts, on their own initiative, should not create legal units which are not human beings. But for centuries it has been a fundamental legal principle that it was the exclusive prerogative of the sovereign (with us, the legislatures) to create legal units which were not human beings. For the courts to recognize an association as a legal unit, in the absence of legislative sanction, is in violation of this principle. Whether the courts may properly treat as obsolete this long-established principle is questionable. But this is a question as to the division of power between legislatures and courts, and has nothing to do with the question of the reality of corporations.

In dealing with an association of persons, one may conceivably regard the association as a reality (Mr. Carter's view), or as a mere abstraction, conceding reality only to the persons (Lord Coke's view). But it is inconsistent for the same person to urge (1) that an association of persons should be regarded as a unit, on the ground that this is the real fact; and also to urge (2) that the corporate entity should be disregarded, on the ground that thus we get down to the real facts. If the association is a real unit, then to disregard the entity is not to sweep away a fiction (a phrase connoting the righteous act of striking down a sham), but is to ignore or override the truth. If Mr. Carter is thoroughly convinced of the reality of corporations, he ought to be vastly more troubled than he apparently is by the decisions which disregard the corporate entity. His chapter on this topic is a disappointment.

It may be added that, even if a corporation is only a legal fiction, nevertheless that fiction is of legislative origin and should be respected by the courts. The first authority that a court may, when it sees fit, disregard the fiction was the *Deveaux* case, and it would be hard to-day to find champions for the reasoning of the court in that case. The doctrine is destructive of reasonable certainty in corporation law, for it amounts to saying that the courts will respect or disregard the corporate entity from case to case as they think fit. Nor is such a doctrine necessary in order that justice be done; if persons in control of corporations use their power of control for an improper purpose, or if a corporation confederates with other legal units to accomplish an improper purpose, the courts can easily give appropriate relief without disregarding the corporate entity.

EDWARD H. WARREN.

A HISTORY OF THE BANKRUPTCY LAW. By F. Regis Noel. Washington, D. C.: Charles H. Potter and Company. 1919. pp. iv., 209.

There is room for a good history of bankruptcy legislation, and a knowledge of the subject is not without practical utility. Especially was this true during the early years of the present federal bankruptcy statute, when there was little precedent for the guidance of the courts except what might be found under earlier laws. How little the history of similar statutes was in the minds of the judges may be seen, for instance, from the reasoning in the dissenting opinion in *Wilson v. Nelson*, 183 U. S. 191, 211, 22 Sup. Ct. Rep. 74. In that case the passive suffering or permitting a creditor to obtain a preference by legal proceedings was held to be an act of bankruptcy. Four judges dissented, approving the decision below of *In re Nelson*, 98 Fed. Rep. 76, and *Duncan v. Landis*, 106 Fed. 839 (C. C. A.), one of the grounds being that passively permitting a preference could not be an act of bankruptcy, since an act must necessarily be active. If the dissenting judges and the lower courts taking the same view, had realized that every bankruptcy statute in England and the United States for centuries had made certain kinds of passive indications of insolvency a ground for bankruptcy proceedings, and had classified these passive causes as acts of bankruptcy, the futility of their reasoning on this point would have been apparent.

It is unfortunate that Mr. Noel's book cannot be commended. In his introduction he assumes that the purpose of bankruptcy legislation has been the relief of insolvent debtors, and this error vitiates many of his conclusions. He does, indeed, state the provisions of the early statutes, which show that their purpose was partly to give the creditors of an insolvent an added remedy, and partly to punish the debtor; but he fails to realize the persistence of this view. He says of the provision for a discharge, which first found a place in the Statute of Anne: "At that time debt was not looked upon as a crime, as Englishmen of an earlier and quite frequently of the present age regard it, and for the first time the rights of the debtor as well as those of the creditor were considered in formulating a law," and adds: "Lord Loughborough sometime earlier detected this tendency and in *Sill versus Worswick*, 1 H. Bl. 665, established a departure from the criminal view, remarking that, 'the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, and not as a forfeiture, not as a supposition of crime committed, not as a penalty.'"

If the author had realized the true character of early bankruptcy legislation, he could not have supposed that Lord Loughborough's statement was prior to the Statute of Anne. The full meaning of the facts that voluntary bankruptcy was not allowed in England until the reign of George the Fourth, and that the relief of poor debtors was achieved originally through so-called

insolvent laws and not the bankruptcy laws; that, prior to the nineteenth century, for the debtor to procure a friendly creditor to file a petition in bankruptcy in order that the debtor might obtain a discharge was called a fraud on the statute; that in *Nelson v. Carland*, 1 How. 265, the constitutionality of voluntary bankruptcy in the United States was drawn in question on the ground that no such proceedings were known at the time when the Constitution was adopted, escapes the author. So that although the résumé of the successive bankruptcy statutes is given, the effect of them is not clearly perceived.

Moreover, there is little indication of any examination of English bankruptcy decisions. The development, which was not statutory in its origin, of the most characteristic doctrine of bankruptcy, that of preference, is hardly touched upon.

A comparatively full account of colonial legislation and practice and of the proceedings in the Constitutional Convention is given, and the latter half of the book summarizes briefly the four successive bankruptcy statutes of the United States.

The lack of an index must be noted as a final criticism.

SAMUEL WILLISTON.

THE UNSOUND MIND AND THE LAW. By George W. Jacoby, M.D. New York: Funk & Wagnalls. 1918. pp. v, 424.

To the student of the law the title of this book is a signpost on a path to disappointment; for upon the problems that have vexed the lawyer through the generations the book sheds little or no light and for their solution it offers no constructive suggestion. Indeed, whatever may be its merits as a textbook for psychiatric experts, — and the authority of the author in his own field warrants the assumption that those merits are great, — its relation to the juristic aspects of the problems is slight.

Such interest as it may have for the lawyer arises primarily from the clarity of its style. For a book devoted to a series of topics so highly technical as the causes and conditions of mental aberration, the methods and technique of diagnosis, the symptoms and effects of the various types of mental diseases and anomalies, it is unusually readable, and its fifty odd pages devoted to the development of the science of psychiatry from the days of Hippocrates make interesting reading for those in search of general information. Yet the absence of a glossary of the medical terms with which it is inevitably interspersed renders it doubtful whether it will serve as the instrument for the enlightenment of the lay (non-medical) public for which, as appears from the introduction, it was designed.

The omission of such a glossary is an instance of the rather remarkable defect of imagination which, on the assumption that the book was designed for the purposes which its title and introduction suggest, characterizes it as a whole; for the author seems strangely oblivious of the nature of the juristic problems involved in the ascertainment of mental states and in the determination of their relation to the capacity or responsibility of the individual whose acts are the subject of litigation. Rather curiously, he seems to suppose that what he terms the "inadequacies or inequities of the partly antiquated law" result solely from the ignorance and perversity of the lawyers, and to imagine that, through the generations, jurists and practitioners have resolutely shut their eyes to the discoveries of the psychiatrists and have refused to concern themselves with the problem of adjusting substantive law and procedure to the advance of the science.

"Why is it," he says, "that psychiatry, which could and should be of so

great aid to the jurists, is as yet inadequately appreciated by judges and lawyers?" and replies, "The answer to these questions is that *all* laymen — and jurists are laymen in this regard — notwithstanding all efforts to enlighten them, still remain *entirely ignorant concerning mental disease and are prejudiced against occupying themselves in any way with the questions it involves*" (p. 7). Is it possible that he is unfamiliar with the mass of legal literature on the subject, or that he is ignorant even of so widely known and voluminous a text-book as that of "Wharton and Stiles," which, whatever its merits or demerits, makes it plain, at least, that jurists are not prejudiced against occupying themselves with the questions involved.

Similarly, while he "admits that even the most ideal law cannot fully accord with all the requirements of medical science," and concedes that "social order demands a more or less categorically incisive legal treatment which in individual cases may act as a hardship, occasionally even as an injustice," he shifts the obligation to prevent such hardship and injustice upon the shoulders of "our law makers" (p. v) and would seem to be oblivious of an obligation resting upon the medical profession, as a body, to coöperate, by constructive suggestion, in the search for definitions and procedure which will tend to bring the administration of the law into accord with the conclusions of the scientists, without ignoring the demand for such "categorical definition and incisive treatment as the social order demands."

Apparently he conceives that the duty of the psychiatrist and the neurologist is discharged when they have promulgated their conclusions as to the origin, nature, and methods of detection of mental aberrations, and that it is no part of their obligation to devise and suggest the means whereby the existence or non-existence of such derangement may best be ascertained, and its relation to responsibility or capacity in the particular be determined; for of concrete suggestion on those heads the book contains hardly a line.

Moreover, it is remarkable that a forensic psychiatrist should have failed to appreciate that the greatest obstacle to reliance upon expert opinion in cases involving mental states lies in the distrust with which the testimony of the alienist is commonly received, and that he should ignore the substantial character of the foundation for that distrust. This aspect of the problem he dismisses with the observation that "the cry that psychiatrists believe it proper to aid guilty persons to escape merited punishment by endeavoring to prove them insane is, of course, unjust" (p. 6), a statement which is doubtless strictly accurate, if due weight be given to the words "believe it proper" and "merited." But certainly the author knows that nearly every litigation in which the question of mental condition is involved presents — if the litigants can afford the cost — the spectacle of two groups of equally distinguished psychiatrists testifying to mutually contradictory conclusions and each exercising a degree of ingenuity in advocacy of which a lawyer would be proud — or ashamed — in the effort to establish the consistency of the evidence with the thesis it conceives itself to have been paid to advocate.

And surely it does not require his especial qualifications as a psychologist to recognize that the laymen (including lawyers and judges) who are accustomed to view or to assist in those conflicts of wits can draw from them only one of two conclusions: either that psychiatric knowledge has not progressed to the point at which expert opinion constitutes anything more than a guess camouflaged by an unfamiliar vocabulary, or that psychiatrists are subject to bias through the spirit of advocacy or of self-interest to a point which renders their testimony negligible. Certainly a more imaginative and constructive treatment of the subject would have taken into account this condition of the lay mind, and would have recognized that, until the forensic psychiatrist is rehabilitated in public opinion to the point where his testimony as a witness will receive the same respect as is ordinarily accorded to his opinion as a consultant, there can

be little hope of securing, and possibly less reason for seeking, a procedure which will accord to him any greater influence in the determination of litigated questions than he is now accorded.

Meanwhile it is questionable whether progress toward such rehabilitation is achieved through advocacy of the doctrine that it is the duty of the psychiatrist to shape the law to his own concept of what it should be by "interpretations" that nullify the law as it is and to divert the jury from the issues which the court is called upon to submit.

It is possible that the author of the "Unsound Mind and the Law" did not intend to preach so casuistic a doctrine. But in view of the illustration whereby he fortifies his preachment in the following statement, I can construe it no otherwise (p. 6):

"The physician is bound by the teachings of science, and the crass antagonism between these teachings and the antiquated views of the law that so often manifests itself can but exert a beneficial and modernizing influence upon the interpretation of the laws as they exist. This becomes the more evident when we consider that, after all, it is upon the lay judges (the jury) and not upon the professional judge that the decision of guilt or innocence devolves; and in forming an opinion they as a rule will be governed less by the letter of the law than by ordinary common sense, and, therefore, will be more easily influenced by the arguments of the psychiatric expert. How each individual case may be affected by the interpretation that is given to the law is shown by the fact that, while according to the existing statutes in certain states, an attempt at suicide is a punishable offense, it is most rarely punished, even in the absence of any suspicion of mental disorder."

H. S. G.

THE BENCH AND BAR OF ENGLAND. By J. A. Strahan. London: William Blackwood & Sons. 1919. pp. x, 256.

This readable little book consists of some ten chapters, each in itself really a little essay on some phase of legal life. The book aims to be amusing rather than educational; there are many entertaining anecdotes with occasional brief sketches on matters of legal history. The author entered the Middle Temple over forty years ago, consequently his account of certain aspects of legal life deal with the past, and may with advantage be compared with conditions of to-day. Perhaps the most interesting chapters are those entitled "Counsel and Students," "Young Life in the Middle Temple," and "The Life of a Lawyer."

It is to be remembered that in England the legal profession is divided into two branches, solicitor and barrister, the former preparing the case, the latter advising on difficult points of law and presenting it in court. The distinction is shown vividly and briefly by a discussion overheard between the usher of the Middle Temple Hall and an American lady. The usher, after a lengthy peroration which seemed unsuccessful in conveying to the lady's mind the difference between the two ended in desperation, "Well, it's like this, a solicitor and a barrister cannot live in the same street."

There are now only four Inns of Court left, Sergeants' Inn and the Inns of Chancery having ceased to exist. The governing body of each of these Inns of Court consists of Benchers who are eminent members of the "Senior" or "Junior" Bar. Appointments to vacancies in the Bench are filled by the existing members of it; it is a custom for all judges of the High Court to be members thereof. The management of the Inn and the admission and the examination and call of students to the Bar are within the sole discretion of the Benchers of each inn. It is interesting to remember that the late Mr. J.

H. Choate was made an honorary Benchers of the Middle Temple, being the first non-British subject to receive that honor.

Dining in Hall is usually a very pleasant business. The men dine in messes of four. There is served one of the cheapest dinners in London, wine and beer being included free of charge, which pleasant state of affairs is made possible by the facts that it is an ancient privilege of the Inns of Courts to import wine into England duty free and that it is the duty of a newly called Benchers to make a contribution of wine to the cellars of his Inn. It is the custom for a member of the royal family to belong to each Inn of Court; a few months ago the Prince of Wales was called to the Bench of the Middle Temple, in the presence of a brilliant and crowded assembly.

The "Middle" and "Inner" composing "The Temple," Lincoln's Inn and Gray's Inn, all within five minutes' walk of each other, compose unique quarters of London. One enters any of them through a great gateway from the rush and roar and din of the street, and then suddenly finds one's self in a world of quiet and peace, of beautiful lawns and gardens and squares and buildings, all some hundreds of years old; one might in fact be fifty miles from a town. "The Temple" is where all the common-law barristers are congregated; Lincoln's Inn is occupied by the Chancery men, Gray's Inn has long since ceased to be used for a barrister's professional chamber. The custom of young barristers living in the Inns of Courts in the rough and tumble manner in which they did in the author's young days has ceased; in all the Inns, most delightful apartments with every modern convenience are now to be obtained.

The Circuit System, as the author says, has received its death blow from the express train and the local Bar; the only two circuits on which anything like the old spirit of the Bar mess survives are the "Northern" and the "South Wales," which are so far distant from London as to make the journey "down and up" in the one day, together with an appearance in court, somewhat tedious; but even these are tending to decay under the influence of growing local Bars and the tendency to bring all civil cases of importance to London for trial.

As the author points out, more than half of the men called to the English Bar are from India and the colonies and intend to return to their homes to practice. Of the remainder, about one-half are called merely for the social status incident thereto, and of the others who intend to practice, only some small proportion realize their ambition. Mr. Strahan thinks that in his day equity was far cleaner and more intellectual than common law. That would not seem to be true at the present day, when the problems presented in commercial practice are quite as delicate and intricate as those found in Chancery practice.

"The Bench and Bar of England" does much more than present a picture of legal life a few decades ago. In its chatty, informal way, it marshals a list of great personages for amiable review. Like Mr. Lytton Strachey, Mr. Strahan delights to peer beneath the robe of history; indeed, he manages to slip it off altogether, and what his lawyers and judges lose in dignity, they gain in sprightliness.

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TAXABILITY OF STOCK DIVIDENDS AS INCOME

AT the formation of a corporation, five thousand shares of its stock, each of a par value of \$100, were issued for \$500,000. The business of the corporation was successfully conducted; some of its profits were distributed from time to time to its stockholders, and the balance was carried to surplus account; its net assets came to be worth \$1,000,000, so that it had a capital of \$500,000 and a surplus of \$500,000; the directors believed it wise not to distribute this surplus to the stockholders, but to retain it permanently in the business; they therefore paid a stock dividend of 100 per cent. Thus the surplus was capitalized. A fund out of which dividends might have been paid to the stockholders at the discretion of the directors became part of the corporate capital, and so a part of funds out of which dividends might never be paid.

Before the payment of the stock dividend, the book value of each share was \$200. After the payment of the stock dividend, the book value of each share was \$100. Before the dividend, a stockholder had, say, one hundred shares; each of these shares had a book value of \$200, so that the total book value of his shares was \$20,000. After the dividend, this stockholder has two hundred shares; each of these shares has a book value of \$100, so that the total book value of his shares remains at \$20,000. The stockholder has precisely the same fractional interest in the corporate undertaking that he had before. It is obvious that the book value of a stockholder's holdings cannot be increased a penny by a stock dividend.

From this, many a man in the street leaps to the conclusion that a stock dividend is not income. A two-dollar bill, he says, has been exchanged for two one-dollar bills. This is superficial, — the problem is declared closed before it has been opened.

After *Eisner v. Macomber*,¹ the recent decision of the Supreme Court on this matter, was handed down, the stocks of many corporations which were likely to declare stock dividends rose in market value. It may well be that the market value of a stockholder's holdings, as distinguished from their book value, is increased by a stock dividend. This result is produced by a number of considerations operating upon the minds of persons who buy stocks, of which the following may be mentioned:

1. The market value of a stock is determined only partly by the asset or book value; the amount of dividends which is being paid, or which is likely to be paid in the near future, determines the rate of return which a stockholder may expect, and the rate of return is an influential factor in determining market value. A belief that the directors are soon to increase the amount of dividends will usually cause the market value of the shares to increase. Now the financial history of corporations shows that, after a stock dividend is declared, the cash dividends thereafter declared (on the increased amount of stock outstanding) will usually total more than the cash dividends theretofore declared. Thus the stockholder with one hundred shares may have been receiving \$8.00 a year per share, or a total of \$800; after the stock dividend the rate of cash dividend on his two hundred shares *is likely* to be better than \$4.00 a share. Thus the declaration of a stock dividend is a circumstance which frequently produces the same result as is produced when, for any other cause, a belief becomes current that an increase in the dividend rate is at hand.

2. Persons become accustomed to see a share of stock of a particular corporation sell around \$200. When a share of that corporation is to be had at \$110, there are many persons who do not analyze the matter but feel that they are now getting a share at much less than the normal value. And there is a surprisingly large number of persons who before the stock dividend would have been afraid to buy a share of stock at \$200, because the stock was at

¹ U. S. Sup. Ct., October Term, No. 318 (March 8, 1920).

a dizzy height and might have a great fall, and yet, after the stock dividend, would feel quite safe in buying two shares of the stock at \$110 a share.

Even if, however, the market value of a stockholder's holdings is increased by a stock dividend, the government did not purport to measure the tax by this increase in market value. The tax was not a tax on the difference between the market value of a stockholder's holdings before and after the payment of the dividend; under the Revenue Act of 1916 it was a tax on the whole cash value of the stock issued as a dividend. Thus if we assume that the stock sold, before the stock dividend, at \$200 a share, and that it sold, after the stock dividend, at \$110 a share, the stockholder who had one hundred shares of a total market value of \$20,000 and now has two hundred shares of a total market value of \$22,000, would be subjected to a tax, not on \$2000, but on \$11,000. These considerations of market value, therefore, are not a legitimate basis for the tax which Congress imposed.

Assume that, in a particular case, there was no increase even in the market value of a stockholder's holdings (and this was the fact in *Eisner v. Macomber*). This brings us back to the argument that the stock dividend is not income, *because its payment does not cause an increase in the stockholder's wealth*.

Reflection will show that there is nothing in this argument.

A taxpayer is employed by a solvent corporation which promptly pays its debts. He receives his weekly wage of \$50 at one o'clock on each Saturday, when his week's work is done. He is not \$50 richer at one o'clock than he was at 12:59. He has been growing richer throughout the week as he was earning the \$50. When he received the \$50 he exchanged a right for cash. Possibly the cash is worth a little more than the right—it is comforting to have the cash in hand—but the difference in the case supposed is very slight. No one would claim that the government may tax as income only the difference between the \$50 and the value of the right at 12:59.

Take the case of a cash dividend. If the corporation with a capital of \$500,000 and a surplus of \$500,000 pays a cash dividend of \$100 a share, the book value of the shares drops from \$200 to \$100 a share. Instead of one hundred shares of a total book value of \$20,000, the stockholder now has \$10,000 cash, and one hundred shares of a total book value of \$10,000. His wealth has not been

increased by \$10,000, and yet no one disputes but that the Government may tax the whole \$10,000 cash dividend as income.

There is one case in which a person's wealth is increased by the amount which he receives. That is when something is given to him. If \$1000 is given to him, he is worth \$1000 more the instant it is received than he was the instant before the receipt. But Congress itself has expressly declared that gifts are *not* income.

It is not profitable to multiply examples. It may well be that a stock dividend is income, although the taxpayer's wealth is not increased at the moment of its receipt.

In *Pollock v. Farmers' Loan & Trust Co.*² the court held, *inter alia*, that taxes upon returns from investments of personal property were direct taxes and that Congress could not impose such taxes without apportioning them among the states according to population, as required by Article I, section 2, clause 3, and section 9, clause 4, of the Constitution. Thereafter the Sixteenth Amendment was passed providing that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." In the Revenue Act of 1916 Congress declared that "the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation . . . out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation . . . which stock dividend shall be considered income, to the amount of its cash value."³ In *Eisner v. Macomber* the Supreme Court decided, four judges dissenting, that Congress could not constitutionally tax stock dividends as incomes. Mr. Justice Pitney delivered the opinion of the majority. Mr. Justice Brandeis delivered the principal dissenting opinion.

What is the proper mode of approach for the Supreme Court in dealing with the constitutionality of an act of Congress? We do not open any discussion of that great question. If the question were new, it might be urged that the court should interpret the Constitutional provisions to the best of its ability, uninfluenced by any interpretation which Congress may have made, and should

² 158 U. S. 601 (1895).

³ 39 STAT. AT L. 757.

sustain or reject acts of Congress according as they conformed or did not conform to the Constitution so judicially interpreted. But the question is not a new question; the Supreme Court has repeatedly stated that, since it is dealing with the act of a coördinate branch of the government, it will pay great respect to the legislative interpretation of the Constitution, and that no act of Congress will be declared unconstitutional if it is consistent with any reasonable interpretation of the Constitution. Our question therefore becomes this: Was this provision in the Revenue Act of 1916 consistent with any reasonable interpretation of the Constitutional provisions mentioned above?

We should note at once the different methods of taxation which Congress has employed and now employs in taxing trusts, partnerships, and corporations. A trustee takes in the trust income, and distributes the net income to beneficiaries. Here are two acts, — the receipt of income by the trustee, and the receipt of the net income by the beneficiaries from the trustee. Conceivably Congress might have enacted that the trustee should be taxed upon his receipt of income, and then that the beneficiaries should be taxed upon their receipt of net income from the trustee. In a business sense, this would obviously be double taxation, and Congress has not seen fit to make such enactment. As the law now stands, the trustee (under the kind of trust most commonly found, where it is the duty of the trustee to distribute income periodically) simply files an information return, no tax is assessed to him upon his receipt of income, but a tax is assessed to the beneficiaries upon their distributive shares of the net income, whether the income has in fact been distributed or not. Similarly with partnerships. The present law provides that "individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year." That is, Congress does not treat the partnership as an entity separate from the partners, and tax it upon the receipt of income, and then also tax the members upon their receipt from that entity of their shares of net income. Congress adheres to the common-law conception that a receipt by a partnership is a receipt by the persons who are members of that partnership.

But it is otherwise with a business carried on by a corporation. Here there is double taxation. The corporation is taxed upon its income and then the stockholders are taxed (under the present law, for surtax purposes only) upon their receipt of income from the corporation. The stockholder is a different legal unit from the corporation, and Congress is "at liberty to treat the dividends as coming to him *ab extra*, and as constituting a part of his income when they came to hand."⁴ Thus, a dividend paid to a stockholder, even out of earnings which the corporation had made prior to March 1, 1913, may, if Congress sees fit, be treated as taxable income of the stockholder. If that which was part of the corporate earnings (remaining after corporate taxes have been paid) is passed on to the stockholder, the asset received is taxable income to the stockholder.

Note again the words of the Revenue Act of 1916. "The term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation . . . out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or stock of the corporation."⁵ (The words of the Revenue Act of 1918 are, "A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed.")⁶

But, when the directors of a corporation pay a stock dividend they do not distribute corporate earnings. No part of the corporate assets passes from the control of the corporation to the control of the stockholder.

The nature of the transaction is the very opposite to a distribution of earnings. Dividends can only be paid out of surplus, — they must not be paid out of, and hence impair, the capital. So long as there is a surplus there is a fund out of which dividends may be paid at some future time in the discretion of the directors, and out of which a court may order dividends to be paid, if the directors abuse their discretion. So long as there is a surplus, there is a possibility of dividends. When a stock dividend is paid, that which was surplus becomes capital. A fund available for dividends is converted into a fund not available for dividends. The payment

⁴ *Lynch v. Hornby*, 247 U. S. 339, 344 (1918).

⁵ 39 STAT. AT L. 757.

⁶ 40 STAT. AT L. 1059.

of a stock dividend is not only not a present distribution of earnings, but it destroys all possibility of a future distribution therefrom.

The payment of the stock dividend does not give to the stockholder as against the corporation any right which he did not have before. On the contrary, the rights of the stockholder are diminished and the rights of the corporation are increased. By the capitalization of surplus, corporate control of the assets is perpetuated. If a court should order directors to distribute corporate earnings, it would be a mockery for the directors to pay a stock dividend.

Mr. Justice Brandeis, however, argued, in effect, as follows: The payment of a stock dividend, in business substance, includes two transactions: (1) the payment of a cash dividend by the corporation to its stockholders, and (2) the return of that cash to the corporation for further stock.

It is submitted that the constitutionality of the provision in question cannot properly be sustained on this ground. A corporation has no authority to pay a cash dividend out of surplus, and make it a condition that the cash be returned in payment for new stock. Once the asset has passed from the control of the corporation to the control of the stockholder, it is wholly for the stockholder to decide what he will do with it. It is true that the corporation may accompany its declaration of a cash dividend with an attractive offer to subscribe to a further issue of stock, but it must permit the stockholder to assign his right to take advantage of this attractive offer. The corporation must really let go of the cash. It may at the same time bid to get the cash back again, but it will be exposed to competition with all other legal units who seek the stockholder's cash. The stockholder, with the cash in hand, is master. He may prefer another investment, or he may feel the need of using the cash to pay his income taxes and debts, or he may spend the cash in the pursuit of happiness.

The financial history of corporations shows that under such circumstances there is usually a lively market in the "rights," and there could be no such market if there were not stockholders who did not choose to return the cash to the corporation. Even if the corporation gets back an amount of cash equivalent to that paid out, it does not at all follow that it is getting it back from the persons to whom it was paid (and sometimes it happens that the

directors were, in fixing the terms, too optimistic about the attractiveness of the rights, and that rights are not exercised either by the stockholder or any assignee).

In *Tax Commissioner v. Putnam*⁷ the court decided that a stock dividend was income (even though the surplus which was thus capitalized had been earned before the pertinent amendment to the state constitution became effective). The legislature had simply subjected "dividends" to taxation as income, and had not declared that this term should include stock dividends. Therefore on this point (there were other points before the court raising constitutional questions), the primary question was one of the construction of a statute. Prior to that time, the court had had occasion to consider whether a stock dividend was capital or income, and had persistently held it was capital. The prior cases had, to be sure, dealt with questions between life tenants and remaindermen, but lawyers had grown accustomed to thinking of stock dividends as capital and not income, and this was important in determining what the legislature had in mind when it said that "dividends" should be taxed as income. Moreover, taxation statutes are to be strictly construed. As the question before the court was one of statutory construction, one would have expected the court to decide that it was not clear that the legislature had intended to tax stock dividends as income. In *Towne v. Eisner*⁸ a similar question was presented, the Income Tax Law of 1913 not expressly declaring stock dividends to be income, and the court unanimously declined to sustain the government's contention that a stock dividend was taxable as income under that law. But the Massachusetts court decided (the decision was made prior to the decision in *Towne v. Eisner*) that a stock dividend was income under the Massachusetts Income Tax Law of 1916. Mr. Chief Justice Rugg said: "The substance of the transaction is no different from what it would be if a cash dividend had been declared with the privilege of subscription to an equivalent amount of new shares."⁹

This statement is opposed to the decisions of the Massachusetts court itself in cases arising between life tenant and remainderman. Conceding that there may be some adequate basis for a court, in

⁷ 227 Mass. 522, 116 N. E. 904 (1917).

⁸ 245 U. S. 418 (1918).

⁹ 227 Mass. 522, 535, 116 N. E. 904 (1917).

declaring what is income, to lay down one rule as between life tenant and remainderman, and to lay down the opposite rule between the government and a taxpayer, that adequate basis cannot be that the business substance of a transaction is one thing when the question is between life tenant and the remainderman, and is the opposite thing when the question is between the government and a taxpayer. Business substance is business substance. It is therefore profitable on this question of business substance to look at the pertinent Massachusetts cases arising between life tenant and remainderman.

Rand v. Hubbell.¹⁰ A corporation had voted to allow each stockholder to subscribe to additional shares. The directors declared a cash dividend just sufficient to pay the subscription price, "the dividend to be applied by the stockholders in payment for the new stock created." Each stockholder received a check for the amount of his dividend, and immediately exchanged the check for a certificate of stock; the checks were then destroyed. The court said: "No money was ever paid, or intended to be paid, by the corporation to any stockholder. The declaring of the dividend in cash, and the giving of checks therefor, were mere forms," and it held that the dividend must be treated as a stock dividend.

Hyde v. Holmes.¹¹ A corporation had given to each stockholder the right to subscribe to additional shares. The directors declared a cash dividend just sufficient to pay the subscription price. "It was undoubtedly expected that many if not most of the stockholders would exercise their option by subscribing." But the court declined to treat this as a stock dividend, saying, "Every stockholder could take the money and use it as he chose."

Smith v. Cotting.¹² A Massachusetts trust company was prohibited by law from issuing stock dividends. It gave to each stockholder the right to subscribe to additional shares. The directors declared a cash dividend just sufficient to pay the subscription price, "which stockholders may apply if they so desire in payment of new stock." A trustee received the cash and applied it in payment of new stock. The court declined to treat this as a stock dividend and made the trustee accountable to the life tenant for the cash received. The court said:

¹⁰ 115 Mass. 461 (1874).

¹¹ 198 Mass. 287, 84 N. E. 318 (1908).

¹² 231 Mass. 42, 120 N. E. 177 (1918).

"It is plain that the distribution cannot be deemed as comprising both stock and cash, a stock dividend to share owners who chose to take stock, and a cash dividend to those who chose to take money. . . . Nor can the dividend be called a mere form as in *Rand v. Hubbell*, 115 Mass. 461, 477, where the directors voted, that the dividend must be applied in payment for new stock simultaneously created. The money having been deposited in a national bank, separate warrants were sent to the stockholders respectively entitled extra dividend warrant, and stock subscription warrant, which they could indorse if they elected to take stock, or use the dividend warrant if cash was preferred. A stockholder accordingly had the option to use either warrant, and he was not bound legally or morally to take stock rather than cash in payment."¹³

Where a corporation pays a cash dividend to its stockholders and at the same time offers other stock for subscription, *if* the corporation really lets go of the cash, so that it is wholly for the stockholder to say whether he will use that cash in subscribing for more stock or not, there is a transaction which differs radically in business substance from the payment of a stock dividend.

If therefore a stock dividend can be treated as income only on the ground that it is a distribution of corporate earnings, we should conclude that the decision of the majority in *Eisner v. Macomber* was right. Congress cannot by its declaration convert a transaction which is not a distribution of earnings into a transaction which is a distribution of earnings.

If we take a literal construction of the Act of 1916, these considerations would end the discussion. For Congress did not make a general declaration that stock dividends should be taxable as income. It said that "dividends" shall be held to mean "any distribution . . . by a corporation . . . out of its earnings . . . whether in cash or in stock of the corporation . . . *which* stock dividend shall be considered income." A demonstration that a stock dividend is not a distribution of earnings makes this enactment, literally construed, abortive so far as stock dividends are concerned. But such a construction is unduly strict. Congress had shown plainly what result it intended to reach, and the statute ought to be given the same effect as though Congress had declared that stock dividends should be taxable as income, and had said no more. Mr. Justice Pitney gave this effect to the statute.

¹³ 231 Mass. 42, 46, 120 N. E. 177 (1918).

This brings us to the great question: May the word *income* reasonably be construed as broad enough to include stock dividends under any circumstances? Our answer would be in the affirmative, and would be based on the following propositions: (1) capital increment may be taxed as income; (2) so far as a stock dividend capitalizes earnings made during the taxpayer's ownership of the stock (upon which the dividend is paid), it is predicated upon facts showing an increment in the stockholder's capital, and the payment of the dividend furnishes a proper basis for taxing such increment. We will consider these two propositions.

(1) *Capital increment may be taxed as income.*

In *Tebrau (Johore) Rubber Syndicate, Limited v. Farmer*¹⁴ the Court of Session held that a profit made by a company through the purchase and sale of property was not taxable. Lord Salvesen said:

"I am unable to distinguish the position of the appellants from that of a person who acquires a property by way of investment and who realizes it afterward at a profit. It is well settled that in such a case the profit is not part of the person's annual income liable to be assessed for income-tax but results from an appreciation of his capital. No doubt if it is part of his business to deal in land or investments, any profits which in the course of that business he realizes form part of his income; but the mere fact that a person or company has invested funds in the purchase of an estate which has subsequently appreciated and so has realized a profit on his purchase does not make that profit liable to assessment."

The court was construing acts (the first of which was 5 & 6 VICT. c. 35) taxing "annual profits or gains arising or accruing to any person . . . from any kind of property."

Gray v. Darlington.¹⁵ Congress enacted in 1867 that a tax should be paid "annually upon the gains, profits and income of every person . . . derived from any kind of property . . . In estimating the gains, profits, and income of any person, there shall be included . . . profits realized within the year from sales of real estate purchased within the year, or within two years previous to the year for which income is estimated . . . and all other gains, profits, and income derived from any source whatever."¹⁶ *Dar-*

¹⁴ [1910] S. C. 906, 911.

¹⁵ 15 Wall. (U. S.) 63 (1872).

¹⁶ 14 STAT. AT L. 477, 478.

lington bought bonds in 1865 and sold them in 1869 at a profit. The court held that he was not taxable on this profit. Mr. Justice Field said:

"The advance in the value of property during a series of years can, in no just sense, be considered the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. The statute looks, with some exceptions, for subjects of taxation only to annual gains, profits and income. . . . Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital."¹⁷

*Hays v. Gauley Mt. Coal Co.*¹⁸ The Corporation Tax Act of 1909 (effective January 1, 1909) levied an excise tax based upon "the entire net income . . . received" by each corporation during the period stated. A corporation bought shares of stock before 1909, and sold them at a profit in 1911. A tax was assessed to it on that proportion of the profit which had accrued since January 1, 1909. The Circuit Court of Appeals held this tax to be invalid, relying upon *Gray v. Darlington*. But the Supreme Court unanimously held the tax to be valid. Mr. Justice Pitney pointed out the differences in the language of the statute of 1909 from that of the statute of 1867 and said:

"Since the conversion of capital often results in gain, the general purpose of the Act of 1909 to measure the tax by the increase arising from corporate activities together with the income from invested property leads to the inference that that portion of the gross proceeds which represents gain or increase acquired after the taking effect of the act must be regarded as 'gross income.'"¹⁹

In all three cases, the courts were dealing with the construction of statutes, — no constitutional question was presented. But the decision in *Hays v. Gauley Mt. Coal Co.* (which was a decision by a unanimous court) settles the point that the word *income* is a word which is sometimes used in a sense broad enough to include "capital increment." Therefore, if Congress enacts that the capital in-

¹⁷ 15 Wall. (U. S.) 63, 65, 66 (1872).

¹⁸ 247 U. S. 189 (1918).

¹⁹ *Ibid.*, p. 193.

creases of a taxpayer (occurring since the Sixteenth Amendment became effective) shall be taxed as part of his income, the court should sustain the enactment.

- (2) *So far as a stock dividend capitalizes earnings made during the taxpayer's ownership of the stock (upon which the dividend is paid) it is predicated upon facts showing an increment in the stockholder's capital, and the payment of the dividend furnishes a proper basis for taxing such increment.*

Suppose a taxpayer bought one hundred shares of the common stock of the United States Steel Corporation at \$50 a share, and after several years sold it at \$100 a share. He has made \$5000, but he is not worth \$5000 more the instant after he made the sale than he was the instant before. His capital — the one hundred shares of stock — has been increasing in value over a period of time. When he realizes his profit, the law fastens upon that act as a proper basis for taxing him upon the capital increment that has occurred up to that time. There is a pause, a rest, a taking account of what has happened up to date.

Unless the court is prepared to say that Congress may not tax capital increment as income, a taxpayer who receives stock as a dividend and sells it becomes liable to a tax upon the proceeds. Mr. Justice Pitney states in his opinion in *Eisner v. Macomber* that the stockholder would be so taxable.

Therefore our problem narrows to this: Can capital increment constitutionally be taxed as income *only* when the capital has been sold? There is nothing in the nature of things which justifies such a limitation.

The payment of a stock dividend capitalizes surplus. Assume, for a moment, that the taxpayer to whom the dividend was paid had owned the stock on which the dividend is paid throughout the period during which the corporation earned the surplus which is now capitalized. As the corporation was earning the surplus, the value of the taxpayer's capital — his shares of stock — gradually increased. The payment of the stock dividend was legally permissible only because such surplus had been accumulated. As the stock dividend is predicated upon facts showing a capital increment to this taxpayer, and as the payment of such dividend changes his rights, both formally and in business substance, it would not be unreasonable for Congress to enact that there shall be a pause, a

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In many, if not most, cases there would, however, have been some changes in the ownership of the stock upon which the dividend is declared during the period when the surplus, now capitalized, was being earned. This greatly complicates the matter. Suppose a corporation had been accumulating a surplus from March 1, 1913, to January 1, 1919, and some of its stock was held by A throughout that period, and was sold by A to B on January 1, 1919, and shortly afterwards a stock dividend was paid to B. When A sold to B, he would be taxed on the proceeds, less the value of the stock on March 1, 1913. His profit so determined would probably not exactly coincide with his share of the corporate surplus earned in that period, although the amount of such surplus would be an influential factor. But the important point is that he would be taxed on the capital increment which had occurred up to the time of sale, under a rule which Congress has seen fit to lay down. Now if B is taxed on the full amount of the stock dividend (either on its cash value, as prescribed by the Act of 1916, or on its par value, as prescribed by the Act of 1918), he will be taxed on an increment which has not occurred to *his* capital. And Congress could not constitutionally enact that B shall be taxed as a part of his income for an increase which occurred to the capital of A. When A sold to B, there was a pause, a rest, a taking account of the capital increment up to date. B can therefore only be taxed on the capital increment which occurred after the date when the capital passed into his ownership.

In *Eisner v. Macomber* a stock dividend was declared based partly upon earnings before March 1, 1913, and partly upon earnings made after that date. The government sought to tax the stock dividend only to the extent that it was based upon earnings made after March 1, 1913. The record states that on March 4, 1916, Mrs. Macomber owned the stock (upon which the stock dividend in question was paid), but the record is silent as to the date of her acquisition of that stock. If she wished to object to the tax on the ground that the tax was assessed in part upon the capitalization of earnings made prior to her acquisition of stock, it was incumbent upon her to allege and prove that such was the fact.

It is submitted that Congress had the constitutional power, under the Sixteenth Amendment, to tax as income to a taxpayer the par value of stock received by him as a dividend to the extent that the surplus capitalized by such dividend was earned (1) subsequent to March 1, 1913, and (2) during the ownership by this taxpayer of the stock upon which the dividend was declared. The tax claimed by the government in *Eisner v. Macomber* was within this rule.

To sustain a tax assessed to a taxpayer on a stock dividend paid to him only to the extent that it capitalizes surplus earned during that taxpayer's ownership (of the stock upon which the dividend is paid), would be to sustain the Act only with a limitation, but the court when it can sustain an Act of Congress only with a limitation may well do so, leaving it to Congress to say whether it wishes the act, with that limitation, to continue in force.

For these reasons, and on the facts of the particular case, we believe that the result reached by the minority in *Eisner v. Macomber* was the right result.

If we turn from questions of constitutional power to questions of what is wise legislation, we should think that a tax on stock dividends, within the limits defined above, would not be wise.

One groans at the thought of a tax the computation of which would require not only a determination of how much of the capitalized surplus was earned since March 1, 1913, but also a determination of how much of that surplus was earned during the ownership of each stockholder of the stock upon which the dividend was paid. At present the burden upon taxpayers is twofold, — first, to prepare the returns, and second, to pay the taxes. Tax returns are already highly complex; a great amount of time has to be spent to make accurate returns, and the time so spent is sheer economic waste. The complete elimination of stock dividends from the subjects of income taxation will tend to simplicity.

Moreover, Congress may bear in mind that if a cash dividend is paid, it is quite likely to be spent. The payment of a stock dividend, on the other hand, locks up the money, — it makes an addition to the permanent capital of the corporation. This is the kind of act which ought now to be encouraged.

Will the government be crippled by the loss of revenue expected from the taxation of stock dividends? No.

The claim that the decision in *Eisner v. Macomber* will allow corporations to escape taxation on their profits may be dismissed as demagogic. The result in no wise affects the taxation of the corporations — it only affects the extent of the double taxation which comes from first taxing the corporation on its earnings, and then taxing the stockholders also because of those earnings.

Even when reckoned in terms of double taxation, and without any change in the law, the ultimate loss, if any, to the government ought to be small. The Revenue Law of 1918, and the regulations thereunder, contemplate that a stockholder who receives stock as a dividend and pays a tax thereon and thereafter sells the stock so received shall not be subject to a tax except to the extent that the proceeds of sale exceed the par value of the stock received. But the regulations also require that a stockholder who receives stock as a dividend and pays no tax thereon and thereafter sells the stock so received shall be subject to a tax on the entire proceeds, and this is confirmed by Mr. Justice Pitney's statement in *Eisner v. Macomber*. This decision simply throws all stock received as a dividend into the latter class. The tax will accrue, not when the stock is received, but when it is sold. The inhibition on stock dividends being now removed, they will probably frequently be made, and sales of stock received will follow.

But suppose the stock is not sold. If the stock is given away, or passes upon the stockholder's death to his legatees or next of kin, no tax is, under the present law and regulations, assessed upon the capital increment which has occurred prior to such a transfer. And, if the transferee later sells, he will have a taxable gain or a deductible loss according as the proceeds of sale are greater or less than the value of the stock when *he* received it. This is true of both shares of stock and all other kinds of capital. Thus, there is a great gap in the taxing structure designed to encircle capital increment.

If our taxation laws are to be changed, Congress will seek for taxes which cannot readily be passed on to the consuming public. The country is awakening to the economic fact that heavy taxes on corporate earnings are readily passed on to the consumer — an "excess profits" tax suggests the lancing of swollen wealth, but it does nothing of the kind and is, instead, probably the greatest single factor in the present high cost of living. A tax on capital

increment is a desirable form of tax, as it cannot readily be passed on. Therefore the gap in the taxing structure designed to encircle capital increment ought to be closed.

If a taxpayer acquires capital, and later that capital passes from his ownership, at this point there may well be a pause, a rest, a taking account of the capital increase which has occurred during his ownership of the capital. It should make no difference whether the transfer is for a consideration or without a consideration. The administration of such a law would be simple, and, if the reasoning in this article is sound, it is within the constitutional power of Congress to say that the capital increase shall be taxed as income *whenever* the capital that has increased passes into the ownership of another.

If such a change in the law were made, the ultimate loss, if any, to the government arising from the decision in *Eisner v. Macomber* would be offset by a substantial gain, for it is to be noted that this change would be applicable to increases of all kinds of capital, and not merely shares of stock.

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RAILWAY VALUATION AND THE COURTS

I

THE railways of the country have now secured a statutory rule of rate-making, which requires the Interstate Commerce Commission to fix such rates as will bring five and a half per cent (or at its discretion six per cent) upon the "fair value" of the aggregate railway property within a given district. Upon this clause the hopes of the financial community are centered. It is to bring stability and certainty of return, to restore railway credit, to place rigid restraints upon a supposedly hostile regulating body. It is to substitute an inflexible rule for an uncertain administrative discretion.

Whether or not these hopes are well founded obviously depends upon whether the clause does contain a rule which may be applied with certainty and precision. Five and a half per cent is definite enough, but what is the "fair value" of the railroads? For the present it is obvious that the Commission can do little more than arbitrarily assign a value to the railway property in each rate district. But for the future "fair value" must be derived from the findings of the Commission in its gigantic task of valuing the railroads of the country under the Valuation Act of 1912. How certain and stable a result does this valuation promise?

For better or for worse, we must now take it to be settled that under our American system of jurisprudence the problem is a constitutional one, and the Supreme Court the final arbiter. The Interstate Commerce Commission will before long complete its task of inventorying and appraising every item of railroad property in the United States. Field parties are making engineering surveys of every mile of track, appraisers are examining land values, accountants and experts are digging into historical records and corporate accounts. So far as a vast expenditure of money and indefatigable zeal can accomplish the task, the facts in the case are being brought to light.¹ As to findings of fact, it may be assumed

¹ See "Railroad Valuation by the Interstate Commerce Commission," by H. B. Vanderblue, in 34 QUART. J. OF EC. 22.

that the conclusions of the commission will be deemed well-nigh conclusive, in actual practice if not in legal theory.² But these underlying facts constitute merely the raw material out of which the final decision must be made. The principles according to which the raw material is to be combined must be passed upon by the Supreme Court, and must square with the Supreme Court's conception of constitutional theory.

The object of this paper is to inquire into the premises upon which the court's function, as final court of review in valuation cases, must rest. I shall not attempt any detailed analysis of cases, nor any voluminous marshaling of economic data. The inquiry will lead, necessarily, into an analysis of the nature of the problem which will confront the court, and an examination of those decisions of the court which will throw light upon its own conception of the premises upon which it must act. The inquiry into the nature of the relation between the public utility and the community will lead to certain conclusions which seem to me to have a practical bearing upon some of the problems now agitating the legislature and the courts.

When railroad regulation first became a subject of political and legal controversy, the constitutional issue was simple. The railroads claimed that they were entirely exempt from rate regulation. They operated under charters granted by the states, which in so many words gave them the right to fix their own passenger and freight rates, and these charters were contracts, sacred from the touch of state legislatures. Their property was private, they were in private business operating for profit, and any state interference not specifically authorized in their charter violated those general guarantees in the Fourteenth Amendment, the sweeping character of which lawyers and courts were just beginning to appreciate. The claims on the other side were just as clear cut. The lawyers of the anti-railroad forces claimed that any regulation of rates, however drastic, was valid. The charter provisions giving the railroads power to fix rates meant no more than power to fix rates in accordance with, or in the absence of, state legislation. And apart from charters, the railroad business was a public business, resembling in many ways the businesses of trucking, ferrying, carriage driving, and the like, which the British Parliament had traditionally regu-

² *Cf. Van Dyke v. Geary*, 244 U. S. 39 (1916).

lated. Regulation of railroad rates was therefore a proper legislative function and quite beyond the jurisdiction of the courts. No one ever heard of a British court inquiring whether a schedule of rates for wagoners or ferrymen, fixed by Parliament, was reasonable. If a legislature fixed unreasonable rates, the people had their remedy at the polls, not in the courts.

In the granger cases,³ in 1876, a majority of the Supreme Court sustained to its full extent the popular view. It not only upheld the power of the legislature to fix rates, but it declared that the legislature alone was the judge of what was a reasonable rate. "The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied." If the rate has been improperly fixed, the legislature, not the courts, must be appealed to for the change. The argument that the charter protected the corporations against rate regulation was met by pointing to the general clause in state constitutions reserving the right in the legislature to alter all corporate charters.

One point in this early controversy it is important to understand. There is much discussion whether rate fixing is in its nature a "judicial" or a "legislative" function. This was a period in the history of American jurisprudence when discussions of this sort were popular. The separation of powers into executive, legislative, and judicial was looked upon as more than a mere differentiation of functions based upon practical considerations; it was thought to be the manifestation of an inherent truth. The pseudo-philosophy of the period regarded certain governmental acts as in their nature judicial, and hence never to be exercised, under the constitution, by either the legislative or the executive branch. The opponents of legislative rate regulation tried to bring rate fixing into this category. At common law, in the absence of legislation, a public utility was bound to charge no more than a reasonable rate, and if a shipper or a passenger complained of an act of extortion, it was for the court to decide whether in fact the rate was unreasonable. In such a case reasonableness was a judicial question. So much the court in the granger cases readily admitted. But it declined to draw the conclusion that a rule of the common

³ *Munn v. Illinois*, 94 U. S. 113 (1876); *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 (1876); *Peik v. Chicago, etc. Ry. Co.*, 94 U. S. 164 (1876); and cases following.

law, leaving to the courts the issue of reasonableness, could never be changed by the legislature. Chief Justice Waite pointed out that as soon as the legislature had changed this common-law rule by substituting a specific schedule of rates, reasonableness ceased to be an open question on which courts could pass. Potentially, rate regulation was a legislative question; it was merely by default of the legislature that the courts had anything to do with it.

If the matter had rested there, the constitutional history of rate regulation would have been brief. If a legislature had uncontrolled power over railroad rates, it could delegate this power to an administrative tribunal, and make the decision of that tribunal conclusive on all questions of reasonableness. The courts would have nothing to do with the matter. But the railroads represented immense property investments. The granger legislation aroused bitter political passions, and grave fears among those who believed that the welfare of the country depended upon the security of property. In case after case, as it came before the Supreme Court, the leaders of the bar appealed to the court not to leave the vast interests of private stockholders at the mercy of radical state legislatures. To have withstood this appeal would have been utterly inconsistent with the individualistic spirit which pervaded American jurisprudence in the latter part of the nineteenth century. Some method must be devised by which the courts could check the assaults of western legislatures upon established property rights. The court obviously could not go back on its decision in the granger cases, and hold that railroads were completely free from legislative interference. The principle was too firmly established in the precedents. The problem was to find some midway course which would preserve the power of regulation, but would put a reasonable check on the exercise of that power, when it attempted to cut too drastically into property values.

How the Supreme Court, in the series of cases culminating in *Smyth v. Ames*,⁴ finally hit upon what seemed a solution of this problem, is a familiar story. When *Munn v. Illinois*⁵ was before the court, the juristic development of the Fourteenth Amendment was still in its infancy. Only four years before, in the Slaughter House cases,⁶ the court had seemed reluctant to extend its protection to other classes than to Negroes. To hold that a statute on a subject

⁴ 169 U. S. 466 (1898). ⁵ 94 U. S. 113 (1876). ⁶ 16 Wall. (U. S.) 36 (1872).

which was in its nature legislative, conferring power which the British Parliament had traditionally exercised, and in which the forms of due process were observed, was lacking in due process, would at that time have seemed a bold step for the court to take. Where the legislature had delegated its power to a commission, and made the decision of that commission final, there was at least a possible argument that the railroad was deprived of its traditional right to due process by judicial inquiry.⁷ But where the legislature itself fixed fares directly, or where a commission fixed rates under a law which provided for a judicial review, there were obvious difficulties in holding that the state was acting without due process.

The argument which finally prevailed, rested on the analogy of the law of eminent domain. If the federal government were to take physical possession of a railroad, obviously it would be necessary under the Fifth Amendment to pay just compensation. If instead of taking possession it issued an order compelling the railroad to give the use of its property to the public free of charge, this would virtually be taking the property for public use without just compensation. If it allowed the railroad to receive compensation for its services, there would still be a question for the court whether the compensation was just. It required, perhaps, a slight wrench to make a doctrine which required the government to *pay* just compensation, serve the purpose of requiring the government to permit the railroads to collect just compensation from their patrons; but the matter was never very minutely inquired into. Another difficulty also had to be overcome. The cases that came up to the Supreme Court involved state laws, not federal laws. There is no clause in the Constitution expressly forbidding a state to take property for public use without just compensation. It was necessary to go a step further, and hold that to take property without making what the Supreme Court thought to be just compensation, was to take it without due process of law, and this even where the forms of due process were faithfully adhered to.

Through this difficult pathway the court had to find its way, and it is no wonder that its progress was slow and hesitating. It threw up a kind of *ballon d'essai* in 1886, in the form of a *dictum* that "under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property

⁷ Chicago, etc. Ry v. Minnesota, etc. Ry. Co., 134 U. S. 418 (1890).

without reward; neither can it do that which in law amounts to a taking of property for public use without just compensation, or without due process of law.”⁸ The following year it still expressed a doubt whether “it would under any circumstances have the power” to hold a state rate regulation void on the ground that it was confiscatory.⁹ A year later the *ballon d’essai* of 1886 was again thrown out.¹⁰ But in 1892 the court was still in doubt whether it could ever hold that a rate fixed by the state legislature was unreasonable.¹¹

Before pursuing this germinating theory to its full bloom in *Smyth v. Ames*, it is instructive to notice that in its earlier period of growth it was not without a rival. One member of the court, Justice Harlan, made valiant efforts to swing the court over to another theory, which would accomplish the same general result of limiting without abrogating the regulating power of the state. Justice Harlan participated in his first rate case in 1882.¹² In that case he voted with the majority in holding that the rate law in question was constitutional. But he filed a concurring opinion in which he developed a constitutional theory which would put a clear limit on the regulating power. The railroad’s charter, he said, gave the railroad directors the power to fix “such rates of toll . . . as they shall by their by-laws determine.” In view of the common-law history of public callings this must mean, he pointed out, “such *reasonable* rates of toll.” The corporation had, therefore, a charter right through its directors to fix reasonable rates; they had no charter right to fix more than reasonable rates. A statute which merely regulated rates down to the level of reasonableness did not infringe their charter right, but a statute which reduced rates below the level of reasonableness was an infringement of charter rights which, under the principle of the Dartmouth College case, would be invalid under the contract clause of the Federal Constitution. And whether or not this charter right had been infringed was necessarily a judicial question, not a legislative one.

Here were two alternative theories, which seemed to achieve the result the court was groping for. Each left the power to regulate in

⁸ *Stone v. Farmers’ Loan and Trust Co.*, 116 U. S. 307, 331 (1886).

⁹ *Dow v. Beidelman*, 125 U. S. 680, 691 (1888).

¹⁰ *Georgia R. R. & Banking Corp. v. Smith*, 128 U. S. 174 (1888).

¹¹ *Budd v. New York*, 143 U. S. 517, 548 (1892).

¹² *Ruggles v. Illinois*, 108 U. S. 526 (1883).

existence, and each established, without any very violent stretch of legal reasoning, a means of judicial protection against abuse of the power. In *Stone v. Farmers' Loan and Trust Co.*,¹³ in 1886, the two theories seemed to come into sharp conflict. This was the case in which Chief Justice Waite sent up his first *ballon d'essai* under the Fourteenth Amendment. The statute in question authorized the railroad commission to reduce rates "so as to allow a fair and just return on the value of such railroad." Under the eminent domain analogy this was precisely what the railroad was entitled to receive. Justice Harlan, however, dissented from the decision, pointing out that the statute might authorize a reduction below the level of reasonableness, so long as a fair return on the "value" was allowed. But there was no necessary conflict between the two theories. A slight modification of Justice Harlan's conception of reasonableness would bring them into harmony. In *Budd v. New York*,¹⁴ in 1892, the rate regulation was sustained on the ground that "the records do not show that the rates fixed by the statute are unreasonable, or that property has been taken without due process of law." In the Texas rate cases of 1894,¹⁵ a unanimous court held that the rates fixed by the state were unconstitutional. There is only one opinion, and it appears to go on both the contract theory of Justice Harlan and the property theory of Chief Justice Waite. In discussing a preliminary jurisdictional question, Justice Brewer points out that it is an open question for the court to consider whether "there is not implied in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road and return some profit to those who have invested their money in the construction." And a little later he says:

"If the state were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?"¹⁶

¹³ 116 U. S. 307 (1886).

¹⁴ 143 U. S. 517 (1892).

¹⁵ *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362 (1894). ¹⁶ *Ibid.*, 410.

The final holding was that the state law was "unjust and unreasonable." Apparently the court was still holding open the opportunity of selecting either or both of the theories, as might prove expedient.

One of the Texas rate cases involved not a state but a federal corporation.¹⁷ Here the contract theory obviously broke down. But this of itself would not be an insuperable obstacle to the application of Justice Harlan's theory in a modified form. The federal charter gave the corporation the right to fix reasonable rates. It would have been simple to hold that this federal grant of power carried with it an implied limitation of the right of the state to reduce its rates below the point of reasonableness, just as the grant of a federal charter to carry on the banking business had been held to carry with it an implied limitation of the taxing power of the state.¹⁸ The court delivered only a brief separate opinion in this case, however, which does not make it clear on what theory it was relying.

In these Texas cases we hear the last of Justice Harlan's theory of an inviolable charter right to collect reasonable rates. In *St. Louis & San Francisco Railway v. Gill*,¹⁹ the discussion turned entirely on the Fourteenth Amendment, and in *Covington, etc. Turnpike Co. v. Sandford*,²⁰ and *Smyth v. Ames*,²¹ Justice Harlan, the originator of the contract theory, who ten years before had considered a statute unconstitutional which allowed only a "fair and just return on the value" of the railroad, himself delivered an opinion for a unanimous court, based squarely on the Fourteenth Amendment. A railroad corporation, he said, is a "person" under the Constitution, and a statute or regulation which does not allow just compensation for railroad services deprives it of property without due process of law. And "the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public."²²

Is there any significance in the fact that the court, having the

¹⁷ *Reagan v. Mercantile Trust Co.*, 154 U. S. 413 (1894).

¹⁸ *McCullough v. Maryland*, 4 Wheat. (U. S.) 316 (1819).

¹⁹ 156 U. S. 649 (1895).

²¹ 169 U. S. 466 (1898).

²⁰ 164 U. S. 578 (1896).

²² *Ibid.*, 546.

choice of two possible theories, each achieving virtually the same result, finally accepted the property theory and rejected the contract theory? Does it throw any light on the subsequent course of judicial decision? Since the court does not itself give any reasons for its choice, one can only speculate. But it seems to me that the choice has some significance.

For a court composed of nine jurists, appointed for life, to annul a legislative expression of the popular will is always a delicate matter. To upset a law which has behind it the political passions and aspirations of a great popular movement like the granger movement of the seventies, requires particular circumspection. Above all, the judges must have been anxious to avoid the suspicion that they were substituting their own discretion for the will of the legislature. Their decision must rest on judicial, not on legislative grounds. A court acting judicially ascertains facts, and applies to them rules derived by certain processes of reasoning from established principles or precedents. A public body with legislative powers ascertains facts, perhaps, but it applies to these facts its own sense of what is in the public interest. Now the word "reasonable" carries with it a large suggestion of legislative discretion. No process of juristic reasoning can point with certainty to the precise limit beyond which a rate ceases to be reasonable. For twenty years the court had been saying that the issue of reasonableness was a legislative and not a judicial question. But a decision based on the rule in *Smyth v. Ames* would have at least the illusion of juristic necessity. What the value of a railroad was, seemed on the surface to be a pure question of fact, and a fair return could easily be ascertained by reference to current rates of profit. A judge who upset a state statute on the ground that it failed to allow a reasonable return on the fair value of the property seemed protected against any charge of usurping legislative power. He need only point to the ascertained facts, and shift all responsibility to the framers of the Constitution.

Certainly the language of the cases subsequent to *Smyth v. Ames* in the main bears out the hypothesis that the court has been trying to ascertain not a rule of policy, but a discoverable fact. The question has been, not what is it wise to allow the company to earn, but what is the value of the property on which it must be allowed to earn a return. In *Smyth v. Ames* the court enumerated

seven factors which were to be taken into account "in order to ascertain that value,"—cost of construction, cost of improvements, amount, and market value of stocks and bonds, present cost, probable earning capacity, and operating costs. It suggested that there might be other factors. But these were merely different kinds of evidence, to be given such weight as they deserved. They were like the instructions of the court to a jury in eminent domain proceedings. The court instructs the jury that they must find, as an ultimate fact, the market value of the property in question. Perhaps it will enumerate the different kinds of evidence submitted at the trial, bearing on this ultimate question. The evidence may be contradictory, and the methods of valuation of the expert witnesses may have been inconsistent. But it is for the jury to give to each item of evidence such weight as in their judgment it deserves. The only requirement is that their ultimate finding must be a finding of fact. They must make up their minds what the property is worth, not what they think the owner should in fairness receive for it. No other explanation of the Supreme Court's enumeration of inconsistent and contradictory factors in *Smyth v. Ames* seems to me possible. The court was addressing the masters in chancery and the lower federal courts, and instructing them what ultimate fact they had to find, and what evidence they could consider.

On the whole, although there have been some suggestions that a rate schedule must be "just both to the company and to the public,"²³ this conception that rates should be based upon an ultimate fact to be determined by inquiry has persisted. "What the company is entitled to demand . . . is a fair return upon the reasonable value of the property at the time it is being used for the public."²⁴ The price paid at a recent foreclosure sale is "evidence" of value.²⁵ The cost of reproduction is "one way of ascertaining the present value" of a public service corporation.²⁶ The cost of reproduction is "of service in ascertaining the present value of the plant," but it is not conclusive.²⁷ That mere conjecture is insufficient to justify overturning state legislation "is true of asserted value as of other

²³ *San Diego Land Co. v. National City*, 174 U. S. 739, 758 (1899).

²⁴ *Ibid.*, 757.

²⁵ *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 443 (1903).

²⁶ *Knoxville v. Knoxville Water Co.*, 212 U. S. 1 (1909).

²⁷ *Minnesota Rate Cases*, 230 U. S. 352 (1913).

facts.”²⁸ This conception that there is a fact which can be discovered, if we are only persistent enough in our search for it, and which, once it is found, will provide a mathematical solution of all rate-making problems, is widely prevalent outside the Supreme Court decisions. Congress has instructed the Interstate Commerce Commission to “investigate, ascertain and report” the value of all property owned or used by common carriers.²⁹ It is the general practice of many state public service commissions to conclude their opinions with “findings of fact” as to the value of the utility in question. Indeed a general technique seems to have been developed, among state commissions, the object of which appears to be to render their decisions proof against reversal in the courts. The commission inquires minutely into the several “evidences” of value enumerated in *Smyth v. Ames*: original cost, cost of reproduction, capitalization, value of stocks and bonds, etc. It then marshals the figures, of course widely divergent, which these different lines of inquiry produce, and concludes somewhat as follows: We have considered carefully the facts which the Supreme Court has directed us to consider, and have given to each fact such weight as in our judgment it deserves. We therefor find that the value of the property is so and so. The final figure evolved generally bears no arithmetical relation to any of the evidentiary figures which the commission has “taken into consideration” and no indication is given of the logical process by which the figure is reached.³⁰ A court which is reviewing such a decision obviously finds it exceedingly difficult to hold that a wrong method was applied in valuing the property, since it is not clear what method, if any, was in the commission’s mind. Unless the net result is clearly unjust, the court is more than likely to treat the whole question as one of fact, on which the decision of a fair-minded board which considers all the evidence is virtually conclusive.³¹

²⁸ *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439 (1903).

²⁹ Valuation Act, 37 STAT. AT L. 701.

³⁰ See, for instance, *Re Champaign & Urbana Water Co.* (Ill. Pub. U. Com’n), P. U. R. 1919 E, 798, 825. *Harbster v. Angelica Water & Ice Co.* (Penn. Pub. S. Com’n), P. U. R. 1918 E, 540, 548. *Re Western Col. Power Co.* (Colorado P. U. C.), P. U. R. 1918 E, 629, 648. *Pub. Serv. Com’n v. Pac. Tel. & Tel. Co.* (Washington P. S. C.), P. U. R. 1916 D, 947, 959. *Re Valuation Missouri Southern R. Co.* (Mo. P. S. C.), P. U. R. 1916 C, 607, 648.

³¹ As in *Van Dyke v. Geary*, 244 U. S. 39 (1916)

II

Smyth v. Ames closed the first great chapter in the judicial history of rate regulation in the United States. The conflicting desires which plagued the Supreme Court in the granger and railroad commission cases were reconciled by the unanimous adoption of a formula which conceded what the majority of the court desired, the power to regulate, and yet guarded against what the minority feared, confiscation. The second chapter was already opening. What content should be given to the general terms of the formula? The formula implied a business relation between the railroad and the public. A certain service was to be performed and a certain measure of compensation to be paid. But what were the detailed terms of this hypothetical agreement? What risks was each side to assume? What meaning should be ascribed to the word "value," and what was a "reasonable return"? To any one familiar with the intricacy and refinement of detail in any business contract involving large sums and complex relations it must be apparent that the general language of the rule in *Smyth v. Ames* could only be regarded as a preliminary formulation, and that the task of giving it precision of meaning and fullness of detail still lay in the future.

The answer to these questions is obviously not to be found in *Smyth v. Ames* itself. Sometimes a court uses a word to which it ascribes a clear and definite meaning, but which to the reader is ambiguous. In such a case a minute inquiry into the context, the facts of the case, the precedents and the theoretical probabilities, may reveal just what it was that the court meant. But a mere grammatical inquiry of this sort is of little use in interpreting the rule in *Smyth v. Ames*, for the ambiguity of the words "fair value" is of a different sort. It is more probable that the court did not have in its mind any clear definition of the phrase. Consciously or unconsciously, it used words which merely described a large area of possible meanings. The use of such words of indeterminate meaning is not uncommon in jurisprudence, and almost universal in political discussion. Whether or not the court was originally aware of the ambiguity is of no importance. It must sooner or later have realized it, and intentionally left it to the future to decide what signification the term should have.

Before inquiring in what manner and to what extent the Supreme

Court has accomplished this task, it will be helpful to consider more carefully the elements involved in the business relation which the rule of *Smyth v. Ames* covered. Juristically, the problem may be to construe and interpret certain general concepts, such as property, due process of law, just compensation, but mere analysis of juristic concepts will not carry us very far. For the moment let us forget the Fourteenth Amendment and the nature of property. Instead of deducing a rule of rate making from a definition of value, or from a theory of the police power or of the nature of judicial and legislative functions, let us consider the matter pragmatically, as a problem in practical statesmanship.

The community requires certain transportation services. It is willing to pay for them, but for practical reasons, or perhaps because of certain historical and political preconceptions, it does not wish to undertake the construction and operation of the necessary facilities through its own governmental agencies. A group of citizens with financial resources form a company and offer to perform the services for the community, provided a satisfactory agreement can be reached as to the terms on which the services shall be performed and paid for. The agreement is obviously one of the very greatest importance, both in the magnitude of the financial interests involved, and in the vital effect which it will have on the business development, the health, and the prosperity of the community. One might naturally expect that the leading principles of such an agreement would be debated with the greatest thoroughness, and that they would be embodied in a written instrument in which the reciprocal rights and obligations of the respective parties were set down with the utmost clarity and refinement of detail.

Let us visualize the negotiations which might lead up to such an agreement. A committee representing the community is closeted with a committee representing the company. We will assume that a certain consensus of opinion has already been achieved. The committee for the public has rejected the company's proposal that the government should give a financial guarantee of operating expenses and a fair profit. The company has rejected the counter proposal that a fixed schedule of rates be embodied in the contract, the company taking the risk of increases in operating expenses and of fluctuations in the volume of traffic. It is agreed that the company shall look for its compensation to the fares and freight charges,

and not to the public treasury, and that the level of rates shall be under the control of a regulating tribunal, and shall vary with the larger fluctuations in costs of operation. "We are not now asking for a guarantee," the president of the company points out. "If business is so poor and expenses are so high that the traffic will not bear rates high enough to earn a profit, we are willing to stand the loss. If business is good, and expenses low, we are willing to let you cut down our rates to a fair profit. All we ask is that if our profits are too low, and if higher rates can increase them, you will let us raise our rates."

The proposal seems a sensible one, and the committee for the public withdraws for a few minutes for discussion. A lawyer among them, and also an economist, are seen to speak earnestly to the chairman, and as soon as the conference is resumed, the latter takes up the conversation.

"Of course you did not mean," he begins, addressing the company delegates, "that we should let you at all times charge rates high enough to give you a profit, regardless of the efficiency or lack of efficiency of your business. If you see fit to employ an incompetent general manager, of course you do not expect our constituents, your customers, to bear the burden of his incompetency. We have every confidence in the integrity of you gentlemen, but your successors may be of a different stripe. Suppose they should make a grievous mistake, and order a lot of engines of a type poorly adapted to your road, so that your trainload would have to be cut down and your speed reduced? Or suppose even that they should organize a car construction company, and buy freight cars from it at exorbitant prices? You catch our point. Doubtless you will not object to our putting into the agreement the qualifying words, 'so long as the property is operated honestly, progressively and with the highest efficiency and technical ability.'"

The representatives of the company of course agree in principle, although the company's attorney suggests substitution of the word "reasonable" for the words "the highest." After all, the community cannot expect them to employ the very highest talent in the country, regardless of cost. But they point out that the qualification suggested by the public representatives introduces into the agreement a most undesirable element of uncertainty. Who is to decide what is reasonable efficiency? Surely that is a matter

on which men of equal ability and experience can differ widely. Suppose there is a disagreement between the company and the community? Who is there that has the infinite wisdom, the universal experience, and the supreme impartiality to render a true decision? The public representatives admit the difficulty, but ask that it be postponed for the time being, while they pass on to the second point.

"There may be," the chairman continues, "some unforeseen development, which cannot be guarded against, which seriously depletes your earnings. Suppose, for instance, a great public catastrophe, a fire, an earthquake, a flood, which not only interrupts traffic, so that your income is lessened, but greatly increases your operating expenses. Or suppose there is a prolonged strike. Do you expect us after such an extraordinary event to increase your rates until you have recouped the loss? Or imagine a loss due to a mistake in judgment, which is not so reprehensible as to amount to negligence. Who is to stand that loss?"

"That, of course," says the company's president, "would be an ordinary expense of operation. You can expect us to be reasonably efficient, but you cannot expect omniscience. You cannot expect our foresight to be as wise as your hindsight. As long as we behave like ordinary reasonable business men, we are entitled to our fair profits."

"But are you not overlooking the fact that every business man assumes the ordinary risks of his business?" interposes the economist in the public delegation. "If you were investing in a clothing factory, you would stand the risk of fire, earthquake, and flood. Direct fire loss, perhaps, we might be willing to let you insure against, and we would not object to your charging the premium to operating expenses. But the risks of business disturbance, of strikes, of unavoidable mistakes of judgment, fall on every business man, and we see no reason why they should not fall on you."

The company negotiators point out that their business will be different from an ordinary private undertaking, and their attorney says that Lord Hale once described such a business as "affected with a public interest." A long discussion ensues, and it is finally agreed to postpone settlement of this point till the question of profits is reached. For the company representatives insist that if

they are to assume any risks other than those arising out of their own negligence, they should be amply paid for it.

The discussion shifts to the question of what profit is to be allowed, and many divergent views are expressed. The company representatives first suggest a percentage of expenses, but the proposal proves unacceptable for obvious reasons. The public negotiators suggest a lump sum annually, to be specified in the contract, but it is pointed out that in the course of many years business may increase enormously, and it may be necessary to sink larger amounts of capital and assume larger risks, so that a lump sum which is adequate to-day may prove inadequate ten years hence.

The company's attorney then suggests that it be allowed always a certain percentage on the value of the property. If value goes up, rates should go up proportionately. But the economist points out that the only accepted and sensible meaning of the word "value" is "value in exchange," — the amount which the property would bring at a free sale, and that obviously this depended mainly on earnings. "But earnings," he said, "will depend partly on what we allow you gentlemen to charge the public. If we reduce your rates, your value goes down. If we increase them, it goes up. Obviously we cannot measure rates by value, if value is itself a function of rates."

Finally, some one suggests that rates be fixed so as to bring as nearly as possible a fair return on the amount of money actually invested in the undertaking. If the business expands and more capital is sunk, the return will automatically increase. If some of it proves unprofitable and is abandoned, the return would automatically decrease. The chairman of the public group points out that of course such an arrangement would be subject to the qualification, already accepted as to operating expenses, that the investment on which a return is sought was honestly and efficiently made. The company negotiators agree in principle, although they point out again the large element of uncertainty which such a qualification involves. It is also agreed that the question of responsibility for reasonable mistakes of judgment in capital construction must be held in suspense until the rate of return is discussed. But the company representatives raise some more fundamental questions.

"The railroad," says one of their number, a banker, "will run into a region which is as yet undeveloped, but which I confidently believe has brilliant prospects. There is a city, for instance, in which we expect to build large terminals, and buy extensive real estate for roadbed and freight houses and passenger stations. The land will not cost us much to-day, but if my judgment as a business man is vindicated, it will some day be worth five or ten times what it costs to-day. Now we are taking the risk of the community languishing and failing to supply enough traffic to make the road profitable. Are we not entitled to a share in the general prosperity of the country? If our real estate investment appreciates, are we not entitled to reap the rewards of our business acumen in selecting the site? Every other business gets such a reward if it is wise in its real estate purchases, so why should not we?"

"That is true also of our investment in work and materials," says another of the company representatives, an engineer. "It so happens that this year, as you all know, is a year of great business depression. There is little free capital for investment or expenditure, and business is stagnant. Owing to the unusual resources and conservative financial policies of the gentlemen who compose our group, we have been able to raise the necessary capital now, to take advantage of the period of depression. Soon prices will take an upward turn. Those of you who have studied curves of business cycles will agree that that must be so. Are we not to get a return on the greater value which will inhere in our plant when the general level of prices has gone up? Are we to be penalized because our foresight and resources enabled us to have capital available while prices were low, instead of waiting till they were high?"

"Take another aspect of the situation," resumes the banker. "In my home town, through which the proposed railroad will run, the citizens were so anxious that their town should be included in the line that they offered, through the town authorities, to give several acres available for terminal facilities and roadway, free of charge. Now of course that property is worth something. The fact that they are donating it does not take away a cent of its value. The gift is a purely private arrangement between the town and the railroad, in which you gentlemen are not at all concerned. The community will get just as good service whether we pay for the

land or not. It does not seem right that you should take away from us the gift which the city has for reasons of its own seen fit to bestow on us. Yet that is exactly what your theory of allowing us a percentage on our actual investment would do."

"There is another point," the president adds. "You speak of the actual cost of the business — the cash investment which we will have made. Are you not forgetting that we are investing more than mere cash? The plant will be worth more than the mere dollars and cents put into the individual items of real estate and rolling stock and improvements. We are investing not only our cash, but our reputation, our business experience, our energy and initiative. We will give you a living, working organism, not merely the bare bones, the *disjecta membra*, of land and steel and wood. Moreover the members of our group have a reputation in the community, and, I may add, a certain popularity, which will strongly influence the public toward patronizing our line. And does not the fact that the public has entrusted us with this vastly important public undertaking (assuming that these negotiations are successful), and given us a valuable franchise from which all others are excluded, does not that fact of itself add to the value of our property? Every business man knows that these intangible elements — the value of our plant as a going concern, the value of its good will, and the value of its franchise — are among the most important possessions of a company such as ours."

The chairman of the public negotiators is somewhat taken aback by these arguments. In private life he is a department-store proprietor, and his income has kept pace with the growth and prosperity of the city. But the lawyer comes to the rescue.

"That would be all very well, gentlemen," he says, "if you were going into a purely private business. But as my brother on the other side has so well said, transportation is affected with a public interest. It is in its nature, if I may use the word, a governmental function. If the government cared to, it could go into the business itself, and operate the railroad as a public service, without any profit above the interest on its bonds. Moreover it is in a sense a monopolistic business. To acquire the right of way for your roadbed, you will need to exercise the right of eminent domain, a right which we can give or withhold at pleasure. Before a competitor can cut

into your field, he must get a franchise from us, and although we cannot of course guarantee you a perpetual monopoly, yet we know that competition is a dangerous and disturbing element in railroading, so that as a practical matter we are likely to leave you in possession of the field."

"Moreover," interposes the economist, "a railroad requires an unusual amount of fixed investment before it can be put into operation, and hence there must be a promise of a large amount of business before capitalists will venture to enter a field in which a company is already installed. So that there is an unusual degree of what I may call natural monopoly, quite apart from any legal restrictions which may exist."

"What is the conclusion to be drawn from the fact that your undertaking is a quasi-public one, and that it is semi-monopolistic?" continues the lawyer. "Is it not precisely that you are to be treated differently from men who engage in an ordinary competitive venture? That you are not to be allowed to charge what the traffic will bear? You are asking us for a franchise. If we give it to you, it will be in order that you may serve the public at reasonable rates, not so that you can make an undue profit out of the public. You are given a right of eminent domain, with which you are able to acquire land at reasonable prices. That right is a sovereign right, which exists under the constitution only for public purposes. We would be betraying our trust if we were to let you forcibly appropriate another's land by the exercise of a governmental right, thus depriving him of the possibility of enhancement of value, and then convert that land into a source of private enrichment. What you paid for the land, provided it was reasonable, was a legitimate investment, on which you are entitled to a return, but any increment belongs to the public. Or take the land which you expect to receive from the city authorities. Can we assume that the city is giving you that land to swell your own private incomes? Surely the object of its benevolence is the public. A city would be acting beyond the scope of its municipal powers if it gave away municipal property for the private benefit of a few individuals. We must assume that it gave you the land, so to speak, in trust for the public, and that the public is to get the benefit in the shape of lower rates."

"Besides," adds the economist, "how are you going to measure

these intangible rights you speak of? Your good will, your franchise, your status as a going concern, have no value, in any accepted sense of the word, except as they contribute to your earning power. As a congeries of wood and iron, without a franchise to operate and collect fares, and without customers, your plant is mere junk. Earning power gives it value. But earning power, as I succeeded in convincing you this morning, is entirely dependent on rates. Your intangible rights are worth just as much, and just as little, as we decide to make them.

"Another point occurs to me," he continues. "You are asking that the amount on which a percentage of profit is to be earned shall include certain elements which we economists call unearned increment. This year your land may be worth a million. Ten years from now it may be worth two millions. You claim this year a rate sufficient to give you a return on the million, and ten years from now a rate sufficient to give you a return on the two millions. But if your property has been appreciating at the rate of a hundred thousand a year, why is not that hundred thousand dollars to be treated as a part of your income, just as much as the fares and freight charges paid by the public? Is it not income reinvested in plant? Income is that which induces the capitalist to sink his capital. When capital is sunk in land, the inducement is not merely the annual cash earnings, but the probable annual appreciation. My friend here (turning to the banker) can doubtless tell of many cases in which money has been sunk in real estate without any prospect of cash return in the near future, merely because the value of the land was expected to go up."

The discussion waxes warm. The company attorney disputes the contention of the lawyer for the public, and asks if capital devoted to railroading is not just as much private property as capital invested in a department store, so long as its public obligations are fulfilled. "Is there any reason," he asks, turning to the economist, "why property should be confiscated merely because its value is hard to ascertain?" The engineer suggests that the value could always be ascertained by estimating the cost of reproducing the plant, new, at a given time, and making a reasonable allowance for depreciation. The intangible elements, he says, could be ascertained by assuming a phantom plant, ready for operation without any customers or good will, and estimating the cost in advertising,

loss of profits, etc., of building up the business. To which the reply is made that in fact a business is never reproduced in this way, as a single unit, that the plant is built or improved and extensions are made when the labor and material markets are favorable, and that good will is built up gradually by judicious soliciting, by publicity, by the self-advertisement which springs from the mere fact of successful operation. And the expense of this acquisition of patronage will generally be charged to the operating account, and so will already have been paid for by the public. Finally the chairman of the public delegation, who has for a while allowed the others to carry on the debate, gets up from his chair and asks for attention.

"Gentlemen," he says, "I have listened with great interest to the discussion, and especially to what my good friends the lawyers on both sides have been saying. Some of it, especially that about Lord Hale, I confess I did not quite catch. Sometimes my friend the economist, here, got beyond my depth. But I think we can all of us understand the main points about which we've got to agree. My lawyer friend here has given us a theory which would decide all the disputed points in our favor. My lawyer friend on your side has given a theory which would decide them all in your favor. But, gentlemen, we are practical men. We have a practical business proposition to settle. Let's look at it in a practical way. We want a road built. We could build it ourselves, but we don't want to if we can help it. We could get some other group of gentlemen to do it for us, but we think we can make a reasonable arrangement with you. You gentlemen, on the other hand, have capital, and business ability, and a willingness to run some risks. You might invest your money and brains in some other line of business — in manufacture, or construction, or mining, or shipping. But you are ready to come to a reasonable agreement with us.

"First let us see just where we stand. We are agreed that you are to be allowed to charge a freight rate which (assuming there is enough traffic) will permit you to pay your operating expenses (provided you are operating honestly and efficiently) and a return on so much of your investment as was honestly and efficiently made. We haven't yet agreed whether you or the public are to take the risk of loss from extraordinary events, such as earthquakes and

floods and strikes, or of unavoidable mistakes in judgment. We are at odds on the question whether you are to get the benefit of increased land values, or of appreciation in your plant due to higher prices and labor costs. We disagree as to the amount which is to be added, if anything, on account of franchise value, good will, or the value of your road as a going concern. On the other hand we haven't discussed at all the most important question of all, the percentage of return you are to get each year once the value is determined.

"I think, gentleman, that we understand each other. I believe that the time has come for a reasonable compromise, and that if we bear in mind the welfare of the community, for which we are all working, we can settle the matter this afternoon. There is only one thought I would like to leave with you. The items on which we are still in dispute are interdependent. One hangs on the other. If you are to assume the risks of earthquakes, floods, and strikes, or of unavoidable mistakes in construction or operation, you will insist, and rightly insist, on a larger percentage return to compensate you for that risk. If we assume those risks, we are entitled to ask you to be content with a lower rate of return. If you are to get the benefit of what my friend calls the unearned increment, that is an added attraction which the community is offering you, and which should induce you to accept a very moderate rate of annual return; if you are to get a return only on the money actually invested, you will be reasonable in demanding a larger rate of return. Your business experience and foresight and reputation must no doubt be compensated, either by taking your services into consideration in fixing the rate of return, or by agreeing on some reasonable sum as the capital value of those services, and including it in the valuation. Those, I think, are the elements out of which our agreement must be made. Let's forget Lord Hale, and get together on a sensible basis."

Anyone familiar with business negotiations can imagine what the outcome will be. There will be give and take. Each side will concede something. One point will go in favor of the government, another in favor of the company, without much regard either to legal principle or economic theory. Just where the compromise will be, must depend on a number of strategic factors — on the strength of the capitalists' desire to undertake the enterprise, and

of the government's desire to have them do it, on their relative bargaining powers, perhaps on the toss of a penny. What is yielded in valuation may be reclaimed in rate of return. Perhaps the public representatives will be strong enough to gain almost all their points; perhaps they will be weak enough to concede almost all. Somewhere a compromise will be hit upon. Then the lawyers will get together and draw up the results of the negotiation in a document which expresses in legally effective language the practical compromise which has been reached.

III

My object in rehearsing this imaginary negotiation has been to bring out the true character of the hypothetical contract which the rule in *Smyth v. Ames* implies. Many business transactions are entered into without a clear formulation of terms. A man visits a doctor; he does not generally settle in advance the fee which he is to pay. A woman buys two pounds of sugar at a grocery store; she may not know till the end of the month what the price is. Where there is a simple transaction like the sale of a commodity with a current price, or performance of services which have a customary value, it is not impossible for a court to arrive, *ex post facto* with reasonable certainty, at the probable terms of the contract. Even if there is no standard by which the terms could be gauged, such as a market price, or a customary fee, there are currently accepted rules of reasonable conduct which make it possible for a court to reconstruct fair terms without doing substantial injustice to either party. But where the contract is virtually unique, where there is no accepted standard of reasonableness to which its terms can be referred, and where the relations which it determines are from their nature complex beyond measure, a court which attempts to deduce from general notions of reasonableness and customary fairness the unwritten and unthought terms of such a contract, made perhaps fifty years ago, is obviously attempting the impossible.

In no class of business agreements is the utter impossibility of attempting to reconstruct *a posteriori* the probable terms of a non-existent contract more apparent than in the case of agreements involving an element of extraneous risk. An insurance contract is a typical example. The insured is to pay a certain premium, and

the insurer is to pay a certain principal sum if certain contingencies happen. If the court knows neither the premium which is to be paid, nor the contingencies upon which payment of principal depends, obviously it cannot reconstruct the contract along general lines of reasonableness, or by guessing at what the parties probably meant. The premium might have been large, and the contingencies probable, or the premiums small and the contingencies remote. Either alternative would have been equally reasonable, and equally probable.

The relation between the owners of a public utility and the government is not a standardized relation. There is no generally accepted norm to which a contract embodying such a relation can be assumed to conform. It is not a simple transaction, like the sale of a current commodity, or the performance of customary services. And it involves to a large degree the element of extraneous risk. The probable earnings depend upon a number of contingent factors, some within the control of the owners, some within the control of the government, others beyond the control of either. The risk of loss or chance of profit from any one of these contingencies, and especially from those which are beyond the control of either party, may fall on the company or on the community, and in many cases it is impossible to say whether it should more reasonably fall on one or on the other. It all depends upon who pays or receives the theoretical insurance premium against the happening of these contingencies.

I have already indicated, in the imaginary negotiations which I have portrayed, some of the uncertain factors in the public utility relation. What standard of reasonableness or what law of probability can determine whether the company or the public shall stand the risk of unforeseeable catastrophies or of reasonable mistakes of judgment? Or which side to the bargain shall get the benefit of unearned increments of value, or of the cheaper unit costs of operation and larger gross revenues due to the growth of the community? There are at least two other elements of uncertainty, of the most far-reaching importance.

Obviously there is no mathematical relation between earnings and rates, although courts and commissions sometimes speak as if there were. The level of rates is only one of the three major factors which affect earnings. The other two are the level of expenses,

and the volume and character of traffic. A regulating commission may fix a schedule of rates designed to produce say a seven per cent return on a given valuation. But there may be a slump in traffic, or a temporary rise in operating expenses, which cuts down the actual return to five or four per cent. What disposition is to be made of this "deficit"? Or the deficiency may arise in the early development years of the company's life, before traffic has reached its full volume, and before the machine is working smoothly. Is the company to be reimbursed for such deficiencies, or are they among the risks which it assumes? If it is to be reimbursed, in what manner? Obviously there are many possibilities. A distinction might reasonably be made between differences due to miscalculations of the commission as to probable operating expenses, and deficiencies due to insufficient traffic. To begin with the first. Shall the commission each year, in fixing rates for the ensuing year, take into account its own under- or over-estimate of expenses the previous year, and correct the award for the ensuing year by adding or subtracting the amount of the previous miscalculation? Theoretically such a procedure would perhaps be correct; but it is equally probable that in view of the almost insuperable difficulty of determining how much of the deficit or surplus was attributable to the miscalculation, and how much to other causes, the government would insist that its good faith and fairness be taken for granted, and that the company be satisfied with the regulating body's general duty to act fairly and to the best of its ability. Deficits due to lack of traffic offer even greater difficulties. It may be assumed that the government has not under any circumstances agreed to make good losses out of its own treasury. But suppose that during the early years of development traffic was light, but that in later years it has grown to remunerative proportions. Is the company entitled to recoup its early losses out of subsequent earnings? If so, in what manner? By calling the early loss a capital investment, part of the cost of production of the business as a going concern, and hence part of the fair value on which future annual returns are calculated? Or by recouping the losses as rapidly as the traffic will bear? Or by amortizing them over a period of years? Or shall the early losses be deemed one of the business risks which the company has assumed, and for which the annual return is deemed a fair compensation? Ob-

viously any one of these alternatives might reasonably have been agreed upon.

A similar problem arises when a company for some time in exclusive possession of the field is suddenly subjected to competition, and its earnings materially reduced. If after a few years the competitor is eliminated or bought out, or if traffic develops in sufficient volume to make both railroads profitable, are the competitive losses to be recouped, or are they, too, among the risks assumed by the company?

The second element of uncertainty arises out of the rate-making practices of the railroads. It is a well-known fact that under a commercial system of rate making certain commodities are carried at a rate so low that while perhaps they bring in their out-of-pocket expenses, they add little if anything to the continuing costs of operation or to the fixed charges or dividends. The state of the law appears to be that while a railroad may of its own volition reduce rates to such a level, for reasons of commercial competition, without incurring the charge of unjust discrimination, nevertheless the government cannot constitutionally force a railroad to make such special rate reductions, even if the net result of all its operations is to bring in a fair return.³² Assume that a railroad has made such competitive reductions on a substantial number of commodities. Has it a constitutional right to recoup the deficiency in net earnings from these commodities out of such of the traffic as will bear a higher rate? Or are the losses from its competitive ventures for its own account?

Thus it is apparent that were we privileged to transport ourselves back to the days in which railroads were built, even if we could carry with us all the economic and juristic wisdom which the last quarter-century has produced, we would find it impossible to indicate any true economic or legal principle of rate making. We could not, however acute our perception, point to any one criterion of reasonableness, and say that it and it alone was sound. Essentially, it would be a subject for business agreement. A lawyer might point out that a certain combination of terms would leave a loophole or an ambiguity not contemplated by the parties. An economist might point out that another combination of terms in-

³² *Northern Pacific v. North Dakota*, 236 U. S. 585 (1915).

volved practical consequences injurious to one party or the other. But when both lawyer and economist have had their say, there would still remain a substantial variety of possible adjustments, each different from the other, and each nevertheless accomplishing the primary objects which the parties had in mind:

Gerard C. Henderson.

NEW YORK.

(To be concluded)

THE PROGRESS OF THE LAW, 1918-1919

EQUITY (Concluded)

12. MARKETABLE TITLE

THREE cases involve different phases of marketability of title where the title depends on a question of fact and all parties who might claim are not before the court so that it cannot make the title marketable through a finding that title is good and a decree of specific performance. *Simpson v. Klipstein*¹ is a typical case. In *Boylan v. Wilson*² there was a misdescription in a deed in the chain of title which it would take parol evidence to correct. Should litigation ensue the evidence in a suit between purchaser and a possible claimant might be different from that adduced by vendor in the suit for specific performance. Hence the title could only be made marketable by a suit for reformation and it was the business of the vendor to bring this suit and remove the defect before calling upon purchaser to take the title.³ In *Jamison v. Van Auken*⁴ the title depended on adverse possession. Such a title may be marketable,⁵ although it will not suffice where the

¹ 89 N. J. Eq. 543, 105 Atl. 218 (1918).

² 79 So. (Ala.) 364 (1918).

³ *Prewitt v. Graves*, 5 J. J. Marsh. (Ky.) 114, 126 (1830).

⁴ 210 S. W. (Mo.) 404 (1919).

⁵ *Sands v. Thompson*, 22 Ch. D. 614 (1883); *Beste v. McGaugh*, 5 Pennewill (Del.), 258, 63 Atl. 28 (1904); *Cherry v. Davis*, 59 Ga. 454 (1877); *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355 (1893); *Duetzmann v. Kuntze*, 147 Ia. 158, 125 N. W. 1007 (1910); *Keepers v. Yocum*, 84 Kans. 554, 114 Pac. 1063 (1911); *Logan v. Bull*, 78 Ky. 607 (1880); *Westerfield v. Cohen*, 130 La. 533, 58 So. 175 (1912); *Lurman v. Hubner*, 75 Md. 268, 23 Atl. 646 (1892); *Stewart v. Kreuzer*, 127 Md. 1, 95 Atl. 1052 (1915); *Aroian v. Fairbanks*, 216 Mass. 215, 103 N. E. 629 (1913); *Barnard v. Brown*, 112 Mich. 452, 70 N. W. 1038 (1897); *Hedderly v. Johnson*, 42 Minn. 443, 44 N. W. 527 (1890); *Waddell v. Latham*, 71 Miss. 351, 15 So. 32 (1893); *Ballou v. Sherwood*, 32 Neb. 666, 695, 49 N. W. 790, 50 N. W. 1131 (1891); *Ottinger v. Strasburger*, 33 Hun (N. Y.), 460 (1884) (aff'd 102 N. Y. 692 (1886)); *O'Connor v. Huggins*, 48 Hun (N. Y.), 620, 1 N. Y. Supp. 377 (1888); *Clarke v. Woolpert*, 128 App. Div. 203, 112 N. Y. Supp. 547 (1908); *Warne v. Greenbaum*, 101 Atl. (N. J. Eq.) 568 (1917); *Pratt v. Eby*, 67 Pa. St. 396 (1871); *Miller v. Cramer*, 48 S. C. 282, 26 S. E. 657 (1896); *Boggs v. Bodkin*, 32 W. Va. 567, 9 S. E. 891 (1889); *Summers v. Hively*, 78 W. Va. 53, 88 S. E. 608 (1916).

In California a contract for a "perfect title" calls for one "fairly deducible of record" and a title by adverse possession will not suffice. *Gwin v. Calegaris*, 139 Cal.

contract calls for a "title of record."⁶ It may be so indubitably good on the face of the evidence adduced by vendor that any reasonable purchaser ought to be satisfied and so it may be marketable.⁷ Or the evidence may still leave a doubt, as distinguished from a "suspicion" in the court's mind.⁸ Many courts have spoken as if this were the test. Thus in *Amery v. Grocock*⁹ Sir John Leach, V. C., said:

"The . . . rule . . . seems to be, that if the Case be such, that sitting before a Jury, it would be the duty of a Judge to give a clear direction in favour of the fact; then it is to be considered as without reasonable doubt; but if it would be the duty of a Judge to leave it to the Jury to pronounce upon the effect of the Evidence, then it is to be considered as too doubtful to conclude a Purchaser."

This has been approved by the Court of Appeals in New York.¹⁰ But it is subject to two observations. In the first place, when we say that the title must be free from reasonable doubt, we must mean not merely free from reasonable doubt in the mind of the court of equity passing on the suit for specific performance, but also free from reasonable possibility of doubt on the part of competent persons who may be called on to pass upon the title.¹¹ For

384, 73 Pac. 851 (1903); *Crim v. Umbsen*, 155 Cal. 697, 103 Pac. 178 (1909); *Allen v. Globe Milling Co.*, 156 Cal. 286, 104 Pac. 305 (1909); *Las Animas Co. v. Preciado*, 167 Cal. 580, 140 Pac. 239 (1914) (*semble* "a title not deducible of record is clouded and unmerchantable").

In Oregon it is said that "a marketable title means one appearing to be such by the record of conveyances or other public memorial. It means that the title must appear of record and not rest in parol." *Lockhart v. Ferrey*, 59 Ore. 179, 183, 115 Pac. 431, 433 (1911). But in that case the contract called for "an abstract showing a marketable title." In Washington also it is said that a marketable title is one "that does not require the purchaser to inquire outside of the record." *Watson v. Boyle*, 55 Wash. 141, 104 Pac. 147 (1909); *Coonrod v. Studebaker*, 53 Wash. 32, 101 Pac. 489 (1909). In these cases too, however, the contracts called for abstracts showing title.

⁶ *Attebery v. Blair*, 244 Ill. 363, 91 N. E. 475 (1910); *Page v. Greeley*, 75 Ill. 400 (1874); *Zunker v. Kuehn*, 113 Wis. 421, 88 N. W. 605 (1902).

⁷ *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355 (1893); *Gaines v. Jones*, 86 Ky. 527, 7 S. W. 25 (1888); *Arey v. Baer*, 112 Md. 541, 76 Atl. 843 (1910); *Forsyth v. Leslie*, 74 App. Div. 517, 77 N. Y. Supp. 826 (1902); *Alderman v. McKnight*, 95 S. C. 245, 78 S. E. 982 (1913); *Greer v. International Ship Yards Co.*, 43 Tex. Civ. App. 370, 96 S. W. 79 (1906).

⁸ *Shriver v. Shriver*, 86 N. Y. 575, 585 (1881).

⁹ 6 Madd. 54, 57 (1821).

¹⁰ *Shriver v. Shriver*, 86 N. Y. 575, 584 (1881).

¹¹ "I think, therefore, that in these cases it is the duty of the Court not to have regard to its own opinion only, but to take into account what the opinion of other

the *jus disponendi* is one of the most valuable of the incidents of ownership, and the court of equity ought to be assured not merely that the purchaser will not be disturbed in his enjoyment of the property but also that he will be able to dispose of it to the ordinary, reasonably cautious buyer.¹² Again, it may be that a court would direct a verdict upon the case made by the vendor and yet a third person, not bound by the decree, who might later assert a claim, might well adduce further evidence that might affect the result. Hence the court of equity ought to be assured reasonably that the facts are as fully before it as they could be in any litigation over the title that may arise hereafter. This is particularly true where the title depends on adverse possession. If, therefore, whether or not the title is good may turn on a question of fact depending on evidence that may not all be before the court, the title ought not to be held marketable.¹³

Another question arose in *Jamison v. Van Auken*.¹⁴ The contract called for delivery of "an abstract showing good and merchantable title." As generally understood by the courts, this means a title shown by the public records to be abstracted and is not satisfied by a title depending on adverse possession.¹⁵ But the court,

competent persons may be." Turner, V. C., in *Pyrke v. Waddingham*, 10 Hare, 1, 8 (1852). The "judicial mind" spoken of in some cases must mean the judicial mind applied to the question how other competent persons would regard the title. *Hedderly v. Johnson*, 42 Minn. 443, 445, 44 N. W. 527 (1890); *Bruegger v. Cartier*, 29 N. D. 575, 581, 151 N. W. 34 (1915).

¹² A purchaser is entitled to a title such "as will bring, in the market as high a price with, as without the objection." Caton, J., in *Brown v. Cannon*, 10 Ill. 174, 182 (1848); *Flood v. Von Macard*, 102 Wash. 140, 147, 172 Pac. 884, 886 (1918).

¹³ *Watkins v. Pfeiffer*, 29 Ky. L. Rep. 97, 92 S. W. 562 (1906); *Trustees v. Rother*, 83 Md. 289, 34 Atl. 843 (1896); *Baumeister v. Silver*, 98 Md. 418, 56 Atl. 825 (1904); *Noyes v. Johnson*, 139 Mass. 436, 31 N. E. 767 (1885); *Conley v. Finn*, 171 Mass. 70, 50 N. E. 460 (1898); *Scannell v. American Soda Fountain Co.*, 161 Mo. 606, 61 S. W. 889 (1901); *Sulk v. Tumulty*, 77 N. J. Eq. 97, 75 Atl. 757 (1910); *Freedman v. Oppenheim*, 187 N. Y. 101, 79 N. E. 841 (1907); *Weil v. Radley*, 31 App. Div. 25, 52 N. Y. Supp. 398 (1898); *Kahn v. Mount*, 46 App. Div. 84, 61 N. Y. Supp. 358 (1899); *Binzen v. Epstein*, 58 App. Div. 304, 69 N. Y. Supp. 789 (1901); *Carolan v. Yoran*, 104 App. Div. 488, 93 N. Y. Supp. 935 (1905); *Lalor v. Tooker*, 130 App. Div. 11, 114 N. Y. Supp. 403 (1909); *McLaughlin v. Brown*, 126 S. W. (Tex. Civ. App.) 292 (1910).

¹⁴ *Supra*, note 4.

¹⁵ *Page v. Greeley*, 75 Ill. 400 (1874); *Attebery v. Blair*, 244 Ill. 363, 91 N. E. 475 (1910); *Bear v. Fletcher*, 252 Ill. 206, 96 N. E. 997 (1911); *Knox v. Despain*, 156 Ill. App. 134 (1910); *Constantine v. East*, 8 Ind. App. 291, 35 N. E. 844 (1893); *Fagan v. Hook*, 134 Ia. 381, 105 N. W. 155 (1907); *Upton v. Smith*, 183 Ia. 588, 166 N. W. 268 (1918); *Lake Erie Land Co. v. Chilinski*, 197 Mich. 214, 163 N. W. 929 (1917); *Brad-*

departing from the prior current of authority in that state, held that a marketable title depending on adverse possession and shown outside of the record and abstract would suffice. The same result was reached in *Kenefick v. Shumaker*,¹⁶ which also departs from an earlier decision in the same state. Perhaps something must depend on the purposes for which land is bought and held, the practice of conveyancing and the form of the records in the particular state. As the Supreme Court of Washington says:

"Few persons care for that form of title which requires a resort to parol evidence to establish a link in its chain. And there is a well-founded reason for such dislike. Other conditions being equal, property so held is always passed by when offered for sale in competition with property held by title deducible of record. Such a title is more subject to attack by speculators in defective titles than is a record title, and when attacked more difficulty is experienced in establishing it than is in establishing the latter form of title. Land so held cannot be left vacant with the same safety as land held by title of record, and it seems that no matter how incontestable the parol proofs of title may be, a constant resort to the courts is necessary to enforce rights and contracts in connection therewith which pass unquestioned with other forms of title. For these and other reasons, such a title is undesirable."¹⁷

Without going as far as the courts of California, Oregon and Washington and holding that such titles are not marketable, we may see good reason why purchasers should contract, not merely for a good title, but for one which they may at any time show to be good by the public records. Where land is much bought and sold a contract calling for an abstract showing title may well mean more than a contract calling only for a marketable title in the sense which courts attach to that term. The Supreme Court of Missouri denies this, doubting whether a contract for a record title as distinguished from an "actual title" was ever intentionally made. It argues that the holder of the record title may not be the actual

way v. Miller, 200 Mich. 648, 167 N. W. 15 (1918); Thompson v. Dickerson, 68 Mo. App. 535 (1897); Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723 (1903); St. Clair v. Hellweg, 173 Mo. App. 660, 159 S. W. 17 (1913); McLane v. Petty, 159 S. W. (Tex. Civ. App.) 891 (1913); Moser v. Tucker, 195 S. W. (Tex. Civ. App.) 259 (1917).

¹⁶ 116 N. E. (Ind. App.) 319 (1917).

¹⁷ Watson v. Boyle, 55 Wash. 141, 143, 104 Pac. 147 (1908). "Titles by adverse possession are in disfavor with persons contemplating the purchase of property." Crocker Point Ass'n v. Gouraud, 224 N. Y. 343, 350, 120 N. E. 737 (1918).

owner and that actual ownership is the thing of paramount importance. But actual ownership is called for by the mere contract of sale without more.¹⁸ It is important for the purchaser that vendor be both actual owner and owner of record. Hence when the contract calls for an abstract showing title in vendor it calls specifically for a substantial advantage to purchaser which he ought to be allowed to insist upon.

13. THE STATUTE OF FRAUDS

No less than twenty-three cases during the past year turned on alleged oral contracts to leave property by will,¹⁹ or to adopt and leave property to the adopted person as to a child.²⁰ As one reads these cases he cannot but have an uneasy feeling that general expectations of becoming the object of a testator's bounty often ripen into a contract after testator's death. Where the courts do not require the acts of part performance relied upon to take the case out of the Statute of Frauds to be unequivocal and indubitably referable to a contract as to the very land in question, but are content with a case of great hardship upon plaintiff, it is not hard to do for the deceased by proof of his casual "admissions" in conversation over a series of years what the law would not have permitted him to do in person otherwise than by jealously guarded formalities. It is not merely the Statute of Frauds that is involved

¹⁸ "It should be borne in mind that in contracts for the sale of real estate, an agreement to make a good title is always implied, unless the liability is expressly excluded." SUGDEN, VENDORS AND PURCHASERS, 14 ed., 16.

¹⁹ *Starrett v. Dickson*, 136 Ark. 326, 206 S. W. 441 (1918); *Trout v. Ogilvie*, 182 Pac. (Cal. App.) 333 (1919); *Kurtz v. De Johnson*, 29 Cal. App. 246, 183 Pac. 588 (1919); *Landrum v. Rivers*, 148 Ga. 774, 98 S. E. 477 (1919); *Stewart v. Todd*, 173 N. W. (Ia.) 619 (1919); *McInnery v. Graham*, 174 N. W. (Ia.) 395 (1919); *Hoppes v. Hoppes*, 124 N. E. (Ind. App.) 772 (1919); *James v. Lane*, 103 Kan. 540, 175 Pac. 387 (1918); *Taylor v. Holyfield*, 104 Kan. 587, 180 Pac. 208 (1919); *Eastman v. Eastman*, 117 Me. 276, 104 Atl. 1 (1918); *Noyes v. Noyes*, 233 Mass. 55, 123 N. E. 395 (1919); *Fleming v. Fleming*, 202 Mich. 615, 168 N. W. 457 (1918); *Powers v. Norton*, 174 N. W. (Neb.) 223 (1919); *Gettins v. Boyle*, 184 App. Div. 499, 171 N. Y. Supp. 711 (1918); *Hermann v. Ludwig*, 186 App. Div. 287, 174 N. Y. Supp. 469 (1919); *Smith v. Furst*, 186 App. Div. 452, 174 N. Y. Supp. 481 (1919); *Herr v. McAllister*, 181 Pac. (Ore.) 741 (1919); *Williams v. Williams*, 123 Va. 643, 96 S. E. 749 (1918); *Alexander v. Lewes*, 104 Wash. 32, 175 Pac. 572 (1918).

²⁰ *Pantel v. Bower*, 104 Kan. 18, 178 Pac. 241 (1919); *Bromeling v. Bromeling*, 202 Mich. 474, 168 N. W. 431 (1918); *Ball v. Brooks*, 173 N. Y. Supp. (N. Y. Misc.) 746 (1918); *Wall v. McEnnery*, 105 Wash. 445, 178 Pac. 631 (1919).

in these cases but the Statute of Wills as well. In a laudable desire to do justice to particular plaintiffs, courts of equity should not overlook the sound policy behind these two statutes. In too many American jurisdictions oral contracts as to disposition of property after the owner's death have come to be enforced against the owner's heirs or representatives much too lightly. Apparently to meet this mischief, California in 1905 added the following clause to the Statute of Frauds:

"An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will."²¹

May a case be taken out of the foregoing provision in equity by the same acts of part performance as would suffice for a contract of sale? This question was before the court in *Trout v. Ogilvie*.²² After a provision substantially in the terms of section 4 of the Statute of Frauds, the Civil Code of California (sec. 1741) adds:

"But this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof."

It was considered that this proviso applied only to contracts for the sale of land and that a contract to leave property by will would not be taken out of the purview of the amendment to section 1624 by acts of part performance. The result is reached on the ground that section 1624 provides for seven cases, of which contracts for the sale of land are one and contracts to devise or bequeath are another, and that the exception in section 1741 by its terms applies only to the former. If a court were inclined to favor the taking of cases out of the statute, it might say that section 1741 was but declaratory of the pre-existing law, that the word "sale" had been construed to include contracts to leave by will or on intestacy²³

²¹ LAWS OF CALIFORNIA, 1905, p. 611. This provision is now subdiv. 7 of § 1624 of the Civil Code.

²² 182 Pac. (Cal. App.) 333 (1919).

²³ *Manning v. Pippen*, 95 Ala. 537, 11 So. 56 (1891); *Allen v. Bromberg*, 163 Ala. 620, 50 So. 884 (1909); *Mayfield v. Cook*, 77 So. (Ala.) 713 (1918), but see *Adams v. Adams*, 26 Ala. 272 (1855); *Gordon v. Spellman*, 145 Ga. 682, 89 S. E. 749 (1916); *Hoopston Library v. Eaton*, 283 Ill. 449, 119 N. E. 647 (1918); *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666 (1885), distinguishing *Lee v. Carter*, 52 Ind. 342 (1876); *Judy v. Gilbert*, 77 Ind. 96 (1881); *Wright v. Green*, 119 N. E. (Ind. App.) 379 (1918); *Hamilton v. Thirston*, 93 Md. 213, 48 Atl. 709 (1901); *Gould v. Mansfield*, 103 Mass. 408

and hence that the exception was meant to apply to all cases of contracts as to an interest in lands within the purview of the clause in section 4 of the Statute of Frauds. But the court's proposition that the amendment to section 1624 would thus be deprived of any real significance, since such contracts would be left exactly where they were before the amendment, is a weighty one; and in connection with the point that the whole doctrine of part performance is an anomaly, which ought to be held within narrow limits,²⁴ it seems conclusive. Thus the case is significant of a reviving regard for the policy of the statute on the part of American courts.

I have said that taking cases out of the Statute of Frauds by part performance is an anomaly. This proposition is disputed with

(1869); *Lozier v. Hill*, 68 N. J. Eq. 300, 59 Atl. 234 (1904); *Gooding v. Brown*, 35 Hun. (N. Y.) 148 (1885); *Henning v. Miller*, 66 Hun (N. Y.) 588, 21 N. Y. Supp. 831 (1893); *Ludwig v. Bungart*, 48 App. Div. 613, 63 N. Y. Supp. 91 (1900); *Banta v. Banta*, 103 App. Div. 172, 93 N. Y. Supp. 393 (1905); *Howard v. Brower*, 37 Ohio St. 402 (1881); *Kling v. Bordner*, 65 Ohio St. 86, 61 N. E. 148 (1901); *Hopple v. Hopple*, 2 Ohio C. D. 59 (1888); *Brown v. Golightly*, 106 S. C. 519, 91 S. E. 869 (1917), *aliter* as to contract to leave personalty, *Turnipseed v. Sirrine*, 57 S. C. 559, 35 S. E. 757 (1899); *Campbell v. Taul*, 3 Yerg. (Tenn.) 548 (1832); *Goodloe v. Goodloe*, 116 Tenn. 252, 92 S. W. 767 (1905); *Henderson v. Davis*, 191 S. W. (Tex. Civ. App.) 358 (1917); *Hale v. Hale*, 90 Va. 728, 19 S. E. 739 (1894); *Swash v. Sharpstein*, 14 Wash. 426, 44 Pac. 862 (1896); *In re Edwall's Estate*, 75 Wash. 391, 134 Pac. 1091 (1913); *Soper v. Sheldon's Estate*, 120 Wis. 26, 97 N. W. 524 (1903); *Laughnan v. Laughnan*, 165 Wis. 348, 162 N. W. 169 (1917); *Horton v. Stegmyer*, 175 Fed. (C. C. A.) 756 (1910); *Quirk v. Bank*, 244 Fed. (C. C. A.) 682 (1917).

A few jurisdictions construe the words of the statute literally and hold to the contrary: *Stahl v. Stevenson*, 102 Kan. 447, 844, 171 Pac. 1164 (1918) (contract to leave property generally, even if whole estate is land); *aliter* a contract to devise specific land, *Nelson v. Schoonover*, 89 Kan. 388, 131 Pac. 147 (1913); *Myles v. Myles*, 6 Bush (Ky.), 237 (1869), but see *Gernhart v. Straeffer*, 172 Ky. 823, 189 S. W. 1141 (1916); *Woods v. Dunn*, 81 Ore. 457, 159 Pac. 1158 (1916) (*semble*); *Quinn v. Quinn*, 5 S. D. 328, 58 N. W. 808 (1894).

If this latter view were to be taken, it could be argued that the amendment to the California code merely sought to bring that jurisdiction into line with the prevailing view and the arguments suggested in the text could be made on that basis.

²⁴ Lord Blackburn in *Maddison v. Alderson*, 8 App. Cas. 467, 489 (1883); Lord Redesdale in *Lindsay v. Lynch*, 2 Sch. & Lef. 1, 5 (1804); *Kent, C.*, in *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131, 139 (1814), and *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273, 284-285 (1814); *Walworth, C.*, in *German v. Machin*, 6 Paige (N. Y.), 288, 293 (1837); *Zabriskie, C.*, in *Eyre v. Eyre*, 19 N. J. Eq. 102, 104 (1868); *Field, J.*, in *Arguello v. Edinger*, 10 Cal. 150, 159 (1858); *Woodward, J.*, in *Moore v. Small*, 19 Pa. St. 461, 466 (1852); *Sterrett, J.*, in *Jamison v. Dimock*, 95 Pa. St. 52, 56 (1880); *Brickell, C. J.*, in *Heflin v. Milton*, 69 Ala. 354, 356 (1881); *Hemphill, C. J.*, in *Garner v. Stubblefield*, 5 Tex. 552, 557 (1851); 2 STORY, EQUITY JURISPRUDENCE, §§ 1051-1052; BROWNE, STATUTE OF FRAUDS, 5 ed., § 492.

much ability in a recent paper,²⁵ on the basis of interpretation of the statute in the light of contemporary history, showing, as it is argued, that it was not intended to apply in equity at all. But the argument proves too much. If the author's thesis is sound, instead of taking cases out of the Statute where there was fraud or possession had been taken or there was part performance, courts of equity should have spoken thus: "Since with our modes of proof we can obviate the mischiefs of seventeenth-century jury trial, for which alone the Statute was devised, we will specifically enforce all contracts, written or oral, according to the general principles of our jurisdiction." What the courts actually did was to assume the Statute applicable in equity and then take particular cases out of its purview by reason of fraud or because the bargain was "executed" — and this from a time almost contemporary with its enactment.²⁶ The proposition had also been disputed by Lord Selborne on the ground that in these cases the court of equity does not enforce the contract but rather the "equities" of the plaintiff arising from fraud or part performance.²⁷ This *ex post facto* rationalization of what had gone on in equity for historical reasons, seems to be open to a conclusive objection. The courts have not enforced and do not enforce the equitable claims of the plaintiff arising from fraud or part performance as such, but rather the contract itself, exactly as if it were a legally enforceable contract for which the legal remedy was inadequate. The "equities" of one who has been put in possession or of one who has partly performed, call for making him whole for what he is out upon the faith of the contract, so far as a court of equity may do so. Hence they amply justify the view of certain southern courts which carry equitable relief so far as to give the purchaser an accounting and complete restitution, but no further.²⁸ Lord Selborne's theory, however, was not pro-

²⁵ Costigan, "Has There Been Judicial Legislation in the Interpretation . . . of the Statute of Frauds," Wigmore Celebration Essays, 473, 14 ILL. LAW REV. 1.

²⁶ The leading cases for the two types of taking out of the statute are *Mullet v. Halfpenny*, Prec. Ch. 404 (1699) and *Butcher v. Stapely*, 1 Vern. 363 (1685).

²⁷ *Maddison v. Alderson*, 8 App. Cas. 467, 475 (1883). This ingenious theory has been given much currency in recent American decisions by Professor Pomeroy, 2 EQUITABLE REMEDIES, 2 ed., § 2239.

²⁸ *Grant v. Craigmiles*, 1 Bibb, 203 (1808) and subsequent cases in Kentucky; *Beaman v. Buck*, 9 Sm. & M. 207 (1848) and subsequent cases in Mississippi; *Albea v. Griffin*, 22 N. C. 9 (1838), and subsequent cases in that state; *Patton v. McClure*, Mart. & Yerg. 333 (1828), and subsequent cases in Tennessee.

pounded to explain cases confining relief to restitution in equity but to meet those where the court of equity "takes the case out of the statute" and enforces the contract as such. It is important to insist that the taking of cases out of the statute is a historical anomaly, only to be understood by reference to seventeenth-century and eighteenth-century legal institutions and modes of thought in equity and that, like all historical anomalies of the sort, it defies logically satisfactory analytical treatment.

What is the actual situation? We say that for the purposes of courts of equity, cases are taken out of the purview of the statute in either of two ways: by fraud or by part performance. Recently there has been a tendency to run the two together, largely under the influence of Pomeroy's doctrine of "equitable fraud."²⁹ But they had an independent origin and have developed along independent lines. Hence they call first for independent consideration.

All the decisions on "fraud" as a ground for taking cases out of the statute refer directly or indirectly to *Mullet v. Halfpenny*.³⁰ There the contract was in writing, but the defendant fraudulently got possession of it so that plaintiff could not produce it. To-day, plaintiff would give him notice to produce and prove the contents of the writing by secondary evidence. In those days it could be said that as defendant himself had fraudulently created the obstacle to making the proof required by the statute, it was inequitable that he be allowed to take advantage thereof and hence that he should not be allowed to assert the statute. In another old case³¹ a marriage took place on the husband's promising to settle certain property upon the wife according to his prior agreement. One may well feel that he did not intend to keep this promise when it was made. But perhaps such a state of facts was not actually proved, and the line between statements of fact as to one's present state of mind and promises as to one's future conduct was not well understood in 1720. At any rate the court distinguished cases of "reliance on the honor, word or promise of the defendant" from "cases of fraud," and put as an instance of fraud, "if one agreement in writing should be proposed and drawn and another fraudulently

²⁹ 4 POMEROY, EQUITY JURISPRUDENCE, 4 ed., § 1409 n.

³⁰ Prec. Ch. 404 (1699). *Halfpenny v. Ballet*, 2 Vern. 373 (1699), is evidently the same case.

³¹ *Montacute v. Maxwell*, 1 P. Wms. 618 (1720).

and secretly brought in and executed in lieu of the former." Evidently the court had in mind cases where a defendant is held in equity to make good his representations after plaintiff has acted on them. Besides these cases of fraudulent creation of the bar and fraudulent representations acted on, the books speak of another case, namely, "a marriage brought about by fraud of the promisor." Statements to this effect go back to *Cookes v. Mascall*³² and *Dundas v. Dutens*.³³ In the former, without fraud of any sort, a marriage settlement reduced to writing but not signed by either party, was decreed to be performed.³⁴ In the latter, Lord Thurlow said *obiter*: "If the husband made an agreement that he would settle and then in fraud of that agreement got married, would not he be bound by it?" Later English decisions make it very doubtful whether the inference drawn from these old cases can stand.³⁵ Of the American cases, *Peek v. Peek*³⁶ and *Allen v. Moore*³⁷ seem to hold that making a promise not intending to keep it and thus procuring a marriage, will take the case out of the statute. But in the latter there was no more than a breach of a promise as to what should be done after marriage. It is hard to find any actual fraud in the case as reported, and the authorities are properly against the proposition that non-performance of a promise relied on by the plaintiff is to be held "fraud" in this connection.³⁸ *Peek v. Peek* relies on *Green v. Green*,³⁹ a case of a radically differ-

³² 2 Vern. 200 (1690).

³³ 1 Ves. Jr. 196, 199 (1790).

³⁴ This has much of the flavor of the strong-arm decisions of seventeenth-century chancellors in matters of family settlement. See the remarks of Lord Henley in *Wycherley v. Wycherley*, 2 Eden, 175, 177-178 (1763).

³⁵ In *Caton v. Caton*, 1 Ch. App. 137 (1865), intended husband and wife agreed upon a settlement before marriage. It was prepared accordingly, but they then agreed there should be no settlement, the husband promising her to make a will giving her all his property. The marriage took place and the will was made, but on the husband's death it was found he had made a later and different will. The court held the case was not taken out of the statute. In *Wood v. Midgley*, 5 De G., M. & G. 41, 45 (1854), Turner, L. J., says: "Is there then a case alleged by the bill of this nature, that the Defendant did by his fraudulent act prevent the agreement from being reduced to writing."

³⁶ 77 Cal. 106, 19 Pac. 227 (1888).

³⁷ 30 Colo. 307, 70 Pac. 682 (1902).

³⁸ But see the *dicta* in *Wooldridge v. Scott*, 69 Mo. 669, 673 (1879). These and other statements to the same effect (compare 1 POMEROY, *EQUITABLE REMEDIES*, 2 ed., § 2253, n. 63) are founded on *Halfpenny v. Ballet*, 2 Vern. 373 (1699), which is a poor report of *Mullet v. Halfpenny*.

³⁹ 34 Kan. 740, 10 Pac. 156 (1886).

ent type.⁴⁰ In the latter there is not a contract at all. In order to induce the marriage the intended husband made representations as to the property he then had, in which the wife would acquire certain homestead or other statutory rights upon marriage. Prior to the marriage he fraudulently conveyed the property to a grantee with notice. The wife having married him on the faith of his ownership of the property he and those who fraudulently held for him were compelled to make the representation good. Where there is no fraudulent creation of the statutory obstacle, no fraudulent representation that the statute has been complied with, and no case of representations, as distinguished from contract, which equity requires to be made good, there is excellent authority for applying the statute.⁴¹ But the first two cases go on a sound general doctrine of equity⁴² and the third is not within the letter nor the spirit of the statute.

There are two main types of case in which part performance is held to remove the bar of the statute. In one possession has been taken under the contract and that alone or something further done in connection therewith is taken to suffice. In the other possession is not possible and the part performance is had in some other way. Logically there would seem little ground for a distinction of this sort. But the cases here also developed along two lines and attempts in the last generation to bring the two together upon some common theory have succeeded more in appearance than in reality. Let us look briefly at each.

Before a decade had passed after its enactment, the Court of Chancery began to take cases out of the operation of the statute where purchaser had been put in possession under the contract.⁴³ Sugden long ago called attention to some old cases which indicate that this was the result of ideas as to livery of seisin.⁴⁴ Putting the purchaser in possession was taken to be the substance of a common-law conveyance. The rule thus derived became established in

⁴⁰ Of the same sort are *Petty v. Petty*, 4 B. Mon. (Ky.) 215 (1843); *Arnegard v. Arnegard*, 7 N. D. 475, 75 N. W. 797 (1898).

⁴¹ *Hackney v. Hackney*, 8 Humph. (Tenn.) 452 (1847); 1 STORY, EQUITY JURISPRUDENCE, § 768.

⁴² Perhaps this is what really lies at the basis of the familiar saying that the doctrine "rests on estoppel." 3 POMEROY, EQUITY JURISPRUDENCE, 4 ed., § 1293.

⁴³ *Butcher v. Stapely*, 1 Vern. 363 (1685).

⁴⁴ VENDOR AND PURCHASER, 14 ed., 152 n. p.

England and in a majority of American jurisdictions. But its original basis was soon overlooked and attempts to rationalize the subject led writers and courts to turn to the idea of "fraud" in order to make a reasoned doctrine of "part performance" on the basis of the old cases where the chancellor had dispensed with the statute. Different developments of this idea gave rise to many varieties of doctrine. Thus we get to-day cases taken out by possession alone;⁴⁵ cases taken out by possession coupled with something else, arbitrarily prescribed by judicial decision or by statute;⁴⁶ cases taken out by possession when joined to circumstances of great hardship upon purchaser;⁴⁷ cases of part performance other than by taking possession, where there are acts solely referable to a contract as to the very land or showing a change in the character of the pre-existing possession;⁴⁸ and cases where it is not possible to take possession but relief is given on a theory of fraud or of irreparable injury to purchaser, without more.⁴⁹ It is significant that where the case admits of taking possession, taking or not taking possession is always made the decisive element in the result, if not in the reasoning. Even where it does not, if something can be strained into a taking possession, many courts have been willing to strain a point accordingly.⁵⁰ It is only where there is no possibility of possession that American courts have been willing to rely wholly upon theories of "equitable fraud." The results are intractable to analysis.⁵¹ So far as not absolutely bound by authority as to particular situations of fact, the most that courts may do is to choose between a policy of departing widely from the spirit of the statute and giving relief on oral contracts in large classes of cases on a theory of fraud or of irreparable injury, or, on the other hand, a policy of holding to the spirit of the statute, and, except in those cases where foreclosed by

⁴⁵ See the cases cited in 1 AMES, CASES ON EQUITY JURISDICTION, 279, n. 1.

⁴⁶ CODE OF ALABAMA, § 2152; *Heflin v. Milton*, 69 Ala. 354 (1881); *Wright v. Raftree*, 181 Ill. 464, 54 N. E. 998 (1899). See 1 AMES, CASES ON EQUITY JURISPRUDENCE, 287-288 n.

⁴⁷ *Burns v. Daggett*, 141 Mass. 368, 6 N. E. 727 (1886).

⁴⁸ *E.g.*, *Morrison v. Herrick*, 130 Ill. 631, 22 N. E. 537 (1889).

⁴⁹ *E.g.*, *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279 (1846) and like cases.

⁵⁰ *E.g.*, the doctrine of "dominant" possession: *Watson v. Mahan*, 20 Ind. 223, 226 (1863); *Gupton v. Gupton*, 47 Mo. 37 (1870).

⁵¹ *E.g.*, in 36 Cyc. 672, treating of "dominant" possession, Professor Pomeroy makes an ingenious attempt to line the decisions up on some principle. But the cases cited in note 32 scarcely sustain the text.

authority in the particular jurisdiction, requiring a state of facts satisfying the policy of the statute and in addition thereto a case affording strong equitable grounds for going forward with the performance which the parties have begun.

There can be little doubt that this subject is closely connected with the attitude of seventeenth- and eighteenth-century courts toward statutes and with the large ideas of seventeenth- and eighteenth-century chancellors as to their power of making things over along ethical lines. As is well known, the courts of that time "manifested no small degree of hostility" to the Statute of Limitations and "sought out numerous contrivances to evade its most obvious provisions."⁵² The doctrine of "acknowledgment" taking cases out of the Statute of Limitations, as it was down to the middle of the nineteenth century, bears a suggestive analogy to the doctrine of part performance taking cases out of the Statute of Frauds.⁵³ Moreover, down to the nineteenth century chancellors were zealous to make over bargains and generally to do what it seemed to each particular chancellor was required by the broad equities of the particular situation, with relatively little regard for the stability of transactions or security of acquisitions.⁵⁴ When chancellors held such ideas, a substantial livery of seisin, the substance of a common-law conveyance, or a serious hardship upon purchaser, which might be brought under the all-embracing and magic word "fraud" might well suffice to move them to dispense with a statute. When *Butcher v. Stapely* was decided, the air was full of ideas of natural law, on a higher plane than any human legislation, and the courts of law were about to decide that the king, in particular cases and

⁵² *Pritchard v. Howell*, 1 Wis. 131, 135 (1853).

⁵³ In equity, provision by a testator in his will for the payment of all his "just debts" was held to waive the statute. *Anon.*, 1 Salk. 154 (1689); *Gofton v. Mill*, 2 Vern. 141 (1690). Almost anything was tortured into an "acknowledgment" by courts of law. *Trueman v. Fenton*, Cowp. 544 (1777); *Quantock v. England*, 5 Burr. 2630 (1770).

⁵⁴ The student of equity will think at once of precatory trusts; of extreme cases of specific performance with compensation, such as Lord Thurlow's decrees, criticized by Lord Eldon in *Drewe v. Hanson*, 6 Ves. 675, 677-678 (1802); of the old decisions dispensing with performance of express conditions precedent; of Lord Thurlow's doctrine that time can never be made of the essence by mere agreement of the parties, *Williams v. Thompson*, NEWLAND, CONTRACTS, 2 ed., 238; of Lord Henley's proposition that courts of equity "attend to slight considerations for confirming family settlements" and "consider the ease and comfort and security of families" rather than whether there is a common-law contract. *Wycherley v. Wycherley*, 2 Eden, 175, 177-178 (1763).

"on necessary and urgent occasions," could in his discretion dispense with penal statutes.⁵⁵ If for good reasons James II might dispense with a statute of Charles II requiring public officers to take a test oath, Lord Jeffreys might well feel that James's chancellor, for good reasons, could dispense with another statute of Charles II, requiring contracts for the sale of land to be in writing. It is significant that at first there was a tendency to take cases out of the statute very freely, analogous to the tendency with respect to the Statute of Limitations already spoken of.⁵⁶ In the fore part of the nineteenth century there was a wholesome reaction, exactly as in case of the Statute of Limitations. Later, chiefly in the United States, there was a return to the older attitude and a movement to let down the bars with great liberality, — largely under the influence of attempts to rationalize the subject of part performance by means of theories of "fraud." In England a generation ago there was a second reaction toward stricter holding to the statute, and there are now signs of a movement in the same direction in the United States.

In so many jurisdictions the specific cases which will obviate the bar of the statute are so well settled that it may seem futile to essay any general theory. And yet many things remain unsettled. Hence some general idea as to the basis on which courts should act and some analytical conception of the subject of taking cases out of the Statute of Frauds, as a whole, will be useful in preventing the growth of further anomalies, in preventing the extension of old ones, and in laying the foundations for an ultimate putting of the subject into better order, whether by legislation or otherwise. From this point of view, what account may be given of the types of case heretofore considered? First we have the cases of "fraud" in the stricter sense. These may well stand, if we except certain *dicta*, on the familiar principle of that much-enduring word "estoppel" — that one who makes a representation for the purpose of inducing another to act on it, if the other so acts to his injury, must make good that representation. Second, we have the cases of possession, now become "part performance." Originally these went on the ground that there had been the substance of a com-

⁵⁵ *Godden v. Hales*, Comb. 21, 2 Shower, 475 (1686).

⁵⁶ *Seagood v. Meale*, Prec. Ch. 560 (1721); *Lacon v. Mertins*, 3 Atk. 1 (1743); *Dickinson v. Adams*, cited in 4 Ves. 722 (1799).

mon-law conveyance. As this was overlooked or forgotten, new explanations were sought. An early theory was that taking possession and holding it as owner, with the assent of the vendor, was something solely referable to a contract between the parties as to that very land, and hence calling for an explanation which would let in evidence of the contract.⁵⁷ Another was that taking possession is an act of part performance because "the party might be treated as a trespasser if he could not invoke the protection of the contract."⁵⁸ That is, being, as it were, seized through the substance of a common-law conveyance, the purchaser may go into equity to protect his equitable ownership *quia timet*. But we have here a transition to the idea of "fraud," and in consequence American courts have often called for something more than taking possession.⁵⁹ Thus we are led to the view well expressed by Lord Cottenham in *Mundy v. Jolliffe*:⁶⁰

"Courts of Equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement."

Pomeroy developed this argument into a theory of "equitable fraud" as the basis of the doctrine,⁶¹ which has had a wide influence in the United States and has given Lord Cottenham's theory general vogue in hard cases not admitting of the taking of possession.⁶² I have already pointed out the effect of this gradual *ex post*

⁵⁷ Sir William Grant in *Frame v. Dawson*, 14 Ves. 386, 387-388 (1807); Wigram, V. C., in *Dale v. Hamilton*, 5 Hare, 369, 381 (1846); *Seitman v. Seitman*, 204 Ill. 504, 68 N. E. 461 (1903); *Hersman v. Hersman*, 253 Mo. 175, 161 S. W. 800 (1913).

⁵⁸ Field, J., in *Arguello v. Edinger*, 10 Cal. 150, 159 (1858).

⁵⁹ "In several jurisdictions . . . this reason, as applied to mere possession, is rejected as artificial and untrue in fact." 1 POMEROY, *EQUITABLE REMEDIES*, 2 ed., § 2239. See also *id.*, § 2243.

⁶⁰ 5 My. & Cr. 167, 177 (1839).

⁶¹ 3 POMEROY, *EQUITY JURISPRUDENCE*, § 1297 (citing *Mundy v. Jolliffe*); 4 *id.*, § 1409, n.; *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297 (1888).

⁶² *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54 (1894); *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4 (1899); *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489 (1896); *Pflugar v. Pultz*, 43 N. J. Eq. 440, 11 Atl. 123 (1887); *Lothrop v. Marble*, 12 S. D. 511, 81 N. W. 885 (1900); *Bryson v. McShane*, 48 W. Va. 126, 35 S. E. 848 (1900).

facto development of a theory in producing an artificial differentiation of cases according to the possibility of taking possession, and in fostering loose notions of possession in cases of contracts for support where vendor is to live on the land during his life and the purchaser is upon the land with him. The cases as to service rendered the vendor are also palpably influenced by the older decisions as to taking cases out of the statute by payment. May we give any satisfactory analytical account of such a situation? At any rate we may note that the prevailing theory, whether put as Lord Cottenham put it, or in terms of "equitable fraud" with Pomeroy, is not applied by courts to one of the strongest cases for its application, namely, payment of the purchase money to an insolvent vendor,⁶³ and this, it is significant to note, because such cases admit of taking possession. In truth it was devised to explain the cases where the situation does not admit of taking possession, just as the theory of acts solely referable to a contract as to the land was devised to explain the cases where possession is held to suffice. And this leads to the suggestion that each contains a part of the truth in that we really have two things to consider: (1) whether the policy of the statute is saved, and (2) whether there is something in the particular case that calls for dispensing with a formal compliance with the statute, its policy being saved, and makes it more equitable to go forward and complete what the parties have begun. The theory of acts solely referable to a contract as to the land shows us how to meet the policy of the statute. Lord Cottenham's proposition or the doctrine as put by Pomeroy, shows us how to determine what to do, if and when our first condition is satisfied. Lord Selborne in effect combined the two along this line in *Maddison v. Alderson*,⁶⁴ and gave us, it is submitted, the best rationalization of part performance to be found in the books. Thus the tendency of American courts to require something more than merely taking possession under the contract and the refusal of many courts to grant relief even in hard cases of service, where no possession is taken, without some act solely referable to the contract, are well justified and are in the right line of progress toward a satisfactory law upon this subject.

⁶³ *Townsend v. Fenton*, 32 Minn. 482, 21 N. W. 726 (1884); *Bradley v. Owsley*, 74 Tex. 69, 11 S. W. 1052 (1889); *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391 (1894).

⁶⁴ 8 App. Cas. 467, 475-476 (1883).

We may now examine the decisions of the past year in the light of the foregoing discussion.

Nothing new is brought out by the cases involving taking of possession. None of them involve possession without more. *Doty v. Rensselaer Insurance Co.*⁶⁵ is a case of possession coupled with expensive improvements, within the settled New York doctrine.⁶⁶ *Pearson v. Gardner*⁶⁷ and *Kemmerer v. Title & Trust Co.*⁶⁸ are cases of possession coupled with part payment. *Page v. Cave*⁶⁹ is a case of possession plus the rendition of services. In *Hudgins v. Thompson*⁷⁰ there was possession along with part payment and substantial improvements. In *Sizemore v. Davidson*⁷¹ vendor was in possession under a contract to purchase public land. He sold by parol to purchaser who took possession. Under the doctrine prevailing in Kentucky, where part performance does not take a case out of the statute, it was held that after vendor had acquired a patent he could be prevented from asserting his legal title against purchaser until the equities between the parties had been adjusted. In other words, vendor was treated as equitable owner,⁷² and his contract with purchaser as a conveyance of his equitable ownership within the Statute of Frauds.

Nor is there much new in the cases of continuance in possession or possession referable to some relation between the parties. *Ashcraft v. Tucker*⁷³ and *Casady v. Casady*⁷⁴ are ordinary cases of continuance in a prior possession. In the former there was the added circumstance of part payment, which standing alone, however, could not suffice.⁷⁵

⁶⁵ 188 App. Div. 29, 176 N. Y. Supp. 55 (1919).

⁶⁶ *Dunckel v. Dunckel*, 141 N. Y. 427, 36 N. E. 405 (1894).

⁶⁷ 202 Mich. 360, 168 N. W. 485 (1918).

⁶⁸ 90 Ore. 137, 175 Pac. 865 (1918).

⁶⁹ 106 Atl. (Vt.) 774 (1919).

⁷⁰ 211 S. W. (Tex.) 586 (1919).

⁷¹ 183 Ky. 166, 208 S. W. 810 (1919).

⁷² This is universally held in such cases. *Russ v. Crichton*, 117 Cal. 695, 49 Pac. 1043 (1897); *Aldrich v. Aldrich*, 37 Ill. 32, 36 (1865); *Egbert v. Bond*, 148 Mo. 19, 49 S. W. 873 (1899). Yet the contract is not enforceable in equity against the state nor indeed judicially at all, unless by way of *mandamus* where some ministerial act of an administrative officer is all that is required to pass title.

⁷³ 136 Ark. 447, 206 S. W. 896 (1918).

⁷⁴ 169 N. W. (Ia.) 683 (1918).

⁷⁵ So also in *Starrett v. Dickson*, 136 Ark. 326, 206 S. W. 441 (1918). In *Hawley v. Wood*, 184 Pac. (Cal.) 9 (1919) purchaser in an oral contract claimed that a tenant at will of seller had attorned to him. This was held insufficient. It may be sup-

In *King v. Hartley*⁷⁶ and *Le Vee v. Le Vee*⁷⁷ the contract was between tenants in common. The possession was referable to the relation and there was nothing to show any change in its character. In *Formby v. Williams*⁷⁸ a tenant in possession under a lease spread fertilizer over the land before the lease expired, relying on an oral contract for a new lease. Specific performance was denied on the ground that the acts relied on were not exclusively referable to the contract nor such as could "not be explained consistently with any other contract." Here, unlike *Mundy v. Jolliffe*,⁷⁹ the acts were such as the lessee could lawfully do by virtue of his tenancy, although it was not likely that he would unless he expected to stay beyond the term of his lease. They did not necessarily show a change in the character of his possession. *Brown v. Western R. Co.*⁸⁰ involved a contract to build a spur track and to give an easement of storing lumber on defendant's right of way. Plaintiff had seriously changed his position for the worse in reliance on the contract and had stored lumber on the right of way under it. In an able opinion, Lynch, J., points out the difference between such a case, where there is an actual contract, whether to lease the right of way for storage or to give an easement of storage, and the cases of parol licenses acted on. Here the storing of the lumber was necessarily referable only to some contract between the parties as to the use of the land by plaintiff, and the great hardship upon plaintiff after all that he had done made it more equitable to go forward than to try to undo it. The most notable thing about this group of cases is the strict insistence upon acts solely referable to a contract as to the very land or indubitably showing a change in the character of a pre-existing possession.

A number of cases involve contracts to devise land in return for services to be rendered during the owner's life. In *Taylor v. Holy-*

ported on the ground that what took place did not establish a change in possession amounting to the substance of a common-law conveyance. But Shaw, J., dissenting, argues convincingly against the technical criterion of the California cases, which call for such a possession as would make purchaser "liable for trespass."

⁷⁶ 123 N. E. (Ind. App.) 728 (1919).

⁷⁷ 181 Pac. (Or.) 351 (1919). *Starrett v. Dickson*, 136 Ark. 326, 206 S.W. 441 (1918), is similar. The alleged possession was referable to a joint occupancy with vendor by virtue of the relation of husband and wife.

⁷⁸ 81 So. (Ala.) 682 (1919).

⁷⁹ 5 My. & Cr. 167 (1839).

⁸⁰ 99 S. E. (W. Va.) 457 (1919).

field⁸¹ a young man agreed to work and care for an older man and his wife during their lives, for which he was to be given half of their property on their death. The case was held to be taken out of the Statute of Frauds inasmuch as the plaintiff had given up other opportunities in life and had rendered a kind of service which could not be adequately compensated for in money. It should be noted that the same court has denied specific performance where the services were of such a nature as to admit of reasonable valuation.⁸² In *Aldrich v. Aldrich*⁸³ a son contracted to care for his father, who was to leave land to the son. There was evidence that the father had put the son in possession and that although both were living on the land he treated the son as in exclusive control. But the court said that the contract did not contemplate possession till the father's death and that possession or improvements by the son were not necessary to take the case out of the statute. *Weir v. Weir*⁸⁴ was a similar case where a grandson went on his grandfather's farm and cared for him under a contract that he was to have the land. The same court denied specific performance on the ground that he did not have possession and could be compensated for his services by a claim against the estate. Although the point is not brought out, it is possible that in the former case the Statute of Limitations had run against the claim for a part of the services rendered. This has been made a controlling consideration by courts that follow Lord Cottenham's theory in this class of case.⁸⁵ *Bromeling v. Bromeling*⁸⁶ involved an oral contract with an adopted son that in consideration of the father's being allowed to use the son's land for life, he would leave all his property to the son by will. The case was held to be taken out of the statute by the father's use of the son's land although a restitution of the value of use and occupation would seem to have been feasible. In *Eastman v. Eastman*⁸⁷ there was an oral agreement to devise land in return for

⁸¹ 104 Kan. 587, 180 Pac. 208 (1919).

⁸² *Baldwin v. Squier*, 31 Kan. 283, 1 Pac. 591 (1884); *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71 (1896).

⁸³ 287 Ill. 213, 122 N. E. 472 (1919).

⁸⁴ 287 Ill. 495, 122 N. E. 868 (1919).

⁸⁵ *Warren v. Warren*, 105 Ill. 508 (1882). But query whether there is a greater hardship than is involved in cases of payment of the purchase price to an insolvent vendor.

⁸⁶ 202 Mich. 474, 168 N. W. 431 (1918).

⁸⁷ 117 Me. 276, 104 Atl. 1 (1918).

services. After pleading the statute, defendant abandoned the point and urged that the remedy at law was adequate. This was clearly not well taken. The question here is not one of jurisdiction but of whether the plaintiff can be so far fairly compensated by restitution or a money equivalent that it is more equitable to undo what has been done, in view of the statutory bar. *Signaigo v. Signaigo*⁸⁸ was a suit to enforce a parol contract with plaintiff's parents to adopt plaintiff as defendant's child and to leave property to plaintiff as to defendant's own child. A like contract with plaintiff was also relied on. A majority of the court (three judges dissenting) granted specific performance solely on the basis of the services rendered. The majority of the court speak of impressing the property with a constructive trust. But that is only saying that they enforce specific performance. Their argument in this connection would point rather to imposing an equitable charge in order to enforce restitution for the services rendered, which do not appear to have been of a special character. The dissenting judges say (per Walker, J., p. 32):

"The necessary, and in fact, the only parties to a contract of adoption are the natural and the adoptive parents. The child in the eye of the law, whether its relation to the transaction be considered under the statute or in equity, is the subject-matter. Its mental attitude, therefore, or its subsequent conduct, cannot properly be shown to affect its legal status. If this be true, then it is a mere toying with words to argue that the relation created is one which may be established by the proof of the performance on the part of the child of all the duties the relation entails, and, as a consequence, that the case is relieved from the limitations of the statute of frauds, and may be established as any other contract."

This seems unanswerable. Succession to property is a result of the relation contracted for, not the subject matter of the contract. To treat such cases as contracts to leave land by will, partly performed, is often to make a new contract for the parties because of the hardship on the plaintiff, quite after the manner of the seventeenth century.⁸⁹ But American cases have generally taken this course on the ground that compensation for the value of the serv-

⁸⁸ 205 S. W. (Mo.) 23 (1918).

⁸⁹ *E.g.*, "implied contracts" to make the informally adopted child an heir. *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54 (1894).

ices rendered by the child would be wholly inadequate.⁹⁰ It is noteworthy that a strong minority of one of the courts that has gone far in this direction is now ready to stop. It is also noteworthy that another court, on substantially the same facts, denied relief upon the authority of a decision that a contract to adopt and to leave property to the adopted child did not preclude disposition of the property *inter vivos*.⁹¹ Here too we may perceive signs of a return to stricter views in accord with the policy of the statute.

Little need be said of the numerous cases of parol gifts of land acted on by the donee. *Howard v. Stephens*,⁹² *Fowler v. Isbell*,⁹³ *Raymond v. Hattrick*,⁹⁴ *Berry v. Berry*⁹⁵ and *Peixouto v. Peixouto*⁹⁶ are ordinary cases of parol gift followed by taking of possession and making of substantial improvements. Perhaps it should be noted that in *Berry v. Berry* the court is conscious that there is another difficulty in these cases, over and above the Statute of Frauds, and so speaks of a "meritorious consideration" because of the relationship between donor and donee. The cases recognize that there must be the substance of a common-law conveyance, and hence refuse relief unless it is shown that possession was taken with the assent of donor⁹⁷ or where donee merely continues in a prior possession.⁹⁸ Also donee must make substantial improvements or otherwise change his position for the worse on the faith of the gift.⁹⁹ That is, there must be substantial reason for treating the donee as an equitable owner, seeking relief *quia timet*. All this merely follows the settled line of authorities and what is conceived

⁹⁰ *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008 (1902); *Bichel v. Oliver*, 77 Kan. 696, 95 Pac. 396 (1908); *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4 (1899); *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489 (1896); *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788 (1894); *Van Duyne v. Vreeland*, 12 N. J. Eq. 142 (1858); 11 Id. 370 (1857); *Quinn v. Quinn*, 5 S. D. 328, 58 N. W. 808 (1894). But see the vigorous observations of O'Brien, J., in *Mahaney v. Carr*, 175 N. Y. 454, 458-460, 67 N. E. 903 (1903).

⁹¹ *Wright v. Green*, 119 N. E. (Ind. App.) 379 (1918), following *Austin v. Davis*, 128 Ind. 472, 476, 26 N. E. 890 (1891), where, however, the suit was to set aside conveyances made in the lifetime of the adopter.

⁹² 27 Cal. App. 409, 176 Pac. 65 (1918).

⁹³ 202 Mich. 572, 168 N. W. 414 (1918).

⁹⁴ 104 Wash. 619, 177 Pac. 640 (1919).

⁹⁵ 99 S. E. (W. Va.) 79 (1919).

⁹⁶ 181 Pac. (Cal. App.) 830 (1919).

⁹⁷ *Martin v. Martin*, 207 S. W. (Tex. Civ. App.) 188 (1918).

⁹⁸ *Casady v. Casady*, 169 N. W. (Ia.) 683 (1918).

⁹⁹ *Kendall v. Metroz*, 176 Pac. (Col.) 473 (1918) (*semble*); *Martin v. Martin*, 207 S. W. (Tex. Civ. App.) 188 (1918); *Ludwig v. Ludwig*, 172 N. W. (Wis.) 726 (1919).

to be the sound principle. I have discussed the theory of such cases at some length in a recent paper.¹⁰⁰

14. PLAINTIFF'S DEFAULT OR LACHES

Because equity treats an impossible or illegal condition precedent in a will of personalty *pro non scripto*, and because in case of a condition subsequent in a mortgage or other security equity interferes to give effect to the substance of the transaction as against the form, attempts have always been made to induce the chancellor to make new contracts by dispensing with express conditions precedent where the circumstances work a hardship upon one of the parties. But the case of legacies on impossible or illegal conditions precedent is an anomaly, borrowed by eighteenth-century equity from the Roman law,¹⁰¹ and the interference of equity to prevent forfeitures is no analogy. Until the condition precedent has been performed, nothing has been acquired. Hence as a general rule courts of equity have properly refused to dispense with such conditions. A typical case is failure to exercise an option within the time fixed.¹⁰² Suppose, however, performance of the condition precedent requires a series of successive acts and after doing some of them the holder of the option does not do the rest within the specified time? As was seen in another connection,¹⁰³ there are *dicta* that there is a conversion in these option contracts from the date of the option, subject to a reconversion if the condition is not ultimately performed. On this basis, the ultimate reconversion looks very like a forfeiture and courts often make inquiry as to how far time is "of the essence" in such cases, as if the question were one, not of performance of an express condition precedent according to its terms, but of non-performance of one of the promises in a bilateral contract and whether such breach coming after

¹⁰⁰ "Consideration in Equity," Wigmore Celebration Essays, 435, 440-443, 13 ILLINOIS L. REV. 667, 672-675. In connection with the idea of giving possession as equivalent to the substance of a common-law conveyance, one might compare Roman equity which treated a will sealed by seven witnesses as the substantial equivalent of the formal *testamentum per aes et libram* with *libripens*, *familiae emptor* and five witnesses.

¹⁰¹ I have discussed this matter in a paper entitled "Legacies on Impossible or Illegal Conditions Precedent," 3 ILLINOIS L. REV. 1, 13-20.

¹⁰² Two cases of this sort during the past year are: *Virginia Mining Co. v. Haeder*, 181 Pac. (Idaho) 141 (1919); *Lau v. McKechnie*, 202 Mich. 284, 168 N. W. 438 (1918).

¹⁰³ 33 HARV. L. REV. 813, 825, n. 59.

part performance went to the root or essence of the contract.¹⁰⁴ But on principle and on authority we cannot speak of a conversion in such cases. Nevertheless, where acts have been done toward performance of conditions precedent, courts have sought to prevent unjust enrichment of vendor at purchaser's expense by enforcing the option contrary to its terms.¹⁰⁵ *Lauderdale Power Co. v. Perry*¹⁰⁶ takes the better course of requiring vendor to reimburse purchaser for improvements made in the endeavor to perform the condition, though not for expenditures by purchaser which did not ultimately inure to vendor's benefit. In *Hughes v. Holliday*¹⁰⁷ also, where the option contract called for successive payments, of which one was made but the other was tendered too late, specific performance was denied. These decisions are right. Unless purchaser has gone so far in exercise of the option that by a fair interpretation of its terms he may be made to go on, the vendor-purchaser relation has not arisen.

Nothing new is brought out in the many cases as to provisions that time shall be of the essence, that upon non-performance at the time fixed the contract shall come to an end, that upon such default the purchaser's rights shall be forfeited, and the like. While courts of equity generally construe the contract against vendor in these respects and require express and unequivocal language,¹⁰⁸ the Supreme Court of Kansas, following a line of past decisions, will give to a forfeiture clause, which is in terms a condition subsequent, a construction making it a condition precedent.¹⁰⁹ It will suffice to refer to Pomeroy's convincing criticism of those decisions.¹¹⁰ For the rest, we may note that in California, one of the states going a great way in holding that there are precedent conditions in such cases, when time is expressly made of the essence, a purchaser who has partly performed, forfeits all rights in the land and all payments made in case he defaults as to time, without any affirmative action

¹⁰⁴ A recent case so arguing is *Hughes v. Holliday*, 99 S. E. (Ga.) 301 (1919).

¹⁰⁵ *Coles v. Peck*, 96 Ind. 333 (1884); *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429 (1877).

¹⁰⁶ 80 So. (Ala.) 476 (1918).

¹⁰⁷ 99 S. E. (Ga.) 301 (1919).

¹⁰⁸ *Sharshel v. Smith*, 181 Pac. (Colo.) 541 (1919); *Re Boshart's Estate*, 188 App. Div. 788, 177 N. Y. Supp. 574 (1919); *Kemmerer v. Title & Trust Co.* 90 Ore. 137, 175 Pac. 865 (1918).

¹⁰⁹ *Pickens v. Campbell*, 104 Kan. 425, 179 Pac. 343 (1919).

¹¹⁰ 1 POMEROY, EQUITY JURISPRUDENCE, §§ 365, n. 1, 368, n. 1.

by vendor.¹¹¹ No doubt this is the logical result of treating such provisions as conditions precedent. But even so, why not do as is done in the option cases and prevent unjust enrichment of vendor at purchaser's expense by taking an account of the payments, interest, value of use and occupation, and the like, and striking a balance?¹¹²

Strict doctrines as to forfeiture inevitably produce loose doctrines as to "waiver." Where before time for performance vendor signifies his intention not to insist on timely or exact performance and purchaser, in reliance thereon, acts accordingly, the principle of equitable estoppel is quite sufficient to preclude insistence upon the condition to purchaser's injury. *Heagy v. Steinmark*¹¹³ and *Wolford v. Jackson*¹¹⁴ involve "waiver" of this sort. But where courts are strict in enforcing forfeiture clauses, and provisions as to time being of the essence are treated as amounting to conditions precedent under all circumstances, vendor is held to "waive" the condition, even after the time has passed, by showing an intention not to rely on it.¹¹⁵ In such cases the courts speak of "intentional relinquishment of a known right"¹¹⁶ — somewhat on the analogy of abandonment of chattels or abandonment of water rights — although in the latter cases there are overt acts of giving up possession as well as declared intention, and in other cases of relinquishment of rights intention as such does not avail without seal or consideration. A new and anomalous category of common-law legal transactions seems to be arising, partly out of a natural and inevitable tendency to enforce declared intention simply as such, to which the law must yield, but partly also from a desire to avoid harsh results required by a harsh doctrine that runs counter to the very genius of equity. Where manifested intention not to insist on the terms of the contract after time for performance has

¹¹¹ *Fresno Irrigated Farms Co. v. Canupis*, 27 Cal. App. 859, 178 Pac. 300 (1918).

¹¹² *Drinkle v. Steedman*, [1916] A. C. 275; 281.

¹¹³ 180 Pac. (Colo.) 93 (1919).

¹¹⁴ 123 Va. 280, 96 S. E. 237 (1918).

¹¹⁵ *Andrews v. Karl*, 29 Cal. App. 462, 183 Pac. 838 (1919); *Kohler v. Lundberg*, 180 Pac. (Utah) 590 (1919).

¹¹⁶ *Grippio v. Davis*, 92 Conn. 693, 104 Atl. 165 (1918). "Waiver depends on what one himself intends to do; estoppel depends on what he caused his adversary to do. . . . In other words, waiver is a voluntary act or declaration whereby the waiver surrenders some privilege or right." *Mitchell v. Hughes*, 80 Or. 574, 581; *Smith v. Martin*, 185 Pac. (Or.) 236 (1919).

passed is held a "waiver" it seems such waiver only suspends vendor's right. He may revive it by giving notice.¹¹⁷ In other words, purchaser is given a reasonable time to redeem after notice. This desirable and equitable result is hardly consistent with the idea that there is a condition precedent and that purchaser acquires no rights until after timely performance.

Two cases of parol gift and part performance raise interesting questions as to laches and the Statute of Limitations. In *Raymond v. Hatrick*¹¹⁸ the court said it would follow the analogy of the Statute of Limitations, but that, where no time for conveyance was fixed, there was no laches in not suing till after refusal to perform, although no demand was made in a reasonable time, where there was an intimate relationship and confidence between the parties. In that case donors were the parents of donee's wife. If the case is treated as one of specific performance, delay longer than the period of the statute would seem to involve more than a question of laches. For the Statute of Limitations in Washington applies to equity as well as to actions at law.¹¹⁹ Delay for a less period may be laches. Delay for a longer period is governed by the statute. Moreover it can hardly be said that there was a fiduciary relation between the parties which called for repudiation by the donor and notice to the donee to set the statute to running. Yet the result is quite right. If we think of the donee in such a case as holding possession under what equity regards as the substance of a common-law conveyance and suing *quia timet* to prevent inequitable assertion of the bare legal title by donor, we shall see that limitation and laches have no application. The case is on the same basis as a suit to quiet title.¹²⁰ In *Peixouto v. Peixouto*¹²¹ the court treated donor in the parol gift after donee had taken possession and made improvements as trustee and then applied the rules as to limitations in case of trustee of an express trust. But this straining of the

¹¹⁷ *Andrews v. Karl*, 29 Cal. App. 462, 183 Pac. 838 (1919). *Bishop v. Barndt*, 184 Pac. (Cal. App.) 901 (1919). Compare the proposition that time may be made of the essence by giving notice. *Parkin v. Thorold*, 16 Beav. 59 (1852); *Stickney v. Keeble*, [1915] A. C. 386; *Taylor v. Goellet*, 208 N. Y. 253, 259, 101 N. E. 867 (1913); *FRY, SPECIFIC PERFORMANCE*, §§ 1092-1099.

¹¹⁸ 104 Wash. 619, 177 Pac. 640 (1919).

¹¹⁹ 1 REM. & BAL. CODES, §§ 153, 158, 159, 165.

¹²⁰ See WOOD, STATUTES OF LIMITATION, §§ 218-219.

¹²¹ 181 Pac. (Cal. App.) 830 (1919).

trust analogy is quite unnecessary to reach the result. It is submitted that there are five analogies to be considered where courts of equity are called on to determine whether there has been lache's following the analogy of the Statute of Limitations, or to choose which provision of the statute is controlling, where the Statute of Limitations governs in equity. If nothing has been paid or done by the purchaser, the analogy should be an action upon the contract. Where the vendor-purchaser relation exists and purchaser has paid money or performed service, the analogy should be redemption. If purchaser in possession as equitable owner is dispossessed by vendor who has only bare legal title, it should be ejectment.¹²² If the whole purchase price has been paid but vendor remains in possession, it should be trust. If purchaser in possession has done everything to be done on his part but vendor retains the bare legal title with no substantial interest, the analogy should be that of a suit to quiet title.

15. HARDSHIP AND UNFAIRNESS

Two cases call for passing mention. *Bartley v. Lindabury*¹²³ is a case of a contract fairly made but so improvident and so hard upon the defendant, if specifically enforced, as to move the chancellor to deny specific performance.¹²⁴ *Kurtz v. De Johnson*¹²⁵ is similar except that defendant may be said to have fairly taken the risk. An aunt contracted with her niece to devise land to her if she would live with the aunt until the niece was married. In the event the niece married within three years, while the aunt lived fifteen. Here there were two possibilities to consider, namely, the aunt's dying and the niece's marrying. In similar cases where the only contingency is that the person contracting for a companion may not live long enough to derive much benefit from the bargain, courts have enforced the contract specifically when fairly made.¹²⁶ Perhaps the court thought the assumption of this double risk by the aunt too improvident.

¹²² *Varick v. Edwards*, 11 Paige (N. Y.), 289 (1844).

¹²³ 89 N. J. Eq. 8, 104 Atl. 333 (1918).

¹²⁴ Compare *Wedgwood v. Adams*, 6 Beav. 600 (1843); *Friend v. Lamb*, 152 Pa. St. 529, 25 Atl. 577 (1893).

¹²⁵ 29 Cal. App. 246, 183 Pac. 588 (1919).

¹²⁶ *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415 (1901); *Dalby v. Maxfield*, 244 Ill. 214, 91 N. E. 420 (1910); *Campbell v. McLaughlin*, 205 S. W. (Mo.) 18 (1918).

16. MUTUALITY

There are a large number of cases raising different aspects of this subject which would afford ground for extended discussion if there were space therefor. But this must be reserved for a future paper. Suffice it to call attention to *Schuyler v. Kirk Brown Realty Co.*,¹²⁷ in which Ross, J., in an admirable opinion reviews the decisions in New York, shows that the *dicta* as to mutuality of remedy have gone beyond the requirements of the decisions in which they are found, and expounds the sound theory of mutuality of performance.

Roscoe Pound.

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¹²⁷ 178 N. Y. Supp. (N. Y. App.) 568 (1919).

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LAWLESS ENFORCEMENT OF LAW. — During the past year no less than forty-four convictions were reversed by appellate tribunals in the United States for flagrant misconduct of the public prosecutor or of the trial judge whereby the accused was deprived of a fair trial. In thirty-three of these cases the district attorney made inflammatory appeals to prejudice upon matters not properly before the jury. In three of them the district attorney extorted confessions or coerced witnesses by palpably unlawful methods. In four, witnesses were so browbeaten during the trial as to prevent the accused from fairly making his case. In two, the trial judge interposed with a high hand to extort testimony unfavorable to the accused or to intimidate witnesses for the accused. It is significant that these cases come from every part of the country and from every sort of court. Thus, in 37 New York Criminal Reports, reporting important decisions in criminal causes in the courts of New York between May 31, 1918, and June 6, 1919, we find five convictions reversed for improper conduct of the district attorney in argument or in the course of the trial,¹ one case of an extorted confession,² one of intemperate

¹ *People v. Esposito*, 224 N. Y. 370, 37 N. Y. Crim. 180; *People v. Marcellus*, 184 App. Div. 711, 37 N. Y. Crim. 192; *People v. Klein*, 185 App. Div. 86, 37 N. Y. Crim. 226; *People v. Teiper*, 186 App. Div. 830, 37 N. Y. Crim. 410. In *People v. Montlake*, 184 App. Div. 578, 37 N. Y. Crim. 132, a mistrial resulted from persistent misconduct of the district attorney in calling counsel for the accused "attorney for the pickpocket trust" and a pickpocket himself. See also *People v. Reilly*, 224 N. Y. 90; *People v. De Simone*, 181 App. Div. 840.

² *People v. Crossman*, 184 App. Div. 724, 37 N. Y. Crim. 198.

action of the trial judge in flagrant disregard of the rights of the accused,³ and one of high-handed action by the police, sustained by an inferior court, at the expense of undoubted rights of the citizen.⁴ Appellate courts interfere reluctantly in these cases and set aside convictions only when convinced that the conduct of the district attorney was flagrant and highly prejudicial. Hence it is a fair inference that the evil is even more extensive than the face of the reports discloses. Indeed, going simply on the face of the reports, we must turn back to the courts of the Stuarts for examples of the sort of thing that is becoming commonplace with American prosecutors.⁵

In *People v. Esposito*⁶ on a trial for murder, the district attorney urged on the jury that the name of the accused meant "bastard" and that he was an alien and within draft age. In *Anderson v. State*⁷ accused was a negro tenant who, when threatened by his white landlord, killed the latter, as he claimed, in self-defense. It appeared that he was a friendless negro, without means or influence. The district attorney argued that as the citizens of the county had "restrained and withheld themselves until the trial" and had not lynched the accused, the jury should convict him. He also recounted the horrors of the race riots at Houston and appealed to race prejudice. In *August v. United States*,⁸ in a prosecution during the war, the United States district attorney went so far in appealing to the prejudices of the jury and invoking the war spirit as to compel the Circuit Court of Appeals to grant a new trial. Indeed, Coke's much-criticised "I thou thee, thou traitor," pales beside the abuse poured forth by recent American prosecutors.⁹

Something in the way of intemperate speech may be excused to prosecutors in view of the heat engendered by a protracted and bitterly contested trial. But deliberate and brutal extortion of confessions¹⁰ and

³ *People v. Frasco*, 187 App. Div. 299, 37 N. Y. Crim. 441.

⁴ *People v. Levy*, 186 App. Div. 444, 37 N. Y. Crim. 390.

⁵ "She is a negro — look at her skin; if she is not a negro, I don't want you to convict her." *Moseley v. State*, 112 Miss. 855, 73 So. 791 (1916). "And the Attorney General proceeded to say: 'What I have said about these two witnesses goes. I would say the same about any white man that would come into court and testify in favor of a nigger, if I was going to hell the next minute. The state has nothing to withdraw and nothing to apologize for.'" *Roland v. State*, 137 Tenn. 663, 194 S. W. 1097 (1917). "The testimony of one soldier boy, perhaps of one person who was not a Jew, was . . . of greater weight than that of all Jews, however upright, intelligent or numerous, who had knowledge of the facts." *Skuy v. United States*, 261 Fed. 316, 320 (1919). In *Flores v. State*, 198 S. W. 575, the district attorney said to the jury: "If you don't convict the defendant in this case, I am going to have you all indicted and sent to the penitentiary for perjury."

Compare, "Show me a Presbyterian and I will engage to show a lying knave" (Jeffreys in the trial of Alice Lisle, 11 St. Tr. 359); the commitment of Bushel as one of the jury which refused to convict William Penn (Bushel's case, Vaughan, 135).

⁶ 224 N. Y. 370.

⁷ 214 S. W. (Tex. Cr. App.) 353.

⁸ 257 Fed. 388.

⁹ "Thou art the most vile and execrable traitor that ever lived." "I want words to express thy viperous treasons." "There never lived a viler viper than thou" (Trial of Raleigh, 2 St. Tr. 26). "He is a Hun . . . a vile ulcer suppurating on the shoulder of decency. He is a moral cancer on the breast of humanity" (*People v. Vickroy*, 182 Pac. (Cal. App.) 764).

¹⁰ *People v. Shaughnessy*, 184 App. Div. 806, 37 N. Y. Crim. 196; *Bianchi v. State*, 171 N. W. (Wis.) 639.

coercion of witnesses¹¹ has no such excuse. Such proceedings as those in *Bianchi v. State*, where the district attorney brought into his office six foreigners, while under arrest, examined them under oath in what looked like and they took to be a judicial proceeding, and then sought to use the admissions so extorted as evidence against them, or as those in *Silverthorne v. United States*,¹² where the district attorney, having caused the arrest of the accused, made a high-handed seizure of all their books, papers, and documents, without a shadow of authority, do more to impair our institutions and are more truly inimical to law and order than the crude writings of ignorant visionaries which prosecutors have been pursuing so ruthlessly. For these lawless proceedings are had under color of law by officers of the law who know better. Moreover, these officers would not venture to do such things as were done in *People v. Shaughnessy* or *Bianchi v. State* in a prosecution of defendants of means or influence, able to employ counsel or well advised of their rights.

In *Venable v. State*¹³ the trial judge took a hand in the coercion of a witness. The district attorney had taken a written statement from a thirteen-year-old girl in the presence of a magistrate and of the sheriff. On its face this statement used words and expressions which an ignorant girl of thirteen could not have employed and could hardly have understood. When later she denied important statements of fact contained in the writing and testified that she was frightened at being alone before so many men and did what they told her to do because she wanted to go home, the district judge and district attorney threatened her with a prosecution for perjury and the judge read to her the statute as to the penalty for perjury (two to ten years in the penitentiary) and told her of a woman who had been sent to prison for twenty years. As she still insisted on the untruth of important parts of the written statement, the judge read to her an imposing order committing her for contempt and when that did not change her testimony, the judge said (p. 529): "Mr. Sheriff, you can take the witness to jail," and turning to the girl added, "*I suppose you understand that the district court can impose the sentence of death upon a person — actually take the life of a person; you knew that, didn't you?*" In *Rutherford v. United States*¹⁴ the trial court adjudged a witness in contempt in the presence of the jury because he insisted he had never seen the accused write and could not testify to his signature, when the court thought he really could.¹⁵ In the case of a prior witness

¹¹ *Venable v. State*, 207 S. W. (Tex. Cr. App.) 520.

¹² 40 Sup. Ct. Rep. 182.

¹³ 207 S. W. (Tex. Cr. App.) 520.

¹⁴ 258 Fed. 855.

¹⁵ In discharging the witness from custody on a writ of *habeas corpus*, the Supreme Court of the United States said: "We are of opinion that the commitment was void for excess of power — a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect. Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt, that is, the perjury, was purged, the impression necessarily arises that it was assumed that the power existed to hold the witness in confinement under the punishment until he consented to give a character of testimony which, in the opinion of the court would not be perjured." *Ex parte Hudgings*, 249 U. S. 378, 384.

As the Circuit Court of Appeals very mildly puts it, the judge's conduct "was

on the same trial, who had been similarly threatened, it turned out eventually that the witness had told the truth and the trial judge's dogmatic confidence that she was lying was unfounded.¹⁶ But this experience did not deter him from attempting to coerce other witnesses to such an extent that the Circuit Court of Appeals granted a new trial.

Happily appellate courts have been inclined to stand up manfully against this revival of seventeenth-century methods.¹⁷ But the practice of turning state trials and other important prosecutions into man hunts, with newspapers,¹⁸ police, district attorney and trial judge in full cry after the accused and bent on running him down at all events, must put a severe strain upon elective appellate courts. It ought to be stopped at its source. The bar ought not to countenance the lawlessness of its members who hold office as prosecutors. It should reflect that the judicial persecutions of the seventeenth century and the high-handed conduct of prosecutions for sedition in the latter part of the eighteenth century had much to do with our tying down of prosecutors by technicalities of procedure and depriving trial judges of common-law powers essential to the effective conduct of jury trial.¹⁹ When prosecutors and

very likely to intimidate witnesses subsequently called," even if it did not succeed with this one. *Rutherford v. United States*, 258 Fed. 855, 863.

In the latter case, when counsel for the government could not make a witness for the government swear up to the mark the court took him in hand: "The court is thoroughly satisfied, Mr. Witness, that you are testifying falsely . . . and it becomes the plain duty of the court to commit you to jail, sir, for contempt. . . . *The court desires you to have every opportunity to correct your answers*, if you desire to do so, . . . but I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it." *Ibid.*, 860.

In the trial of Alice Lisle, when the principal witness for the Crown did not swear up to the mark on a crucial point and after being thoroughly browbeaten said "I am cluttered out of my senses," Jeffreys said from the bench: "Dost thou imagine that any man hereabouts is so weak as to believe thee? It is only thy depraved naughty heart that baulks both thy honesty and understanding, if thou hast any; it is thy studying how to prevaricate that puzzles and confounds thy intellect." 11 How. St. Tr. 348 (1685).

¹⁶ *Rutherford v. United States*, 258 Fed. 855, 857.

¹⁷ See especially the remarks of the Supreme Court of Tennessee in *Roland v. State*, 137 Tenn. 663, 665, 194 S. W. 1097.

¹⁸ *People v. Williams*, 106 Misc. 65, 179 N. Y. Supp. 773, 37 N. Y. Crim. 274.

¹⁹ The intemperate charges of Federalist judges had much to do with creating the distrust of courts which led to legislation prescribing a written charge, prohibiting the trial judge from commenting on the facts and reducing him to the position of a moderator. See Addison, *Charges to Grand Juries* (appended to ADDISON'S REPORTS), nos. 20, 22, 23, 26 (1800). Those charges were delivered in 1797-1798. Also LOYD, *EARLY COURTS OF PENNSYLVANIA*, pages 142-149. Judge Addison's style may be seen from the following: "The French have threatened us with pillage, plunder, and massacre. Such threats they have carried into execution in other countries. They have threatened us with a party among ourselves, which will promote their views. Some of them it is said, have told us, that we dare not resent their injuries; for there are Frenchmen enow among us, to burn our cities, and cut our throats. And, it seems, we dare not remove those gentle lambs! Gracious Heaven! Are we an independent nation, and dare we not do this? Shall our constitution, intended as a shield to defend, become a sword to wound us? Have we made a constitution, to restrain our administration from oppressing ourselves, and so restrain it, as to submit our cities to alien incendiaries, and our throats to alien assassins?" *Ibid.*, 307. See also his charge on freedom of the press, *Ibid.*, 288-289. American legislation limiting the power of trial judges begins in North Carolina in 1796 with "An Act to secure the Impartiality of Trial by Jury and to Direct the Conduct of Judges in Charges to the Petit Jury." NORTH CARO-

trial judges revive these obsolete methods in order to procure convictions where there is strong feeling against the accused, they invite a reaction which will cut away even more of what judicial power yet remains. Moreover they invite immediately further extension of administrative action at the expense of the courts. For the elaborate and dilatory process of judicial trial is not needed for man hunts. If law is to be enforced in this fashion, summary administrative action will operate more swiftly, more sensationally, and less expensively.

ENFORCEMENT OF FOREIGN JUDGMENTS. — The courts and text writers have been far from agreement on the nature of a plaintiff's right in a suit to enforce a foreign judgment.¹ This question, as well as that of the principles on which the plaintiff is granted a remedy, is raised in the recent Canadian case of *Bank of Ottawa v. Esdale*.² In that case an Ontario court gave a judgment for which jurisdiction was lacking. Later the defendant made a general appearance and the court vacated the judgment. Still later the court vacated this order vacating the judgment. An Alberta court gave judgment for the plaintiff in an action on the Ontario judgment.

If the theory is accepted that the plaintiff's original cause of action is merged in the judgment,³ and that he is suing on a new and separate obligation created by the foreign judgment,⁴ it is hard to support the case. For the judgment, when given, was void for want of jurisdiction and would not be recognized abroad;⁵ and the order vacating the order to vacate did not purport to do more than to remove the vice from, and thus restore, the original judgment. In other words, although at the time of the last order the court did have jurisdiction, it did not then give a judgment.⁶

And the same objection is met if the theory is accepted that a foreign judgment is given effect as evidence⁷ of the original cause of action,⁸

LINA LAWS (1796), c. 452. This is better to be understood when we read of Chief Justice Howard (last Chief Justice of the Colony) that he "was notoriously destitute not only of the common virtues of humanity but of all sympathy whatever for the community in which he lived." JONES, DEFENSE OF THE REVOLUTIONARY HISTORY OF NORTH CAROLINA, 121.

¹ See PIGGOTT ON FOREIGN JUDGMENTS, 2 ed., 4 ff.

² 1 W. W. 283. For a fuller statement of facts see RECENT CASES, p. 984.

³ *Henderson v. Staniford*, 105 Mass. 504 (1870). See *Suydam v. Barber*, 18 N. Y. 468, 470 (1858).

⁴ See *Dunstan v. Higgins*, 138 N. Y. 70, 33 N. E. 729 (1893); *Fisher v. Fielding*, 67 Conn. 91, 108, 34 Atl. 714, 716 (1895); *Baker v. Palmer*, 83 Ill. 568 (1876); *Schibsy v. Westenholz*, L. R. 6 Q. B. 155 (1870); *Godard v. Gray*, L. R. 6 Q. B. 139 (1870).

⁵ *Cummington v. Belchertown*, 149 Mass. 223 (1889).

⁶ If the judgment had been appealed from and affirmed, it could be said that the appellate court had given a new judgment incorporating the old, and as the appellate court had jurisdiction its judgment would be recognized abroad. *Guiard v. De Clermont and Donner*, [1914] 3 K. B. 145.

⁷ If the judgment is evidence, it is usually spoken of as *prima facie* evidence; for to allow it as conclusive evidence is practically to coincide with the legal obligation theory supported by the cases in note 4, *supra*.

⁸ See *Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158 (1896); *Grant v. Easton*, 49 L. T. 645 (1883); *Houlditch v. Marquess of Donegall*, 2 Cl. & Fin. 470 (1834).

the latter not being merged in the judgment.⁹ There is no valid judgment to be given as evidence, and the authorities do not suggest that records of proceedings in foreign courts, other than judgments, can be in themselves evidence of indebtedness.¹⁰

Thus the case must stand or fall with the validity of the Ontario judgment as of the date when rendered. There is considerable authority for the assumption of the Ontario court that a general appearance can confer jurisdiction back, making valid a judgment previously rendered.¹¹ If this doctrine is sound the Ontario judgment was correctly recognized as valid. But such a fiction has been denied¹² and is open to strong objections.¹³ A void judgment is no judgment at all, and it would seem that to say that the defendant's appearance makes it valid is to give such an appearance the force of a judicial decree in that it creates a judgment where there was none before. Nor can the doctrine be supported by analogy to a judgment given *nunc pro tunc*, for the latter is only given when a valid judgment could have been rendered at the earlier date.¹⁴

By the English view, as announced in one case,¹⁵ the only question in the Alberta court as to this doctrine of a jurisdiction relating back would have been whether it was opposed to natural justice, and not whether it was accepted or refused in Ontario or Alberta. In view of the authorities supporting such a doctrine of relation back¹⁶ it is probable that in the United States it would be held not to violate "due process," and a judg-

⁹ See *Hall v. Obder*, 11 East, 118 (1809); *Bank of Australasia v. Harding*, 19 L. J. C. P. 345 (1850).

¹⁰ See *Foot v. Newell*, 29 Mo. 400 (1860). But see *Colorado v. Harbeck*, 179 N. Y. Supp. 510 (1919). If a foreign judgment is merely evidence in support of the original cause of action, there seems to be no objection to a rule which would admit records of proceedings other than judgments as evidence, weaker perhaps than a judgment, to the same end. Such records are received for some purposes. See WIGMORE ON EVIDENCE, § 1347. It would then have been possible for the Alberta court to regard the record of all the proceedings in the Ontario Court as sufficient evidence of the plaintiff's claim.

¹¹ *Barnett v. Holyoke Mutual Fire Ins. Co.*, 78 Kan. 630, 97 Pac. 962 (1808); *Curtis v. Jackson*, 23 Minn. 268 (1877); *Dreyfus v. Moline*, 43 Neb. 233, 61 N. W. 599 (1895); *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563 (1862); *Grantier v. Rosecranz*, 27 Wis. 488 (1871). See *Crane v. Penny*, 2 Fed. 187 (1880); *Tisdale v. Rider*, 119 App. Div. 594, 104 N. Y. Supp. 77 (1907).

¹² *Dallas v. Luster*, 27 N. D. 450, 147 N. W. 95 (1914); *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708 (1904); *Bennett v. Knights of Maccabees*, 40 Wash. 431, 82 Pac. 744 (1905). And Minnesota now holds that where the defendant objects to jurisdiction, such an appearance, even though general because it includes other objections, will not confer jurisdiction back, thus limiting its decision in *Curtis v. Jackson*, note 11, *supra*. *Godfrey v. Valentine*, 39 Minn. 336, 40 N. W. 163 (1888); *Spencer v. Court of Honor*, 120 Minn. 422, 139 N. W. 815 (1913).

¹³ The historical explanation of the doctrine may lie in the conception of a judgment as a procedural contract, which can be ratified by the defendant's subsequent appearance. It is enough to say that it is no longer considered that a judgment greatly resembles a contract. See *Rae v. Hulbert*, 17 Ill. 572, 580 (1856); *O'Brien v. Young*, 95 N. Y. 428, 430 (1884). See also 1 BLACK ON JUDGMENTS, 2 ed., § 10.

¹⁴ *Womack v. Sanford*, 37 Ala. 445 (1860). See *O'Riordan v. Walsh*, 8 I. R. C. L. 158 (1873).

¹⁵ *Pemberton v. Hughes*, 1 Ch. 781 (1899). See *Vaquelin v. Bouard*, 15 C. B. (N. S.) 341 (1863).

¹⁶ See note 11, *supra*.

ment depending on it for validity should thus be recognized under the "full faith and credit" clause of the Constitution. But whether the doctrine would conform to the English standard of natural or substantial justice is doubtful,¹⁷ and might be made to depend on the special facts of each case.

IS A PERSON NATURALIZED IN AUSTRALIA A BRITISH SUBJECT IN ENGLAND?—In *The King v. Francis, Ex parte Markwald*,¹ a natural-born subject of Germany, who had emigrated in 1878, had settled in Australia, and had become naturalized there in 1908, was held to be an alien in England.²

The status of the subject is distinguished from that of the alien by allegiance.³ A state is composed of certain members or persons known as its nationals.⁴ All others are foreigners or aliens.⁵ Naturalization is the act of adopting a foreigner and conferring upon him the nationality of a state.⁶ Allegiance is bilateral. Hence to have a complete change of nationality three things are essential: (1) the consent of the subject, (2) the consent of the state of which he is a member,⁷ and (3) the consent of the state of which he desires to become a member. It is quite possible for a person to cease to be a subject of one state without acquiring another nationality and thus to be without a country.⁸ It is also not unusual for a person to acquire a new nationality without ceasing to be a subject of another state and thus to be of double nationality.⁹ Whether a national of one state has ceased to be a national of that state depends exclusively upon its law. Whether he has acquired nationality in another state depends exclusively upon the law of that other state. In determining whether an individual is an alien in a particular state the question to be decided is not whether he is still a subject of his former state but whether he has become a subject of the particular state according to its law.¹⁰ Whether a German subject continues to be so depends, therefore,

¹⁷ The civil law system of issuing execution on a foreign judgment avoids much of the theoretical difficulty that our law encounters by requiring a suit on the judgment. See PIGGOTT ON FOREIGN JUDGMENTS, 2 ed., 22.

¹ [1918] 1 K. B. 617. See RECENT CASES, p. 976, *infra*.

² The same result was reached in a subsequent proceeding. *Markwald v. The Attorney General*, 36 T. L. R. 197. See RECENT CASES, p. 976, *infra*. The petitioner was convicted for failing to register as an alien under the Aliens Restriction (Consolidation) Order of 1916, § 19 (1) (a). See 1916, 1 STAT. RULES AND ORDERS, 11. The power to issue such an order was conferred upon the Crown by the Alien Restriction Act of 1914, which provided for registration of aliens but left that word undefined. See 4 & 5 GEO. V, c. 12.

³ The Case of the Marshall of the King's Bench, Y. B. 33 HEN. VI, f. 1, pl. 3 (1455); Calvin's Case, 7 Rep. 1 (1608). See 32 HARV. L. REV. 160.

⁴ See 3 MOORE, DIG. INTERNATIONAL LAW, § 372.

⁵ See WESTLAKE, INTERNATIONAL LAW, Pt. I, 3, 198.

⁶ *Ibid.*, 225; 1 OPPENHEIM, INTERNATIONAL LAW, 2 ed., § 305; VAN DYNE, NATURALIZATION IN THE UNITED STATES, 5.

⁷ MacDonald's Case, 18 How. St. Tr. 857 (1746); Rex v. Lynch, [1903] 1 K. B. 444.

⁸ See 1 OPPENHEIM, INTERNATIONAL LAW, 2 ed., § 311.

⁹ *Ibid.*, § 309.

¹⁰ Geshwind v. Huntington, [1918] 2 K. B. 420; Dawson v. Meuli, 118 L. T. R. 357 (1918); *Ex parte Freyberger*, [1917] 2 K. B. 129; Vecht v. Taylor, 33 T. L. R. 317 (1917); Sawyer v. Kropp, L. J. 85 K. B. 1446 (1916).

upon German law;¹¹ whether he has become a British subject depends upon British law. Whether he is an alien in either state depends upon whether he is or is not a national of that state.

Prior to 1914 naturalization in Australia was governed by three statutes. The Naturalization Act of 1870¹² conferred power upon the legislature of a British possession to grant naturalization "to be enjoyed within the limits of such possession." The Commonwealth of Australia Constitution Act of 1900¹³ simply gave power to naturalize. The Naturalization Act of Australia of 1903¹⁴ provided, in the exercise of the power thus conferred, for a naturalization to be enjoyed within the territorial limits of Australia. Whether colonial naturalization in view of this restrictive clause makes the recipient a full British subject is a matter of British constitutional law. That he would be according to international law for international purposes there cannot be much doubt.¹⁵ The restrictive words may be explained by saying that they prevent one possession from exceeding its territorial jurisdiction and define and limit the rights of a naturalized person in that place.¹⁶ The naturalizing state may of course grant naturalization upon its own terms, and it is conceivable that a naturalized British subject might have certain rights and disabilities in a possession that he would not have in another possession or in the United Kingdom. But to consider a person a subject in a particular locality only is contrary to the general conception that nationality follows the person and does not depend upon the territory in which he happens to be. If a possession be considered a separate sovereignty or independent state, it is possible to speak of its members as its subjects and to think of them as aliens in the mother country. It is impossible to support this doctrine of a limited naturalization, in the sense that it is used in the principal case,¹⁷ upon any other theory and at the same time conceive of it as a naturalization. Such a doctrine, however, would be irreconcilable with British imperial theory. It would mean that the British Empire would be composed of many distinct sovereignties and nationalities. But this proposition has been strongly denied. It is settled that one born in any part of the empire is a British subject and

¹¹ According to German law German nationality could be lost by express permission of the state or by an uninterrupted residence for ten years in a foreign country. See North German Nationality Law, 1870, § 21; BUNDES-GESETZBLATT DES NORDDEUTSCHEN BUNDES, 358. Until 1913 there was no general statute to the effect that a German lost his nationality upon naturalization in a foreign country. See also German Military Law of May 2, 1874, § 11; 1874 REICHS-GESETZBLATT, 45; German Imperial and State Nationality Law of July 22, 1913, §§ 13, 17, 25, 26, 31; KELLER AND TRAUTMANN, KOMMENTAR ZUM REICHS- UND STAATSANGEHÖRIGKEITSGESETZ; 8 AM. JOURN. INTER. L., Suppl. 217; 20 CLUNET, JOURNAL DU DROIT INTERNATIONAL PRIVÉ, 800-810, 906-907; 22 CLUNET, 640; *Ex parte* Weber, [1916] 1 K. B. 280, [1916] A. C. 421; *The King v. Vine Street Police Superintendent*, *Ex parte* Liebmann, [1916] 1 K. B. 268.

¹² See 33 VICT., c. 14, § 16.

¹³ See 63 & 64 VICT., c. 12.

¹⁴ See 1903, 2 ACTS OF THE PARLIAMENT OF AUSTRALIA, 96.

¹⁵ See 16 STAT. AT L., 775. See also 1 OPPENHEIM, INTERNATIONAL LAW, 2 ed., § 307.

¹⁶ See WESTLAKE, INTERNATIONAL LAW, Pt. I, 229. This seems to be the correct interpretation when the context of the Acts of 1870 and 1903 is considered. See Act of 1903, §§ 3, 7, 8. See also 3 MOORE, DIG. INTERNATIONAL LAW, § 375.

¹⁷ *Ex parte* Markwald, *supra*. Darling, J. (at p. 622), says, "A man may become the liege subject of the King in some part of his dominions yet not in all."

not a subject of that part.¹⁸ It is obvious that an individual can be a British subject without being a subject of the United Kingdom. But it has never been suggested in modern times that a British subject born in a possession would be an alien in the British Isles. And there is no good reason why a naturalized colonial should in this respect be considered in a different class. His British nationality would prevent his being an alien. An analogous situation existed at a time when Porto Ricans were not citizens of the United States. Although not citizens in the United States they were nationals of the United States because citizens of Porto Rico, and hence they were not considered as aliens.¹⁹ The decision of the court in *Ex parte Markwald* is based upon a strained and unfortunate interpretation of statutes.²⁰ It seems even more strained in that it disregarded a contemporary statute which appears to settle the question conclusively the other way. The British Nationality and Status of Aliens Act of 1914 defines the terms "alien" and "British subject,"²¹ repeals former naturalization laws, and provides that naturalization by a British possession has the same effect as that granted in England.²²

THE STEEL CORPORATION CASE.¹—The United States Steel Corporation was formed in 1901 as the culmination of a series of prior combinations resulting in part from the necessity of integration, that is, vertical combination with continuity of operations from the mine to the finished product. The Steel Corporation was a combination of combinations bringing under one control about one hundred and eighty concerns which prior to the original mergers had produced from eighty to ninety per cent of the total output of the country. Dissolution proceedings were begun under the Sherman Anti-Trust Act in 1911 and the bill was dismissed by the District Court,² the four judges finding that

¹⁸ *Gibson v. Gibson*, [1913] 3 K. B. 379; *Re Johnson, Roberts v. The Attorney General*, [1903] 1 Ch. 821. In the latter case Farwell, J., said, (at p. 832), "He is a subject of the British Crown and . . . his nationality is the British Empire."

¹⁹ *Gonzales v. Williams*, 192 U. S. 1 (1903). See 17 HARV. L. REV. 412.

²⁰ It was not necessary to hold that Markwald was an alien because of war-time exigencies. Power had been conferred upon the Crown to try by court martial any person who communicated with the enemy or committed other forbidden acts. See *Defense of the Realm Act of 1914*, 4 & 5 GEO. V, c. 29; *The King v. Halliday, Ex parte Zadig*, [1917] A. C. 260.

²¹ See 4 & 5 GEO. V, c. 17, § 27.

²² *Ibid.*, §§ 8 (2), 28. This statute defines an alien as one who is not a British subject, and a British subject as a natural-born subject, or one to whom a certificate of naturalization has been granted "under the provisions of this Act or under any Act repealed by this Act." It repeals the Naturalization Act of 1870. It is therefore difficult to understand why a person naturalized in Australia in 1908 would not come within the express statutory definition of a British subject. In determining what the term alien included in the Aliens Restriction Act of 1914 the court might well have taken into account the definition contained in the British Nationality and Status of Aliens Act of 1914.

¹ For a review of the authorities under the Sherman Anti-Trust Act through the Standard Oil and Tobacco cases see 25 HARV. L. REV. 31. Important decisions since that article are *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (1912); *United States v. Winslow*, 227 U. S. 202 (1912); *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600 (1913). See also Albert M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 830; "The Sherman Act," 31 HARV. L. REV. 412.

² 223 Fed. 55 (1915).

the corporation did not have control of the industry.³ This was affirmed in the Supreme Court by a four to three decision.⁴ The findings of fact are that the corporation was formed for the illegal purpose of restraining trade by monopolization, that this purpose was abandoned immediately, and that the corporation possessed neither the desire nor the power to dominate the industry, the court distinguishing the purpose of the organizers from that of the corporation. It was found further that the corporation had entered into illegal price agreements with competitors but that these agreements had been abandoned prior to the bill. The question before the court is whether or not the corporation should be dissolved. The reasoning of the majority is that although the corporation was illegal in its inception and had fixed prices, "whatever there was of wrong intent could not be executed, whatever there was of evil effect was discontinued before this suit was brought," and the remedy being in the discretion of the court of equity, dissolution is not necessary.⁵ The position of the minority is that, taking the facts as found by the majority, the corporation attained its present size by illegal combination, it has maintained its position through illegal acts (price agreements), and that its existence is a violation of the Sherman Act, calling for dissolution. The minority also dissent on the finding that the corporation has not a dominant position in the industry.

The decision is, then, that a combination which is illegally formed, but which is not a monopoly, may save itself from dissolution by subsequent good conduct. The factors which determined the court seem to be the absence of unfair methods of competition, the uniform decrease in the Steel Corporation's percentage of the country's production,⁶ and the large foreign trade built up where others had previously failed. These indicated to the court a decreasing danger of monopoly and a legitimate reason for the continued existence of the corporation.

The case has two aspects to be considered for future decisions.⁷ The government's contention was that a combination "may be illegal because it acquires a dominating power, not as the result of normal growth and development, but as a result of a combination of competitors," an

³ Although agreeing as to the absence of domination in fact, there was a division of opinion in the District Court as to the purpose for which the Steel Corporation was formed. Two judges expressed the view that the purpose was not monopoly but "concentration of efforts with resultant economies and benefits." The other two judges were of the opinion that the purpose of the organizers was to monopolize and restrain trade, which view was concurred in by the majority in the Supreme Court.

⁴ *United States v. United States Steel Corporation*, U. S. Sup. Ct., No. 6, October term, 1919 (March 1, 1920). Mr. Justice McReynolds and Mr. Justice Brandeis took no part in the case. See RECENT CASES, page 986.

⁵ The District Court offered to retain jurisdiction of the cause in order that if illegal acts should be attempted they could be restrained. The government did not avail itself of the offer.

⁶ From 1901 to 1911 the Steel Corporation's proportion of the domestic business decreased from 50.1 per cent to 40.9 per cent.

⁷ The FEDERAL TRADE COMMISSION ACT of Sept. 26, 1914, 38 STAT. AT L. 717, provides that in proceedings in equity under the anti-trust Acts, the court may refer the suit to the Federal Trade Commission, as a master in chancery, to ascertain the appropriate form of a decree. In view of the finding of illegality in the formation of the Steel Corporation, the suit might have been referred to the commission to ascertain the practicability of stripping the corporation of the advantages illegally acquired. This was not discussed by the court.

illegal purpose being a "matter of aggravation." This is answered by the finding that the corporation did not have the power to dominate, but the court goes on to say, "the law does not make mere size an offense, or the existence of unexercised power an offense. It requires . . . overt acts." Does the court mean that if the Steel Corporation had achieved dominating power, it would still have been saved from dissolution because the power had not been used? If so, why should emphasis have been placed on the fact that the corporation was not a monopoly? The second aspect is the discussion of the usual powers of discretion of a court of equity in determining what remedy, if any, shall be given. Does the court mean that having found the Steel Corporation to be within the prohibitions of the Sherman Act, the court may, in its discretion, deny a remedy? The existence of discretion when equitable jurisdiction is conferred by statute was denied in the Paper Bag Patent case,⁸ where the court enjoined infringement of a patent acquired by the plaintiff to protect his monopoly by keeping the invention out of the market. If there is no discretion under the patent statute, which was merely declaratory of the common-law jurisdiction of equity, it would seem even clearer that there is no discretion under the Sherman Act, which creates a new equitable jurisdiction. The principal case throws doubt on the holdings in the patent cases.

It was unfortunate that a decision of such importance should have been handed down by less than the full court, for the majority in the case is a minority of the court. The decision cannot be relied on as a precedent with safety.

PRICE RESTRICTION ON THE RESALE OF CHATTELS. — Two recent cases¹ before the Supreme Court of the United States have raised again, in somewhat different form, the question of attempted price maintenance on the resale of chattels — condemned in the well-known case of *Dr. Miles Medical Co. v. Park & Sons*.² In each of these late cases a manufacturing corporation was indicted under Section 1 of the Sherman Anti-Trust Law.³ The substance of the activity of the defendant in each instance was an attempt to establish a uniform price for resale by the dealers to whom it sold that product. In neither of the cases was it charged that the defendant had monopolized or attempted to monopolize any part of its industrial field. In each case the defendant manufactured "branded," or "specialty," goods.

⁸ 210 U. S. 405 (1907).

¹ *United States v. Colgate & Co.*, 250 U. S. 300 (1919); *United States v. A. Schrader's Son, Inc.*, U. S. Sup. Ct., No. 567, Oct. Term, 1919 (March 1, 1920). See RECENT CASES, page 986.

² 220 U. S. 373 (1911). While the court in this case had before it only the question of whether a covenant to maintain prices on resale could be enforced against third persons who took the chattel with notice of the covenant, the court based its denial of relief on the ground that the contract was illegal as in restraint of trade.

³ Sherman Act of July 2, 1890, c. 647, § 1; 26 STAT. AT L. 209. "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor. . . ."

In one of the two cases, *United States v. Colgate & Co.*,⁴ the defendant accomplished this purpose by giving the dealers notice of the uniform prices to be charged for the goods and informing them that in case of departure from the specified prices no more goods would be sold to them. To this policy the defendant vigorously and rigidly adhered, with the result — as the indictment charged — that a uniform price of resale was maintained. Upon a demurrer, it was held that this indictment failed to charge any offense. In the case of *United States v. A. Schrader's Son, Inc.*,⁵ a similar maintenance of resale price was attained by means of contracts between the defendant and the dealers. The trial court sustained a demurrer to the indictment on the ground that the Dr. Miles case had been overruled by the Colgate decision. The trial court pointed out that, in its opinion, there was no real difference upon the facts between the cases, and said:⁶ "The only difference is that in the former [the Miles case] the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the price fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement." This decision of the trial court was, however, reversed by the Supreme Court, Mr. Justice Holmes and Mr. Justice Brandeis dissenting, with Mr. Justice Clarke concurring only in the result.

In view of the opinion of the court below, and of the dissent, the Supreme Court seems almost cavalier in the statement: "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements — whether express or implied from a course of dealing or other circumstances — with all customers throughout the different States which undertake to bind them to fixed resale prices."⁷ The business result of the two methods is the same, and if contracts to the end in question fall within the prohibition of the Sherman Law, it is to be remembered that that prohibition is not limited to "contracts" but extends to "combinations" and "conspiracies." But the court even blurs the technical line which it draws between contract and no contract with its talk concerning agreements "implied from a course of dealing or other circumstances." What the decision of the court would be, for instance, in the case of an agreement by a manufacturer to give a rebate to the dealers who maintained his uniform prices, seems quite uncertain.⁸

The decision in the Miles case has been ably and, it is believed, deservedly criticized.⁹ Practically all other courts in which the question

⁴ *Supra*, note 1.

⁵ *Ibid.*

⁶ Opinion quoted on page 3 of Supreme Court's opinion.

⁷ Page 5 of the opinion.

⁸ Such agreements were uniformly upheld before the decision in the Miles case. *In re Greene*, 52 Fed. 104 (1894); *Clark v. Frank*, 17 Mo. App. 602 (1885); *Park & Sons v. Nat'l Wholesale Druggists Ass'n*, 175 N. Y. 1, 67 N. E. 136 (1903).

⁹ See KALES, CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE (Summary), Chap. IV. See also Charles L. Miller, "The Maintenance of Uniform Resale Prices," 54 U. OF PA. L. REV. 22.

had been raised had reached the contrary result.¹⁰ Subsequent decisions in state courts have refused to follow it.¹¹ The undesirability, as a matter of economics, of the predatory price-cutting to which the decision gave rise, can scarcely be denied.¹² Yet perhaps the case has become too firmly fixed as a principle of decision in the federal courts to make it desirable to overrule it at this late date and perhaps the remedy is now rather for the legislature.¹³ But even so, that is not a valid reason for introducing a new technical distinction into a field of judicially interpreted public policy which has already become stigmatized by an adherence to the letter rather than the spirit. Having decided the *Colgate* case as it was decided, it seems unfortunate that the Supreme Court did not go the full distance and overrule the *Miles* case. As the decisions stand, the *Colgate* case is an exception to an undesirable rule, and the existence of a bad rule has been prolonged altogether too often in the law by the multiplication of virtuous exceptions.

THE CONCURRENT POWER OF CONGRESS AND THE SEVERAL STATES TO ENFORCE THE EIGHTEENTH AMENDMENT. — The Eighteenth Amendment¹ prohibits traffic in "intoxicating" liquors and provides that "Congress and the several States shall have concurrent power to enforce" the prohibition. There is a dispute as to the significance of the phrase "concurrent power," and more particularly as to who has the power to define "intoxicating." Litigation on these points seems certain to arise out of the legislation of at least four states,² which has set a standard at variance with that adopted in the National Prohibition Act.³

Three views are possible: (1) That concurrent power means joint power. (2) That the power is given to each, the legislation of either Congress or the states being of equal force with the other. (3) That the power is in each, but that the legislation of Congress, as the supreme law of the land, will supersede any inconsistent state legislation.

¹⁰ *Elliman Sons & Co. v. Carrington & Son*, L. R. 2 Ch. 275 (1901); *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909); *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174 (1900); *New York Ice Co. v. Parker*, 21 How. Pr. (N. Y.) 302 (1861).

¹¹ *Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041 (1912); *Fisher Flour Milling Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144 (1913).

¹² An enlightening account of this economic effect can be found in the hearings on the Stevens Bill (H. R. 13305) before the Committee on Interstate and Foreign Commerce in the House of Representatives, 63rd Congress, 2nd and 3rd Sessions (Feb. 27, 1914, to Jan. 9, 1915).

¹³ See the opinion of Mr. Justice Brandeis in *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S. 8, 27 (1918).

¹ See 40 STAT. AT L. 1050. For the purposes of this note the validity of the amendment itself is assumed. See William L. Marbury, "Limitations upon the Amending Power," 33 HARV. L. REV. 223; William L. Frierson, "Amending the Constitution of the United States," 33 HARV. L. REV. 659. Power to define "intoxicating" under the power to enforce is also assumed. Cf. *Ruppert v. Caffey*, 251 U. S. 264 (1920).

² Maryland, New Jersey, New York, and Massachusetts. Maryland's statute is expressly conditioned on its validity under the amendment. New York and Massachusetts have bills pending.

³ Volstead Act, October 28, 1919.

Upon the first theory, no law would be effective until the legislation of Congress and the state in question coincided. But the amendment was surely intended to mark an advance in the possible control of intoxicating beverages. This view not only leaves Congress practically powerless, but deprives the several states of the independent power which they had previously. The theory that the power is joint must be untenable.

The conception that the power to enforce is equally in each, neither having any overriding force, is more interesting. It presents a legislative situation analogous to the judicial situation existing between a state court and the federal court, applying the law in the same state.⁴ The situation would also resemble that where two adjoining states are given concurrent jurisdiction over a river which forms a common boundary,⁵ or where a state cedes land to the United States reserving concurrent jurisdiction in certain respects.⁶ These analogies would seem to support this view. The more restrictive law would be enforced, however, by the government enacting it⁷ and so would in a sense supersede the more lenient law so far as the latter impliedly authorized the acts which the former condemned. The principal objection to this second theory is that it renders the acts of Congress, passed in pursuance of the Constitution, less than the supreme law of the land.⁸

Does the third possible meaning deprive the words "concurrent power" of all significance?⁹ That cannot be true if the words had, at the time of the adoption of the amendment, a recognized meaning with exactly the force contended for, and such, it is submitted, is the case. The word "concurrent" appears several times in the Constitution,¹⁰ but not the phrase "concurrent power." The words have been used together, however, by counsel in argument and by the courts in their decisions, to describe those powers which, although delegated to the United States, may yet be exercised by the states, until Congress chooses to act.¹¹ They describe those powers which the state may exercise, but only in absence of federal legislation on the point, as distinguished from powers which were delegated to the United States and could be exercised only by the United States. It was part of the significance of the phrase that, although the power was concurrent in the state, inconsistent state laws

⁴ See *Swift v. Tyson*, 16 Pet. (U. S.) 1 (1842).

⁵ See *State v. Neilsen*, 51 Ore. 588, 95 Pac. 720 (1908); *Wedding v. Meyler*, 192 U. S. 573 (1904).

⁶ See *Fort Leavenworth Rd. Co. v. Lowe*, 114 U. S. 525 (1884); *Opinion of Judges*, 1 Met. (Mass.) 580, 582 (1841).

⁷ *State v. Nielsen*, *supra*.

⁸ See U. S. CONST., Art. VI, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land."

⁹ The argument for the affirmative is that without the words in the amendment, the states could have passed legislation in enforcement of it. This seems true; the state might have made a violation of the National Prohibition Act an offense against the state. Cf. *Fox v. Ohio*, 5 How. (U. S.) 410 (1847); *Houston v. Moore*, 5 Wh. (U. S.) 1 (1820); *State v. Tachin*, 92 N. J. L. 269, 106 Atl. 145 (1919). But the words do settle any doubt as to the power of the states to legislate on subjects uncovered by Congress.

¹⁰ See U. S. CONST., Art. I, §§ 3 [6], 5 [2], 7 [1], 7 [3]; Art. II, § 2 [2].

¹¹ See *Sturges v. Crowninshield*, 4 Wh. (U. S.) 122 (1819); *Houston v. Moore*, 5 Wh. (U. S.) 1, 5, 8, 29, 34, 49 (1820); *Gibbons v. Ogden*, 9 Wh. (U. S.) 1, 13, 36-40 (1824); *Bridge Co. v. Kentucky*, 154 U. S. 204, 211 (1893).

were superseded by a federal law on the matter, by force of the Constitution itself.

The third theory seems preferable. It will result in a uniform enforcement of the first section of the amendment; the word "intoxicating" will not be credited with forty-nine possible meanings; and the states may still legislate on subjects not covered by federal statutes and consistently with Congress.¹² It may be said that for all practical purposes there is no substantial distinction between the second and third views, but theoretically the third theory gives the words their recognized legal meaning, does no violence to Article VI of the Constitution, and averts any possibility of future state laws expressly or impliedly authorizing that which Congress forbids.

REMOVAL OF CAUSES. — The plaintiff whose cause of action arises out of the negligence of an employee will usually desire to make the employer the responsible party. And he will usually be equally desirous of establishing that responsibility in his own state courts. Said Bourquin, J., in a recent case: "So long as eight of twelve jurors may render verdicts in state courts, and twelve of twelve are necessary in federal courts, plaintiffs will try to retain causes in the former courts and defendants to remove them to the latter."¹ Nor is that the sole reason actuating defendants, particularly in cases of tort where sympathy lies altogether with the other party. In federal courts material advantage may be gained from rights not available in many states: the opinion of the judge upon the facts;² the direction of a verdict though there be a scintilla of evidence.³

In order to prevent removal the practice has become familiar for the plaintiff to join the employee — when he is a fellow citizen — as co-defendant with the non-resident employer. If the interests then involved are joint the federal courts cannot acquire jurisdiction, because all the persons concerned are not competent to sue, nor liable to be sued, in those courts.⁴ There may be removal, however, by such defendants as are of diverse citizenship when the interests are separable.⁵ The cause is separable upon which, as against the defendants seeking removal, a distinct suit might have been brought and complete relief afforded without all of the original defendants.⁶ A cause would seem always to

¹² Opinion of the Judges, 77 Leg. Int. 117 (1920).

¹ See *Zigich v. Tuolumne Copper Mining Co.*, 260 Fed. 1014, 1015 (1919). See RECENT CASES, p. 985.

² *Simmons v. United States*, 142 U. S. 148 (1891).

³ *Ewing v. Goode*, 78 Fed. 442 (1897).

⁴ *Marshall, C. J.*, in *Strawbridge v. Curtis*, 3 Cranch (U. S.), 267 (1806).

⁵ See 18 STAT. AT L. 470.

⁶ *Barney v. Latham*, 103 U. S. 205 (1880). A suit may, under correct pleading, as this case shows, embrace several distinct controversies and yet be removable in its entirety on the ground that one of them is separable from the rest. The terms "joint" and "several" are not applied to the parties defendant but to the controversies against them. Thus, when the resident employee's liability is rested solely upon non-feasance and no duty to the plaintiff is shown, the motion to remove need not raise the question of the nature of the controversy if preceded by a motion to strike out the party misjoined. See *Prince v. Illinois Cent. Ry.*, 98 Fed. 1 (1899). On the other hand, the joinder of the parties being proper, a removal will be granted so long as the contro-

include separable interests, therefore, whenever the employer is made liable as codefendant with the employee solely upon the ground of *respondeat superior* and not by reason of his participation, either by presence or direction, in the negligent or wrongful act.⁷ Neither is a necessary party defendant in a suit against the other.

Mere separability, however, is not enough for removal. The federal courts have often said: "A defendant has no right to say that an action shall be several which the plaintiff elects to make joint."⁸ To grant a removal in *Warax v. Cincinnati, etc. Ry.*,⁹ therefore, it was necessary to hold that the liabilities of the employer and the employee rest on such distinct grounds as to make the controversies never joint but always separable. The Georgia Court of Appeals has come to the opposite conclusion in *Postal Telegraph-Cable Co. v. Puckett*,¹⁰ upon the theory that the action is joint and not several, "since the same acts of negligence are charged against both defendants" and "no act of negligence is charged against either of the defendants which is not charged against the other."

In an attempt to avoid the long-standing conflict represented by these authorities the Supreme Court relieved the confusion with a rule more confusing. For a rule of law there was laid down a rule of fact. *Alabama, etc. Ry. Co. v. Thompson*¹¹ was to the effect that the right to a removal is to be determined, not by substantive law, but from the record in the state court at the time of the application for removal. For the purposes of removal the cause of action, whether it is joint or not, is to be deemed what the plaintiff, acting in good faith, has undertaken to make it.¹² But a joinder for the sole purpose of defeating the federal

versies are not joint. *Geer v. Mathieson Alkali Works*, 190 U. S. 428 (1903). But it will not be granted if the controversy is joint. *Fraser v. Jennison*, 106 U. S. 191 (1882); *Moloney v. Cressler*, 210 Fed. 104 (1913).

⁷ *Beuttel v. Chicago, etc. Ry.*, 26 Fed. 50 (1885).

⁸ See the opinion of Story, J., in *Smith v. Rines*, 2 Sumner (C. C. A.), 338, 348 (1836).

⁹ 72 Fed. 637 (1896). The distinct nature of the controversies appears particularly in those jurisdictions where the old forms of action are retained.

¹⁰ 101 S. E. 397 (Ga.) (1919). The question was presented to the Supreme Court in *Chesapeake & Ohio Ry. v. Dixon*, 179 U. S. 131 (1900). A Kentucky statute provided that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act . . . damages may be recovered . . . from the corporation and persons causing the same." The Court of Appeals held that a new and joint cause of action was created. The Supreme Court did not disturb this construction.

¹¹ 200 U. S. 206 (1906). This case raised again the issue avoided in *Chesapeake & Ohio Ry. v. Dixon*, *supra*. The court said, at 218: "Upon the face of the complaint . . . the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action. In determining this question the law looks to the case made in the pleadings. . . ."

¹² *Illinois Cent. Ry. v. Sheegog*, 215 U. S. 308 (1909); *Southern Ry. v. Miller*, 217 U. S. 209 (1910); *Chicago, etc. Ry. v. Dowell*, 229 U. S. 102 (1913). If these cases also hold that for which they are often cited, namely, that whether any controversy is joint or several is to be determined by the state court, they are utterly inconsistent with the federal practice in granting removals. In purporting to regard the record in the state court, it is the purpose of the discussion to show, the federal courts are required to hold the controversy never joint; and in granting removals for fraud they perforce ignore "the settled law of the state" that the controversy can be made joint. Consistency, however, is not to be found in the decisions. "That there is no other phase of American jurisprudence with so many refinements and subtleties, as relative

courts of jurisdiction is fraudulent and will not prevent them from deciding that the controversies are really separable.¹³

If the cause is capable of being treated either as joint or as several it is quite well established that the plaintiff may treat it as joint and his motive for so doing is immaterial.¹⁴ There is no occasion to talk of fraud or improper motive. That issue arises only when the cause can be, not joint, only several. The cases reiterate that good faith in the pleadings will permit the cause to be retained in the state courts; that mere failure to establish a joint liability will not be ground for removal.¹⁵ Yet knowledge is imputed where facts might have been known.¹⁶ Taft, J., said: "Courts are not required to be blind to plain facts. The joinder of a fireman or an engineer or a conductor as defendants in an action to recover \$25,000 against a railroad company, without explanation, of itself raises a suspicion that it is not done merely to recover judgment against the employees."¹⁷ And in *Zigich v. Tuolumne Copper Mining Co.*¹⁸ the court has held that it is not enough that the plaintiff believe upon reasonable grounds that the defendants are jointly liable to him, but he must set out the grounds so that the court may determine whether or not they are reasonable and sufficient to sustain the belief.

Now nothing can so sustain a belief that an action is joint as the fact that it is, and nothing can weaken that belief more than the fact that it is n't joint. This is practically the test of fraud to be found in the cases. But because improper motive becomes material only when the complaint alleges to be joint controversies which in point of law cannot be, it would seem that in granting a removal the courts must first decide that the non-resident employer is not an essential codefendant with the resident employee. Having held the cause separable, there is no reason to talk of fraud.

RULE AND DISCRETION IN THE ADMINISTRATION OF JUSTICE. — The last two decades have witnessed a series of persistent attacks upon the administration of justice by the courts. The courts of the nineteenth century were unyielding in their faith that justice must be administered in accordance with fixed rules, which could be applied by a rather mechanical process of logical reasoning to a given state of facts and made to produce an inevitable result.¹ One phase of the reaction against this

to removal proceedings, is known by all who have to deal with them." McPherson, J., in *Hagerla v. Mississippi River Power Co.*, 202 Fed. 771, 773 (1912). This criticism has been made by Mr. Charles A. Boston in "Removal of Suits from State to United States Courts — A Picture of Chaos Demanding a Remedy," 88 CENT. L. JOURN. 246.

¹³ *Wecker v. National Enameling Co.*, 204 U. S. 176 (1907).

¹⁴ *Chicago, etc. Ry. v. Willard*, 220 U. S. 413 (1911); *Chicago, etc. Ry. v. Schwyhart*, 227 U. S. 184 (1913); *Chicago, etc. Ry. v. Whiteaker*, 239 U. S. 421 (1915).

¹⁵ *Whitcomb v. Smithson*, 175 U. S. 635 (1900); *Kansas City, etc. Ry. v. Herman*, 187 U. S. 63 (1902).

¹⁶ *Wecker v. National Enameling Co.*, *supra*, where, at 185, the court said that "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach." This approaches perilously near to "constructive fraud."

¹⁷ See *Powers v. Chesapeake & Ohio Ry.*, 65 Fed. 129, 131 (1895).

¹⁸ 260 Fed. 1014 (1919).

¹ See Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605.

kind of legal administration appears in the creation of administrative boards and tribunals for handling special problems, — such as determining “reasonable” rates and “reasonable” service by a public service company, fixing the amount of compensation under Workmen’s Compensation acts, etc. — for which, it was conceived, the ordinary judicial machinery was too cumbersome or too dilatory.² Another phase of the movement appears in the creation of juvenile courts, domestic relations courts, and even municipal courts, which, while preserving the name and many of the characteristics of courts, yet adopt the methods of executive rather than judicial justice.³ In other words, as compared with ordinary courts, all these tribunals proceed more by the application of a trained intuition to the facts of a particular case, and less by articulate reasoning from stated premises in the form of legal rules or principles.⁴

It is perhaps too early to make a confident evaluation of the effects of these tendencies upon American legal administration. Yet one may feel sure that the ultimately satisfactory solution lies in overhauling and readjusting our legal machinery to meet the present social demands, in a careful study of these new demands and of the means by which to satisfy them, rather than in haphazard blows at the legal institutions which the experience of the past has given us. In this connection it is interesting to note the attempts at legal reform made by Mr. Justice James E. Robinson of the Supreme Court of North Dakota. His actions in giving to the press a weekly letter as to the doings of the court, the number of times each judge is absent from the court, and his manner of writing decisions, have been commented upon elsewhere,⁵ and Mr. Justice Robinson has made a reply to these criticisms which indicates that he is acting in good faith.⁶

Mr. Justice Robinson’s *bête noire* is the doctrine of *stare decisis*. He rarely cites authorities in his more recent opinions,⁷ and he expresses a preference for deciding “every case in accordance with law, reason and justice.” Thus, in *Bovey-Shute Lumber Co. v. Farmers’ and Merchants’ Bank of Leeds*,⁸ he dismissed in a few sentences and without citation of authority the contention of a banking corporation that a contract of guaranty made by its cashier was *ultra vires* and void. Mr. Justice Robinson says: “When it [the bank] takes a loan on land and on crops, it must have a right to improve the land and to care for the crops. In this case the bank had a perfect right to bargain, as they did, for the construction of a house and granary. It was good business, and it should

² See Winslow, “A Legislative Indictment of the Courts,” 29 HARV. L. REV. 395; Pound, “Executive Justice,” 55 AM. L. REG. (N. S.) 137.

³ See Pound, “The Administration of Justice in the Modern City,” 26 HARV. L. REV. 302.

⁴ Speaking of the rulings of an administrative tribunal, Mr. Justice Holmes said: “They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions — impressions which may lie beneath consciousness without losing their worth.” *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585 (1907).

⁵ See Andrew A. Bruce, “Judicial Buncombe in North Dakota and Other States,” 88 CENTRAL L. J. 136.

⁶ See “Judge Robinson’s Reply,” 88 CENTRAL L. J. 155.

⁷ Of twenty-two opinions by Mr. Justice Robinson in 175 N. W. and 174 N. W. 1-1959, only three contain any citations of previous decisions.

⁸ 173 N. W. (N. D.) 455 (1919).

not have led to any litigation." Perhaps it was "good business" for the directors and shareholders of the bank; but how about the depositors, who were not paid for any such risk-taking and whose interests would be jeopardized if the bank engaged extensively in the business of building houses and granaries for its borrowers? The learned justice's opinion shows clearly one of the chief dangers of "administrative" justice, of justice by discretion rather than of justice by rule, namely, the tendency to take snap judgment upon the basis of more obvious and pressing interests, to the neglect of those which are more subtle and far-reaching. Granting for the moment that the decision is supportable, the "reasoning" of the court⁹ should not have ignored the judicial experience of the past in solving the problem of *ultra vires* acts of banking corporations.¹⁰

Brevity in the statement of facts by the court, "so that any child may read and understand it,"¹¹ is another point on which Mr. Justice Robinson insists. Thus, in *Froelich v. Northern Pacific Railway Co.*,¹² an action for personal injuries by a railroad employee, Mr. Justice Robinson, writing for the court, stated the facts so briefly and simply that one had difficulty, upon reading his statement, in seeing why the plaintiff's attorneys were so foolish as to bring an action at all, and still greater difficulty in seeing why a jury gave a verdict and a judge gave a judgment for the plaintiff in the trial court. But upon a rehearing, the court, in a "Per Curiam" opinion, gives a statement of the facts twice as long as that of Mr. Justice Robinson. Thus, Mr. Justice Robinson's method of stating facts did not save the people or the lawyers of North Dakota anything in the way of printing or print-paper after all.

But something far more important than saving print-paper is involved in the court's statement of facts. A full, clear, and impartial statement of facts by the court is necessary in order that the legal profession and the public may determine whether the judge has decided the case in accordance with the law or in accordance with his individual caprice. It is not only an important safeguard against the exercise of an arbitrary discretion by a court of last resort,¹³ but also an essential part of the decision as a precedent for future guidance.

Another of Mr. Justice Robinson's vagaries is his insistence upon a wide use of "judicial notice." Thus in *Ingmundson v. Midland Continental Railroad Co.*,¹⁴ the court reversed a judgment for defendant in an action for damages caused by an alleged nuisance due to the running of defend-

⁹ The decision was unanimous, but two of the justices concurred in the result only.

¹⁰ See, for example, *Bowen v. Needles, etc. Bank*, 94 Fed. 925 (1899); *Citizens' National Bank v. Appleton*, 216 U. S. 196 (1910). See also *COOK, CORPORATIONS*, 7 ed., § 681.

¹¹ See "Mr. Justice Robinson's Reply," 88 CENTRAL L. J., 155, 156.

¹² 173 N. W. (N. D.) 822 (1919).

¹³ Thus, in the case just cited, granting that the decision was proper, no one could tell from reading Mr. Justice Robinson's opinion that the jury had, upon special interrogatories, found the defendant negligent and the plaintiff not negligent, that there was some evidence upon which to base these findings, and that the real issue in the case was whether or not this evidence was sufficient to go to the jury. See the dissenting opinion of Mr. Justice Bronson. In this connection see also *Wingen v. Minneapolis, St. Paul & S.S.M. Ry. Co.*, 173 N. W. (N. D.) 832 (1919). It is not meant to be denied that courts have in many instances written statements of facts which are unduly prolix, and cited authorities needlessly. There is no need for going to either extreme.

¹⁴ 173 N. W. (N. D.) 752 (1919).

ant's trains over a right of way adjoining plaintiff's premises. Mr. Justice Robinson, dissenting, says: "The complaint not only fails to state a cause of action, but also it shows that plaintiff has no cause of action. . . . In reading such a complaint the court must take judicial notice of such facts as are commonly known to intelligent persons within the jurisdiction of the court. We must take judicial notice of the fact that defendant does operate a little railroad running south from Jamestown, with small engines and light trains, and not with any such mogul engines and trains as pass over the main line of the Northern Pacific Railway. . . . *In so far as the complaint asserts mere exaggerations which are known to be untrue, it should be disregarded.*"¹⁵ In *England v. Townley*,¹⁶ a suit for libel, Mr. Justice Robinson, dissenting, maintained that the complaint did not state a cause of action, saying: "The people are paying less and less regard to such newspaper stuff, so that no one suffers from it, and the courts are no longer disposed to regard mere exaggerations which are manifestly untrue."¹⁷

Judicial justice implies a right to be heard, which in turn implies a right to be confronted with the facts upon which the tribunal relies in denying one's claim, and to be given an opportunity to rebut them. While an exception is made in the case of facts which are notorious,¹⁸ this does not extend to a judge's personal observation of the particular facts of a case.¹⁹ If the tribunal relies upon its own private knowledge, it in effect prejudices the plaintiff's case and denies him "due process of law."²⁰ Here again the dangers of discretion untrammelled by rule are obvious.

In fairness, however, it must be said that Mr. Justice Robinson's methods sometimes find their appropriate field. Thus, in questions of fact in divorce cases,²¹ and in questions of procedure,²² the exercise of judicial discretion, within broad limits such as "due process," appears at its best. In the case just cited the court said: "The rule of *stare decisis* is especially applicable to decisions on matters of procedure and practice." Mr. Justice Robinson said: "I do strenuously dissent to the building of error upon error. I concur in the result, but not in the reasoning of the court or the *stare decisis*." It is submitted with deference that if there is any field in which the doctrine of *stare decisis* is least important, it is in the field of procedure. No man can acquire a vested right in his opponent's procedural error.

On the whole, one who is in warm sympathy with legal reform may

¹⁵ Italics ours. Note the way in which Mr. Justice Robinson, after laying down the rule as to facts of common knowledge, applies it to facts derived from his personal observations.

¹⁶ 174 N. W. (N. D.) 755, 758 (1919).

¹⁷ The appeal was from an order overruling a demurrer to the complaint, hence there was no evidence before the court.

¹⁸ See WIGMORE, EVIDENCE, § 2565.

¹⁹ *Ibid.*, § 2569.

²⁰ *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88 (1913) (*semble*). At page 93 Mr. Justice Lamar, speaking for the court says: ". . . manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute."

²¹ *E. g. McBride v. McBride*, 174 N. W. (N. D.) 870 (1919); *Ford v. Ford*, 173 N. W. (N. D.) 454 (1919).

²² *Horton v. Wright, Barret & Stillwell Co.*, 174 N. W. (N. D.) 67 (1919).

well feel that little, if any, lasting good will be accomplished by haphazard attempts to break away from justice according to rule. Before rejecting utterly the experience of the past, legal reformers should make a careful study of the ends to be attained, and of the fields in which rule, or discretion, as the case may be, will conserve the most and sacrifice the least of the interests which the law has to secure. Only thus can the courts follow "the path of the law."²³

RECENT CASES

ALIENS — NATURALIZATION OF ALIENS — STATUS IN THE BRITISH ISLES OF A PERSON NATURALIZED IN AUSTRALIA. — A natural-born German emigrated from Germany in 1878 to Australia, where he resided until 1908, when he was naturalized. Later he went to England and was residing there in 1914. Failing to register as an alien, he was convicted under the provisions of the Aliens Restriction Act of 1914 (see 4 & 5 GEO. V, c. 12). *Held*, that the conviction was proper. *The King v. Francis, Ex parte Markwald*, [1918] 1 K. B. 617.

The defendant in the above case brought a proceeding in the nature of a petition for a declaration that he was not an alien. *Held*, that it be denied. *Markwald v. The Attorney General*, 36 T. L. R. 197.

For a discussion of these cases see NOTES, p. 962, *supra*.

AGENCY — BROKERS — SECRET AGREEMENT TO POOL COMMISSIONS VOID AS AGAINST PUBLIC POLICY. — In a real-estate transaction a third party brought together the respective agents for a buyer and seller and the three agreed to pool and divide commissions. The seller has paid the commission due into court and the agent of the buyer and the third party each claim one third. *Held*, that the third party can recover, but the agent for the buyer can not. *Williams v. Knight Realty Co.*, 217 S. W. 753 (Tex.).

A broker, though an agent in a limited sense, owes the party he represents the same measure of undivided loyalty which the law exacts from an ordinary agent toward his principal. See *Young v. Hughes*, 32 N. J. Eq. 372, 383. Consequently he may not put himself in a position where his interests would be adverse to those of his principal. *Quinn v. Burton*, 195 Mass. 277, 81 N. E. 257. Thus, he cannot secretly represent two parties with conflicting interests. *Rombeck v. Pattillo*, 104 Ga. 777, 30 S. E. 962; *Bunn v. Keach*, 214 Ill. 259, 73 N. E. 419. An exception is made where his equivocal conduct is assented to by the principals. There dual agency is permitted. *Rowe v. Stevens*, 53 N. Y. 621. There also he may agree to pool commissions with the broker of the other party. See *Sullivan v. Tufts*, 203 Mass. 155, 157, 89 N. E. 239, 240. But pooling arrangements made secretly are void, being inimical to public policy. *Quinn v. Burton, supra*; *Corder v. O'Neill*, 207 Mo. 632, 106 S. W. 10. This is so, even though the price of the property is fixed by the principal. *Levy v. Spencer*, 18 Col. 532, 33 Pac. 415. These engagements unconsciously tend to subordinate the interests of the principals to the desire to carry through the particular scheme of the brokers. That being the case, the *bona fides* of an individual transaction will afford no excuse. *Smith v. Pacific Vinegar Works*, 154 Cal. 352, 78 Pac. 550. Nor will custom. *Walker v. Osgood*, 98 Mass. 348. In the principal case the right of the third party is clear. But the agent for the buyer, relying as he did on an illegal contract, could not succeed.

²³ See Oliver Wendell Holmes, "The Path of the Law," 10 HARV. L. REV., 457.

BAIL — LIABILITY TO ANSWER CHARGES NOT NAMED IN BAIL BOND. — The plaintiff as surety entered into a recognizance with a party committed for trial on a charge of indecent assault. The condition of the bond was that the accused should appear and plead "to such indictment as may be found against him by the grand jury for and in respect to the charge aforesaid . . . and should not depart the court without leave." An indictment for rape was returned by the grand jury. The accused failed to appear. The plaintiff moved to set aside an order authorizing the estreat of the recognizance. *Held*, that the motion be dismissed. *The King v. Mandacos*, 50 D. L. R. 427 (Nova Scotia).

Some courts consider the bail bound only when an indictment is returned charging the crime named in the recognizance. *Queen v. Wheeler*, 1 CAN. L. JOUR. (N. S.) 272; *Queen v. Ritchie*, 1 CAN. L. JOUR. (N. S.) 272. Others regard the recognizance as effecting a substitution of the bail for the jailer, and hold him, although the indictment be based on a different act from that underlying the recognizance. *Pernitti v. People*, 99 App. Div. 391, 91 N. Y. Supp. 210. See 18 HARV. L. REV. 539. A sound intermediate rule prevails, however. This rightly accords independent effect to the undertaking that the accused shall not depart the court without leave, but confines its application to appearances in proceedings connected with the criminal act for which he was committed. Thus, though no indictment be returned, or a *nolle prosequi* be entered, the bail remains bound until the accused is formally discharged. *State v. Stout*, 11 N. J. L. 124; *Silvers v. State*, 59 N. J. L. 428, 37 Atl. 133. See also *State v. Hancock*, 54 N. J. L. 393, 24 Atl. 726. The crimes named in the recognizance and indictment must arise out of the same transaction, if the former is to continue effective. *State v. Brown*, 16 Iowa, 314; *Carson v. Brown*, 142 Ga. 667, 83 S. E. 523. But if, as in the instant case, the offenses are merely different degrees of the same crime, the bail remains bound though the indictment charges the graver crime. *State v. Bryant*, 55 Iowa, 451, 8 N. W. 303. See *Gresham v. State*, 48 Ala. 625, 627. *A fortiori*, where the indictment is for the lesser offense. *Campbell v. State*, 18 Ind. 375; *Comm. v. Teevens*, 143 Mass. 210, 9 N. E. 524.

BANKS AND BANKING — DEPOSITS — CREATION OF RELATION OF BANK AND DEPOSITOR. — The plaintiff by mistake sent funds to the defendant bank for deposit. There was no agreement between the plaintiff and the bank creating the relation of bank and depositor. Subsequently, the bank failed to honor the checks of the plaintiff. *Held*, that the bank is not liable. *Rimes & Stubbs v. National Bank of Savannah*, 101 S. E. 315 (Ga.).

A bank is under no general duty to receive funds offered for deposit. *Thatcher v. The Bank of the State of N. Y.*, 5 Sandf. (N. Y.) 121. See *Jaselli v. Riggs Nat. Bank*, 36 App. Cas. (D. C.) 159, 168; *Elliott v. Capital City State Bank*, 128 Iowa, 275, 277, 103 N. W. 777, 778. Similarly, the relation of bank and depositor cannot be created without the consent of the owner of the funds deposited. *Patek v. Patek*, 166 Mich. 446, 131 N. W. 1101. See *Winslow v. Harriman Iron Co.*, 42 S. W. (Tenn. Ch. App.) 698, 700. These propositions show clearly that the relation is essentially contractual in its nature. *Wilson v. First Nat. Bank*, 176 Mo. App. 73, 162 S. W. 1047; *First Nat. Bank of Allentown v. Williams*, 100 Pa. St. 123. See 1 MORSE, BANKS AND BANKING, § 178. Under the facts in the principal case, the existence of such a contract does not appear, for there is no evidence of assent by the bank. And in the absence of such a contract there is no duty to honor checks, for this is merely an incident of the relation of bank and depositor. *Citizen's Nat. Bank v. Importers & Traders Nat. Bank*, 119 N. Y. 195, 23 N. E. 540. See *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 300. The only basis for liability on the part of the bank, in the absence of an express contract, would be such conduct

by it as to estop it to deny its assent to a contract of deposit. *Burnell v. San Francisco Savings Union*, 136 Cal. 499, 69 Pac. 144; *Van Allen v. The American Nat. Bank*, 52 N. Y. 1.

BANKRUPTCY — DISCHARGE — FAILURE TO OBTAIN DISCHARGE IN PRIOR PROCEEDING AS GROUND FOR REFUSAL OF DISCHARGE IN SUBSEQUENT VOLUNTARY PROCEEDINGS. — A bankrupt failed to apply for a discharge within the time fixed by statute after adjudication under a voluntary petition (BANKRUPTCY ACT OF 1898, § 14 *a*). After the expiration of that period he filed another voluntary petition and was adjudged bankrupt. A creditor whose debt was provable under both proceedings asked that his claim be excluded from the operation of any discharge that might be granted under an application therefor in the second proceeding. *Held*, that the relief be granted. *Monk v. Horn*, 44 Am. B. R. 472 (C. C. A.).

The Bankruptcy Act limits the time within which an application for discharge may be filed. (§ 14 *a*.) It also enumerates specific grounds for the refusal of a discharge. (§ 14 *b*.) It is settled law that failure to obtain a discharge, for either reason, precludes a bankrupt from procuring, in a subsequent voluntary proceeding, a discharge from debts provable in the earlier one. *In re Cooper*, 236 Fed. 298; *In re Loughran*, 218 Fed. 619; *In re Bacon*, 193 Fed. 34. The reason usually stated for the decisions is that the issue as to the right to discharge from those debts is *res judicata*. See *Siebert v. Dahlberg*, 218 Fed. 793, 794; *Kuntz v. Young*, 131 Fed. 719, 721; *In re Elby*, 157 Fed. 935, 936. See COLLIER ON BANKRUPTCY, 9 ed., 318-319. Where there has been a denial of discharge in the earlier proceeding this reasoning is sound. *In re Krall*, 196 Fed. 402; *In re Kuffler*, 155 Fed. 1018. But this theory would hardly apply to the other class of cases, where there has been no judicial determination upon the merits of the issue. See *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 691; *Foster v. Busteed*, 100 Mass. 409, 412. Here the true basis would seem to be that Congress intended by section 14 *a* to relieve creditors from the necessity of remaining prepared for an unreasonable length of time to prove the existence of grounds for the refusal of a discharge under section 14 *b*; and that this intent would be defeated and the latter provision practically nullified, if a bankrupt were allowed to evade the bar by instituting a second proceeding. This reasoning is set forth in several cases and is confirmed in the principal case. See *In re Cooper*, *supra*; *In re Loughran*, *supra*.

CONFLICT OF LAWS — LETTERS ROGATORY — SERVICE OF PROCESS UPON RESIDENT AT THE REQUEST OF A FOREIGN COURT. — A civil court of Mexico City issued letters rogatory to the federal court in New York requesting that service of summons be made upon a defendant, resident in New York, who was being sued in Mexico upon a contract there made and to be performed. The defendant had no property in Mexico and had not been personally served. A Mexican statute gave the court jurisdiction to render a personal judgment, despite non-residence, where the obligation sued upon was to be performed within the territorial jurisdiction. *Held*, that the request be refused. *In re Letters Rogatory*, 261 Fed. 652 (Dist. Ct., S. D., N. Y.).

Under the civil law, courts have long made use of letters rogatory to accomplish judicial acts in foreign jurisdictions. 1 FOELIX, DROIT INTERNATIONAL, 4 ed., §§ 202, 239 *et seq.*; 5 WEISS, DROIT INTERNATIONALE PRIVÉ, 2 ed., 527. And the practice has been usual in courts of admiralty. HALL, ADMIRALTY PRACTICE, part 2, tit. 19, pp. 37-43. Some common-law courts consider this general power to issue and execute letters rogatory to be inherent to prevent failure of justice. *De Villeneuve v. Morning Journal Ass'n*, 206 Fed. 70. See *In re Pacific Ry. Commission*, 32 Fed. 241, 256. Others, however, view it as of entirely statutory origin. See *In re Letters Rogatory*, 36 Fed. 306; *Matter of Romero*, 56 Misc.

319, 320, 107 N. Y. Supp. 621, 622. Under neither view has the practice been used for any purpose other than to procure the testimony or deposition of a witness otherwise unavailable. See WEEKS ON DEPOSITIONS, § 128. And the execution of letters rogatory rests entirely upon principles of comity. Under the theory of our law a personal judgment against a non-resident is a nullity without personal service of process. *Penmoyer v. Neff*, 95 U. S. 714. And service out of the jurisdiction, even though accepted, is not sufficient. *Scott v. Noble*, 72 Pa. St. 115. Accordingly, in the principal case, if service of process were necessary to give the Mexican court jurisdiction, the federal court was clearly correct in refusing to aid in effecting a result contrary to the policy of our legal system. *Emery v. Burbank*, 163 Mass. 326. If the purpose were merely the protection of the defendant, this result is accomplished without danger of prejudice by giving him informal notice of receipt of the request. The same conclusion was reached by the New York courts in a similar case. *Matter of Romero*, *supra*.

CORPORATIONS — STOCKHOLDERS: POWERS OF MAJORITY — EXPULSION OF COMPETING SHAREHOLDERS BY AMENDING BY-LAWS. — Section 13 of the Companies Act of 1908 (8 EDW. VII, c. 69) permits a company to introduce into its altered articles anything that might have been included in its general articles. A company in pursuance of this power *bona fide* passed an amendment which provided that the directors could require any shareholder who competed with the company's business to transfer his shares to nominees of the directors. The plaintiffs, minority shareholders, carried on a competing business, and a declaration is sought by them that the alteration was invalid as against them. *Held*, that the alteration is valid. *Sidebottom v. Kershaw Leese & Co., Ltd.*, [1920] 1 Ch. 154.

Where a contract with a member of a corporation either expressly or impliedly is made subject to future by-laws as well as to those already existing, a later amendment becomes a binding portion of the contract. *Fullenwider v. Sup. Council R. L.*, 180 Ill. 621, 54 N. E. 485; *Stohr v. San Francisco M. F.*, 82 Cal. 57, 22 Pac. 1125; *Allen v. Gold Reefs of West Africa*, [1900] 1 Ch. 656. Not every alteration, however, will be sustained; the power of change must not be exercised unreasonably. 1 MACHEN, CORPORATIONS, § 702; BOISOT, BY-LAWS, § 123. Thus by-laws which impair vested rights have been held invalid in the United States, though precisely what constitutes a vested right is the subject of much confusion. *Supreme Council A. L. H. v. Champe*, 127 Fed. 541; *Weber v. Supreme Tent K. M. W.*, 172 N. Y. 490, 65 N. E. 258. But see *Andrews v. Gold Meter Co.*, [1897] 1 Ch. 361. Restraints on the alienation of stock have uniformly been held invalid. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954; *Bloede Co. v. Bloede*, 84 Md. 129, 34 Atl. 1127. And so with restrictions on the right of members to sue the corporation. *Insurance Co. v. Morse*, 20 Wall. (U. S.) 445; *MacMahon v. Sup. Tent. K. M. W.*, 151 Mo. 522, 52 S. W. 384; *Hope v. International Fin. Soc.*, 4 Ch. D. 327. A by-law which constitutes an unreasonable restraint of trade is also void. *Ipswich Tailors Case*, 11 Coke, 53 a; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822. The English courts give far wider scope to the corporate power of change than do the American courts, possibly because of the broad, inclusive language contained in Section 13 of the Companies Act. See 1 MACHEN, CORPORATIONS, § 721. It was not difficult, therefore, for the court to sustain the altered article in the principal case since it was intended as a reasonable protection of corporate interests and would undoubtedly have been sustained even in the United States.

CORPORATIONS — STOCKHOLDERS: RIGHT TO SHARE IN CORPORATE ASSETS — TRANSFEREE OF STOCK FROM A WRONGFUL STOCKHOLDER. — A stockholder

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brought a representative action on behalf of the corporation against its directors for damages due to the negligent administration of corporate affairs. The plaintiff had acquired a part of his stock from the negligent directors after they had been guilty of breaches of duty. *Held*, that there could be no recovery on this stock. *Harris v. Rogers*, 179 N. Y. Supp. 799 (App. Div.).

By the weight of authority no stockholder can bring a representative action on behalf of the corporation if his transferor participated in the wrong, on the ground that a stockholder, like the transferee of a chose in action, stands in the shoes of his transferor. *Boldenweck v. Bullis*, 40 Colo. 253, 90 Pac. 634. See also *Babcock v. Farwell*, 245 Ill. 14, 41, 91 N. E. 683, 692. *Contra*, *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788. This view overlooks the fact that in a representative action a stockholder acts in behalf of the corporation, and fails to perceive that the guilt of a stockholder should be only a personal bar against his participation in the fruits of the action. See *Babcock v. Farwell*, *supra*. The majority view is also due in part to the interpretation of Equity Rule 94 of the Supreme Court — which allows a stockholder to bring a representative action only if he owned stock at the time of the wrong, or acquired it subsequently by operation of law — as the statement of a substantive equity principle. See *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 656-662, 93 N. W. 1024, 1029-1031. But this rule is merely procedural, to prevent frauds on the jurisdiction of the federal courts. See *Quincy v. Steel*, 120 U. S. 241, 245, 248; *Venner v. Great Northern Ry.*, 209 U. S. 24, 34. It is submitted that the majority view is further objectionable in that it impairs the marketability of stock in general. See WARREN, CASES ON CORPORATIONS, 886, note.

CRIMINAL LAW — TRIAL — REVERSIBLE ERROR TO INSTRUCT JURY CONCERNING A DEGREE OF HOMICIDE LESS THAN THAT SHOWN BY THE EVIDENCE. — The evidence in a murder trial indicated clearly that the killing was accomplished by lying in wait, and that it was done maliciously, deliberately and with premeditation. Over the objection of the defendant, the court instructed the jury as to both first and second degree murder. The jury found the accused guilty of the lower grade. *Held*, that a new trial be granted. *Dickens v. People*, 186 Pac. 277 (Colo.).

It is well established that it is not error for a court to confine its charge to first degree murder, when all the evidence indicates either that grade of the offense or innocence. *Jarvis v. State*, 70 Ark. 613, 67 S. W. 76; *People v. Repke*, 103 Mich. 459, 61 N. W. 861; *State v. Cox*, 110 N. C. 503, 14 S. E. 688. The present case goes a step further, and holds that it is erroneous for a trial court, in such a case, to charge on anything but first degree murder, a view supported by the weight of authority. *State v. Stoeckli*, 71 Mo. 559; *Dresback v. State*, 38 Oh. St. 365. The error consists in the fact that jurors who have a reasonable doubt of the accused's guilt, and who should accordingly vote for an acquittal, may conceivably compromise with that doubt by finding the accused guilty of a lower degree of homicide. See *State v. Mahly*, 68 Mo. 315. Confining instructions to first-degree murder will often be of practical benefit to a defendant, for he thereby obtains the advantage of any aversion which jurors may have to the weighty punishment accompanying conviction. See *State v. Martin*, 92 N. J. L. 436, 447, 106 Atl. 385, 389. It is to be noted that reversals should be restricted to those cases where the defendant objected and excepted at the trial, and where it is very clear that a charge on a lower grade of homicide was inapplicable.

DIVORCE — ALIMONY — WHETHER CONTEMPT IN FAILING TO PAY IS PUNISHABLE BY DISMISSING COMPLAINT. — The plaintiff had brought an action for divorce against his wife. Upon his failure to pay alimony and counsel fees awarded to her, she moved to strike out his complaint. *Held*, that the motion be denied. *Naveja v. Naveja*, 179 N. Y. Supp. 881.

A refusal to pay alimony is a contempt of court, and may be punished by commitment. *Fowler v. Fowler*, 161 Pac. (Okla.) 227. See 30 HARV. L. REV. 518. But as imprisonment is frequently inadvisable, the court often resorts to punishment by denying, in the particular cause, the further use of its process to the delinquent until he has purged his contempt. *Winter v. Superior Court*, 70 Cal. 295; *Casteel v. Casteel*, 38 Ark. 477; *Reed v. Reed*, 70 Neb. 779, 98 N. W. 73. In New York, when the defendant was in contempt, the practice was formerly to strike out his answer and proceed to trial upon the facts alleged by the complainant. *Walker v. Walker*, 82 N. Y. 260; *Delvin v. Hinman*, 161 N. Y. 115, 55 N. E. 386. But the United States Supreme Court held that this was a violation of the Fourteenth Amendment, since it gave the defendant no opportunity to be heard in his own defense. *Hovey v. Elliott*, 167 U. S. 409. And it is especially bad in divorce cases, where the policy of the law requires that no divorce shall be granted except upon the merits. *Trough v. Trough*, 59 W. Va. 464, 53 S. E. 630. See 2 BISHOP, MAR. DIV., & SEP., § 1095. But the Supreme Court indicated that it confined its decision to a situation where the punishment was a denial of a defense. See *Hovey v. Elliott*, *supra*, 444. While the decision of the principal case may be supported upon the ground that it is discretionary with the court whether it will punish for contempt, its observation that it is no longer permissible to strike out the plaintiff's complaint may well be questioned. See *Reed v. Reed*, *supra*, 784.

EMINENT DOMAIN — COMPENSATION — SET-OFF OF BENEFITS CONFERRED ON LAND REMAINING TO OWNER. — In an action to condemn a right of way for a railroad, the court excluded evidence offered by the railway company to show that the land remaining to the owners had increased in value through the building of a depot, stockyards, elevator, and side tracks. No evidence was offered to show that by the construction of the road or its improvements any physical benefits to the land ensued. *Held*, that there was no error. *Gallatin Valley Electric Ry. v. Neible*, 186 Pac. 689 (Mont.).

The courts of the various states have declared several diverse views as to what benefits, if any, may be set off in condemnation proceedings against the damage done to the landowner. See 2 LEWIS, EMINENT DOMAIN, 3 ed., § 687. It is commonly said, however, that general benefits, enjoyed in common with the rest of the community, cannot be set off. *Lanier v. Greenville*, 174 N. C. 311, 93 S. E. 850; *Minneapolis Traction Co. v. Harkins*, 108 Minn. 478, 122 N. W. 450. But deduction of special benefits is usually permitted. *Bauman v. Ross*, 167 U. S. 548; *Ripkey v. Binns*, 264 Mo. 505, 175 S. W. 206; *In re Boyes*, 98 Neb. 671, 154 N. W. 231. Whether, in a particular case, benefits to the landowner are general or special, is a question of fact for the jury. *Colorado Cent. R. Co. v. Humphreys*, 16 Colo. 34, 26 Pac. 165; *Kirby v. Panhandle Ry. Co.*, 39 Tex. Civ. App. 252, 88 S. W. 281. The location of a depot near the property has been held insufficient evidence of special benefit to go to the jury. *Washburn v. Milwaukee R. Co.*, 59 Wis. 364, 18 N. W. 328; *Illinois, etc. Ry. Co. v. Borms*, 219 Ill. 179, 76 N. E. 149. *Contra*, *Peabody v. Boston Elevated Ry. Co.*, 191 Mass. 513, 78 N. E. 392. The same is true of increased transportation facilities. *Portland Co. v. Ladd Co.*, 79 Ore. 517, 155 Pac. 1192; *In re Mantorville Ry. Co.*, 101 Minn. 488, 112 N. W. 1033. *Contra*, *Colorado Cent. R. Co. v. Humphreys*, *supra*. The application of the rule to particular facts is aided by regarding the reason for making the distinction. "Just compensation" requires that benefits to the owner caused by the taking and use should be considered as well as the damage done thereby. See *Bauman v. Ross*, *supra*, 574. But it would be unjust to charge him with general benefits, for they are often speculative and conjectural, and it would be making him pay for benefits which are enjoyed by the rest of the community without any payment. See 3 SEDGWICK, DAMAGES, 9 ed., § 1129.

EVIDENCE — DECLARATIONS IN COURSE OF DUTY — SINGLE CARD FROM A CARD-SYSTEM AS EVIDENCE. — The plaintiff, a physician, in order to prove services rendered to the decedent, offered in evidence a card, showing the name of the decedent, her address, and the dates of all visits made to her. Other evidence showed that such a card was kept for each patient, and the series formed the only books of the plaintiff. *Held*, that the card was not receivable. *Daniel's Estate*, 77 Leg. Int. 134.

Contemporaneous entries made in the regular course of business are a well-recognized exception to the rule that hearsay declarations are not admissible in evidence. *Shove v. Wiley*, 18 Pick. 558; *The Mayor v. Second Avenue R. R. Co.*, 102 N. Y. 572. The habitual accuracy of such entries, the ease with which errors are discovered, and the fear of the consequences of such discovery to the entrant make such evidence sufficiently trustworthy. The fact that pages may be readily substituted in a loose-leaf book, lessening probability of discovery, makes entries in such books less trustworthy. Yet the courts receive them. *Wyman, Partridge & Co. v. Henne*, 127 Minn. 535, 149 N. W. 647; *Armstrong Clothing Co. v. Boggs*, 90 Neb. 499, 133 N. W. 1122. See **WIGMORE, EVIDENCE**, § 1548. Even separate slips, not bound in any way, such as workmen's time slips and cashiers' deposit slips, have been admitted. *New York Motor Car Co. v. Greenfield*, 145 N. Y. Supp. 33; *Ricker v. Davis*, 160 Iowa, 37, 139 N. W. 1110. A rule of evidence admitting a single slip of this sort would be open to the objection that the jury can not, in determining credibility, judge of its accuracy by comparison with other entries. This objection would not apply to the principal case, however, because the card contained various entries made at various times. It resembled a complete ledger page. See *Presley Co. v. Illinois Central R. R. Co.*, 120 Minn. 295, 139 N. W. 609. Thus the principal case can not be supported.

GIFTS — GIFTS CAUSA MORTIS — EFFECT OF THE TRANSFER OF A SAVINGS BANK DEPOSIT TO JOINT ACCOUNT OF TRANSFEROR AND TRANSFEREE — WHAT CONSTITUTES DELIVERY. — Three days before death the intestate, who had a deposit in a savings bank, delivered to the plaintiff the savings account book together with a written order to the bank to pay to the joint account of herself and the transferee. The transfer was accordingly made, and, after the depositor's death, the account was transferred to the plaintiff, who notified relatives of the deceased that she was holding the money for them. *Held*, that the plaintiff is not entitled to the fund. *Hayes v. Claessens*, 179 N. Y. Supp. 153 (App. Div.).

A delivery of the specialty with an intention to transfer the entire property will operate to vest in the transferee the legal and equitable interest in the chose. *Hill v. Stevenson*, 63 Me. 364. See *In re Meyer's Estate*, 125 N. E. 219 (Ind.); *Cogswell v. Newburyport Institution for Savings*, 165 Mass. 524, 43 N. E. 296. And a delivery of the specialty with an intention to convey a joint interest should be effective to that extent. When there has been no delivery of the account book a transfer to a joint account of the depositor and another offers the difficulty that the transferor retains complete control over the subject of the gift. *Denigan v. Hibernia Loan & Savings Society*, 127 Cal. 137, 59 Pac. 389; *Norway Savings Bank v. Merriam*, 88 Me. 146, 33 Atl. 840. But even in such a case the gift has been enforced as a valid chose against the bank. *Deal's Administrator v. The Savings Bank*, 120 Va. 297, 91 S. E. 135. Or as a trust. *Booth v. Oakland Bank*, 122 Cal. 19, 54 Pac. 370. Or even as a gift. *State Bank v. Johnson*, 151 Mich. 538, 115 N. W. 464. The court has apparently confused the case with the situation where the donor retains complete control. It finds its solution in an absence of an intention on the part of the donor to make a gift. Although the donor may not have intended to vest the full beneficial ownership in the donee, there was an intention to give complete control

and the legal title. This should be sufficient after the bank has made the transfer.

HUSBAND AND WIFE — RIGHTS AND LIABILITIES OF WIFE AS TO THIRD PARTIES — WIFE NOT LIABLE FOR FUNDS FRAUDULENTLY OBTAINED BY HUSBAND AND SPENT BY HER IN GOOD FAITH. — The defendant's husband misappropriated funds belonging to his principal, the plaintiff's decedent. Part of the funds he deposited to the credit of defendant's bank account. The defendant in good faith used the money for household expenses and in cash advances to her husband. In an action for money had and received, *held*, that the complaint be dismissed. *Seagle v. Barreto*, 179 N. Y. Supp. 856 (App. Div.).

A depository of stolen money who returns it to the thief before notice of the theft is not liable. *Hill v. Hays*, 38 Conn. 532. Nor is an agent who disposes of a negotiable instrument apparently belonging to his principal, and turns the proceeds over to the latter. *Spooner v. Holmes*, 102 Mass. 503. Consequently, as to the funds that the defendant turned over to her husband and those which she disbursed generally at his behest she should be protected. But as to the money expended on necessities for herself she not only acted as agent but was also the recipient. That being true and the expenditure made being beneficial, she could not plead change of position as a defense, if she were a donee. See *WOODWARD, QUASI CONTRACTS*, § 29. But she is more than a donee. Her services, it is true, are not consideration, the duty to render them arising from the marriage relation. *Blaehinska v. Howard, etc. Home*, 130 N. Y. 497, 29 N. E. 755. She has, however, a legal claim on her husband for necessities. *Goodale v. Lawrence*, 88 N. Y. 513; *Cunningham v. Cunningham*, 75 Conn. 64, 52 Atl. 318. See 1009 N. Y. CONSOL. L., DOMESTIC RELATIONS LAW, § 51. And the release of that claim is value and gives her indefeasible title to the money. *Miller v. Race*, 1 Burr. 452; *First Nat. Bank v. Gilbert*, 123 La. 846, 49 So. 593. On this reasoning the result of the case can be supported.

HUSBAND AND WIFE — TENANCY BY ENTIRETIES — WHETHER PERSONALTY MAY BE HELD BY THE ENTIRETY. — An agreed statement of facts set forth that funds which were the proceeds of real estate owned in entirety by a husband and his wife and of personal property also owned by them were used to purchase store property both real and personal. The administrator of the husband's estate excepted this property from his accounts as property of the wife, and the account was allowed by the Probate Court. *Held*, that there was no error. *George v. Dutton's Estate*, 108 Atl. 515 (Vt.).

In some jurisdictions married women's acts have abolished estates in entirety and have substituted therefor tenancy in common. *Thornley v. Thornley*, [1893] 2 Ch. 229. See *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824. In other states tenancy by the entireties still exists. *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. 695; *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337. If realty is held in entirety, estates in entirety may exist in personality growing out of the realty. *Vartie v. Underwood*, 18 Barb. (N. Y.) 561. At common law, chattels could not be held in entirety. See 1 BISHOP, MARRIED WOMEN, § 211. Whether choses in action which do not come within the doctrine of conversion can be held in entirety has been disputed. The orthodox common-law view is against estates in entirety in any personality. *Blake v. Jones*, Bail. Eq. (S. C.) 141; *Re Albrecht*, 136 N. Y. 91, 32 N. E. 632. See 21 HARV. L. REV. 446. It is strange that since the passage of the emancipation statutes courts should follow the analogy of realty when dealing with personality. Since estates in entirety in personality were not recognized at common law *a fortiori*, they should not be sanctioned under the statutes which aim to abolish antiquated doctrines. But the possibility of estates in entirety in personality finds some support. *Phelps v. Simon*, 159 Mass. 415, 34 N. E. 657; *Bramberry's Appeal*, 156 Pa. St. 628, 27 Atl. 405.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — AGREEMENT TO PROCURE EVIDENCE. — An attorney contracted with his client to litigate a claim for 40 per cent of the recovery. He then agreed that the client, who was a co-party in the action, should look up the evidence in the case for 20 per cent of the lawyer's fee. After the claim had been successfully litigated, the client sued for a breach of the agreement. *Held*, that the contract to procure evidence is illegal. *Johnson v. Higgins*, 108 Atl. 647 (Del.).

An agreement with a layman, stranger to the litigation, to compensate him for procuring evidence to be used in an action, is valid. *Hare v. McGue*, 178 Cal. 740, 174 Pac. 663. But such a contract is illegal, because against public policy, in that it tends to promote perjury and the fabrication of evidence, if the remuneration is contingent upon the character of the evidence to be produced. Such is the case when the evidence is to conform to an assumed state of fact. *Neece v. Joseph*, 95 Ark. 552, 129 S. W. 797. Or when the right to compensation is contingent upon the successful termination of the suit. *Stanley v. Jones*, 7 Bing. 369, 378; *Quirk v. Muller*, 14 Mont. 467, 36 Pac. 1077. Cf. *Haley v. Hollenback*, 53 Mont. 494, 165 Pac. 459. An agreement, however, with one not a stranger in interest to the litigation, to compensate him for securing evidence to sustain a defense, has been held unobjectionable, though remuneration was to be contingent upon success. *Wellington v. Kelly*, 84 N. Y. 543. Still more clearly, such an agreement would seem valid when made, as in the principal case, with a party to the litigation. His interest, as a party, in procuring a recovery, is stronger than his interest under the contract. The contingency, therefore, which might well induce a stranger in interest to manufacture evidence, will have no such effect upon him.

JUDGMENTS — FOREIGN JUDGMENTS — JURISDICTION CONFERRED BY APPEARANCE AFTER JUDGMENT. — An Ontario court gave judgment against the defendant, a resident of Alberta. For this judgment there was no jurisdiction. Later the defendant appeared, moved to set aside the judgment, and offered to defend on the merits. The motion was granted and an order to vacate the judgment given, but on conditions with which the defendant could not comply. Later, on motion of the plaintiff, an order vacating the order to vacate the judgment was given. The plaintiff then sued in Alberta on the Ontario judgment. *Held*, that the plaintiff recover. *Bank of Ottawa v. Esdale*, 1 W. W. R. 283 (Alberta).

For a discussion of the principles involved in this case see Notes, p. 960.

LEGACIES AND DEVISES — PAYMENT — PRIORITY OF GENERAL LEGACY OVER RESIDUARY TO INCOME DURING FIRST YEAR. — A will contained general legacies of \$97,000 and also provisions for a residuary legacy. The assets amounted to only \$93,000. During the first year after the testator's death, the principal earned interest amounting to \$4500. *Held*, that this should go to the general legacies. *Bennett's Estate*, 77 Leg. Intell. 152.

The residuary legacy bears all losses from insufficiency of assets and is not entitled to abatement of general legacies. *In re Tille Guarantee & Trust Co.*, 195 N. Y. 339, 88 N. E. 375. See 2 WOERNER ON ADMINISTRATION, 2 ed., 452. Similarly, lapsed and void legacies will go to make up deficiencies in the general legacies rather than to the residuum. *Nickerson v. Bragg*, 21 R. I. 296, 43 Atl. 539; *Wetmore v. St. Luke's Hospital*, 56 Hun. 313, 9 N. Y. Supp. 753. General legacies enjoy this priority even where the changes take place after the death of the testator. *Pace v. Pace*, 271 Ill. 114, 110 N. E. 878; *Porter v. Howe*, 173 Mass. 521, 54 N. E. 255; *Willmott v. Jenkins*, 1 Beav. 401. These results are part of the general rule, based upon the imputed intention of the testator, that a residuary legatee takes only after the paramount claims, including general legacies, have been met. Under this rule the principal case is clearly right, for the income earned must be considered a part of the estate.

LIMITATION OF ACTION — ACCRUAL OF ACTION — EFFECT OF APPEAL ON RUNNING OF STATUTE OF LIMITATIONS. — A suit was brought for money paid upon an existing consideration which later failed through judicial action setting the transaction aside. The statute of limitations required suit for such money to be brought within three years from the date of the failure of the consideration (1877 INDIAN LIMITATION ACT, Art. 97). This action was brought within three years of the dismissal of an appeal from the decree setting aside the original transaction, but more than three years from the decree of the lower court. *Held*, that the action is barred. *Boid v. Chowdhury*, 26 Madras L. T. R. 131 (Privy Council).

Where an appeal has the effect of suspending the judgment from which appeal is taken, the running of the statute of limitations on a cause of action arising out of the judgment should likewise be suspended. *Irvine v. Bankard*, 181 Fed. 206; *Bowen v. Lovewell*, 119 Ark. 64, 177 S. W. 929; *Donovan v. Dickson*, 37 No. Dak. 404, 164 N. W. 27. If a stay or supersedeas bond or other security named in the statute be given, an appeal will suspend the original judgment. *Hubbard v. Bank of Los Angeles*, 120 Cal. 632, 52 Pac. 1070; *Coombs v. Barker*, 33 Mont. 74, 81 Pac. 737. And even though no security is given, this is true under some statutes. *Sunter v. Sunter*, 204 Mass. 448, 90 N. E. 561; *Merrifield v. Piano Co.*, 238 Ill. 526, 87 N. E. 379. But in general, if no security be given, a judgment is not affected by an appeal. *In re Nat'l Metal Co.*, 155 Fed. 600; *Ex parte Meyer*, 209 N. Y. 59, 102 N. E. 606. And in the principal case, the court found this to be the case under the Indian law. The cause of action accrued to the plaintiff at the time of the original decree. Since that decree is enforceable notwithstanding the appeal, there is no reason why the statute of limitations should be suspended during the appeal. *Delay v. Yost*, 59 Kan. 496, 53 Pac. 482; *Bank of Stockham v. Weins*, 12 Okla. 502, 71 Pac. 1073; *Howard Ins. Co. v. Silverberg*, 94 Fed. 921.

PROXIMATE CAUSE — MUNICIPAL CORPORATIONS — NOTICE OF ONE DEFECT IN SIDEWALK PUTS CITY ON NOTICE OF ANOTHER DEFECT. — An inspector of the appellant city noticed a small hole chipped in the end of a plank in a board walk, and ordered a new plank inserted. The plank, though apparently sound except for the hole, was rotten in the middle; and three days after the inspector's order the respondent was hurt by stumbling through it. The jury found the city negligent in delaying to insert the new plank. *Held*, that judgment for the respondent be affirmed. *City of Winnipeg v. Einarson*, 50 D. L. R. 440 (Manitoba).

The hole was a defect which the city was under a duty to repair. *Upham v. City of Boston*, 187 Mass. 220, 72 N. E. 946. Failure to repair the hole after notice was negligence in the performance of that duty. And it may be assumed from the inspector's order that the reasonable way to repair it was by inserting a new plank. It follows that if the city had done its duty in repairing the hole it would have discovered the defect in the center of the plank. Under these circumstances the city is chargeable with notice of the latent defect in the center, and hence not to repair it constituted negligence. *Dallas v. McAllister*, 39 S. W. (Tex.) 173. This negligence was a proximate cause of the injury; for the only intervening cause between it and the injury was the act of the plaintiff in stepping on the plank, and that act was surely foreseeable. In other words, the city by its negligence took the risk that some one would step on the plank, and the city must be liable for the direct result. See Joseph H. Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633, 650.

REMOVAL OF CAUSES — SEPARABLE CONTROVERSY — FRAUDULENT JOINDER AS GROUND FOR REMOVAL FROM STATE TO FEDERAL COURTS. — In an action brought in the state court against a non-resident corporation and its resident

employee the complaint alleged that the plaintiff had been injured by dynamite caps owned by the corporation and negligently exposed by the employee who was storekeeper. The non-resident defendant obtained a removal to the federal court on the ground of fraudulent joinder. The plaintiff moved to remand, supporting his motion with affidavits of his good faith but without a statement of the grounds for his belief. *Held*, that the motion be denied. *Zigich v. Tuolumne Copper Mining Co.*, 260 Fed. 1014 (Dist. Ct. Mont.).

The plaintiff alleged that while in the employ of the non-resident defendant corporation he was ordered by the foreman, the resident defendant, to go up a telegraph pole, where he was injured by contact with a high-power wire because of the failure of the corporation to provide him a safe place to work and the failure of the foreman to warn him. Because of diverse citizenship the corporation sought a removal on the grounds that the controversies were separable, and that the joinder was fraudulent. *Held*, that the removal be denied. *Postal Telegraph-Cable Co. v. Puckett*, 101 S. E. 397 (Ga.).

For a discussion of these cases, see NOTES, p. 970, *supra*.

RESTRICTION AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — RESTRICTIONS IN PRICE ON RESALE. — A corporation engaged in the manufacture of accessories for automobile tires under letters patent sold its product to jobbers under contracts establishing the resale price of these articles, and refused to sell to any jobber who would not enter into such agreements and adhere to the uniform resale prices fixed. Upon these facts, the corporation was indicted for engaging in a combination rendered criminal by Section 1 of the Sherman Anti-Trust Law. The District Court for the Northern District of Ohio sustained a demurrer to the indictment. A writ of error was brought under the Criminal Appeals Act (34 STAT. AT L. 1246). *Held*, that the judgment be reversed. *United States v. A. Schrader's Son, Inc.*, U. S. Sup. Ct., October term, 1919, No. 567.

For a discussion of this case, see NOTES, p. 966, *supra*.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — THE STEEL CORPORATION CASE. — The United States brought suit under the Sherman Anti-Trust Act against the United States Steel Corporation, asking for dissolution of that corporation and certain of its subsidiaries on the ground that they constituted a monopoly in restraint of trade. *Held*, that the bill be dismissed. *United States v. United States Steel Corporation*, U. S. Sup. Ct., October term, 1919, No. 6.

For a discussion of this case, see NOTES, page 964, *supra*.

RULE AGAINST PERPETUITIES — CHARITABLE GIFTS — REMOTENESS WHERE THERE IS NO PRECEDING GIFT. — Personalty was bequeathed "to the first . . . Orphans' Home . . . built in X," with the provision that "should one of the Homes not be founded there at the time of my decease," the executors should invest the funds "until such time as one of such institutions shall be founded." The executors brought a bill for the construction of the will, that the validity of the gift might be determined. *Held*, that the gift was void. *Re Schjaastad Estate*, 50 D. L. R. 445 (Sask.).

A gift over to a charity from an individual, on a contingency too remote under the rule against perpetuities, is void. *In re Johnson's Trusts*, L. R. 2 Eq. 716; *Smith v. Townsend*, 32 Pa. St. 434. But if the first taker is also a charity, the gift is held valid. *Christ's Hospital v. Grainger*, 16 Sim. 83; *MacKenzie v. Trustees*, 67 N. J. Eq. 652, 669, 61 Atl. 1027, 1034. See 8 HARV. L. REV. 211. This doctrine might be applied with equal logic where there is no preceding gift. Yet it is here well settled that the charity may not take if the contingency upon which it is to vest is too remote. *In re Stratheden*, [1894]

3 Ch. 265; *Kingham v. Kingham*, [1897] 1 I. R. 170; *Girard Trust Co. v. Russell*, 179 Fed. 446. If, however, an immediate gift to charity has been made, though its application is postponed indefinitely, courts adopting the *cy-près* doctrine sustain the gift. *Chamberlayne v. Brockett*, L. R. 8 Ch. App. 206; *Brigham v. Brigham Hospital*, 134 Fed. 513; *Jones v. Habersham*, 107 U. S. 174. And see GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 615. Since the courts look favorably upon charitable gifts, they will search industriously for an intent to vest the gift immediately. *Re Gyde*, 79 L. T. R. 261; *Brigham v. Brigham Hospital*, *supra*. Conceivably, where, as in the principal case, the condition is the establishment of the charitable institution, the funds accumulating meanwhile for its sole benefit, an immediate gift for charitable purposes might be made out. *Cf. Jones v. Habersham*, 107 U. S. 174, 191. But the court's conclusion that the designation of a specific institution as legatee precludes such a construction seems sound. The gift failing, the next of kin were rightly held entitled. *In re White's Trusts*, 33 Ch. Div. 449; *Fowler v. Attorney General*, [1909] 2 Ch. 1; *Brooks v. Belfast*, 90 Me. 318.

STATUTES — INTERPRETATION — SOLDIERS' AND SAILORS' CIVIL RELIEF ACT. — In an action for injuries alleged to have been caused by the negligence of defendant's motorman, the defendant moved for a continuance because the motorman, its sole witness, was in military service in France. The motion was refused on the ground that judgment for the plaintiff would not prejudice the rights of the motorman protected by the Soldiers' and Sailors' Civil Relief Act. *Held*, that the motion be granted. *Ilderton v. Charleston Consolidated Railway and Lighting Co.*, 101 S. E. 282 (S. C.).

A judgment for the plaintiff was reversed and remanded. A Texas statute provided that if this occurred a mandate must be taken out within one year to save the cause. (1913 MCEACHIN'S TEX. CIV. STAT. ANN., Art. 1559.) The plaintiff was in the military service during that period and now moves that issuance of the mandate be ordered. The defendant demurs on the ground that the state statute is mandatory and that the Civil Relief Act is inapplicable. *Held*, that the motion be granted. *Kuehn v. Neugebauer*, 216 S. W. 259 (Tex.).

The federal Soldiers' and Sailors' Civil Relief Act was enacted to suspend temporarily all legal proceedings which might prejudice the civil rights of persons in military service during the war. See ACT OF CONGRESS, March 8, 1918, Art. 1, § 100. The right to stay proceedings was made discretionary with the court. *Konkel v. State*, 168 Wis. 335, 170 N. W. 715; *State v. Klene*, 212 S. W. (Mo.) 55. See ACT OF CONGRESS, March 8, 1918, Art. 2, § 201. Hence if the party in service could still protect his interests, the court need not interfere. *Dietz v. Treupel*, 170 N. Y. Supp. (App. Div.) 108. In some states similar statutes were passed which, however, provided that suspension of proceedings should be absolute and not discretionary. *Thress v. Zemple*, 174 N. W. (N. D.) 85. Such statutes were declared constitutional as not impairing the obligation of contracts. *Pierrard v. Hoch*, 184 Pac. (Ore.) 494. Similar legislation passed during the Civil War was held constitutional. *Breitenbach v. Bush*, 44 Pa. St. 313; *Bruns v. Crawford*, 34 Mo. 330. The federal act prohibited eviction of dependents of a soldier, foreclosure of mortgages on his property except under an order of court, and similar proceedings detrimental to his interests. *Gilluly v. Hawkins*, 182 Pac. (Wash.) 958; *Hoffman v. Charleston Five Cents Savings Bank*, 231 Mass. 324, 121 N. E. 15; *Vaughn v. Charpiot*, 213 S. W. (Tex.) 950. But the benefit of the act was limited strictly to persons in the service. *Howie Mining Co. v. McGary*, 256 Fed. 38; *Harrell v. Shealey*, 100 S. E. (Ga.) 800. The principal cases seem rightly decided. The view of the South Carolina court that the judgment in this suit would be some evidence of negligence in a subsequent suit by the company against the motorman for reimbursement is sufficient ground for a continuance under the broad terms of

the act. See *Logan v. Atlanta R. R. Co.*, 82 S. C. 518, 523, 64 S. E. 515, 516; *Boston & Me. R. R. v. Brackett*, 71 N. H. 494, 496, 53 Atl. 304, 305.

TELEGRAPH AND TELEPHONE COMPANIES — CONTRACTS AND STIPULATIONS LIMITING LIABILITY — EFFECT OF THE MANN-ELKINS ACT UPON LIMITATION OF LIABILITY FOR INTERSTATE MESSAGES. — A telegraph company negligently made an error in the transmission of an interstate unrepeatable message which was sent under an agreement that in case of error, whether due to negligence or other causes, the telegraph company should not be liable for more than the amount paid for the transmission. Under the law of Mississippi the agreement was void. The Mann-Elkins Act of 1910 (36 STAT. AT L. 539) brought telegraph companies engaged in interstate business within the provisions of the Act to Regulate Commerce. *Held*, that state laws have thereby been rendered inoperative and that the agreement is valid. *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, U. S. Sup. Ct., October Term, 1919, No. 91.

A statute of Indiana provided for a penalty to be recovered by the sender for delays in the transmission of unrepeatable telegrams. *Held*, that the statute is inoperative upon interstate messages. *Western Union Telegraph Co. v. Boegli*, U. S. Sup. Ct., October Term, 1919, No. 83.

Many states have held agreements limiting liability void as attempts by telegraph companies to contract themselves out of their common-law liability for negligence. *Ayer v. W. U. Tel. Co.*, 79 Me. 493, 10 Atl. 495; *W. U. Tel. Co. v. Robertson*, 59 Tex. Civ. App. 426, 126 S. W. 629. See Emlin McLain, "Limitation of Liability for Negligence," 28 HARV. L. REV. 550, 561. See also 30 HARV. L. REV. 391. Other states and the federal courts have held them reasonable and valid. *Wheelock v. Postal Tel.-Cable Co.*, 197 Mass. 119, 83 N. E. 313; *Weld v. Postal Tel.-Cable Co.*, 199 N. Y. 88, 92 N. E. 415. *Primrose v. W. U. Tel. Co.*, 154 U. S. 1. But state policy, in the absence of Congressional action, remained unaffected by the federal doctrine. *W. U. Tel. Co. v. James*, 162 U. S. 650; *W. U. Tel. Co. v. Crovo*, 220 U. S. 364. In 1910 Congress extended the Interstate Commerce Act to include telegraph companies engaged in interstate business and provided that messages might be classified into repeated and unrepeatable. 36 STAT. AT L. 544. Some courts have construed this statute to apply only to rates and not to deprive the states of power to apply their own laws of liability. *Des Arc Oil Mill Co. v. W. U. Tel. Co.*, 132 Ark. 335, 201 S. W. 273; *Bowman & Bull Co. v. Postal Tel.-Cable Co.*, 124 N. E. (Ill.) 851. The principal cases apparently go on the ground that the statute appropriates the whole field to the federal courts, without positively enacting the validity of agreements limiting liability. The Supreme Court is thus left free to apply its own view of the common law. *Adams Express Co. v. Croninger*, 226 U. S. 491. A third and preferable view, reaching the same ultimate result, is that the statute positively enacts the validity of the classification of messages into repeated and unrepeatable for purposes of limiting liability. *Gardner v. W. U. Tel. Co.*, 231 Fed. 405; *W. U. Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91.

WILLS — CONSTRUCTION — RULE IN SHELLEY'S CASE — WHETHER ISSUE A WORD OF PURCHASE OR OF LIMITATION — EFFECT OF STATUTE ABOLISHING NECESSITY OF WORDS OF LIMITATION TO PASS A FEE. — A testator devised land upon trust for A for life, and upon her death then for her lawful issue, and if there be more than one, as tenants in common, with a gift over if there be no lawful issue. A statute passed prior to the making of the will provided that in devises of land words of limitation should no longer be necessary to pass the fee. (1890 VICTORIAN STAT. 3620.) The question was whether A took a life estate or an estate tail. *Held*, that A took a life estate. *In re Cust*, [1919] V. L. R. 693 (Australia).

The rule in Shelley's case has no application unless the words used in the

remainder are words of limitation as distinguished from words of purchase. CO. LIT. 319 b. Cf. A. M. Kales, "Application of Rule in Shelley's Case," 28 L. QUART. REV. 148, 152. But whether they are words of limitation or of purchase is a question of construction. *Jordan v. Adams*, 9 C. B. (N. S.) 483; *Arnold v. Muhlenberg College*, 227 Pa. St. 321, 76 Atl. 30. See 1 TIFFANY, REAL PROP., § 132. In devises of land, "issue" has generally been treated as embracing descendants of every degree of the ancestor, and consequently as synonymous with "heirs of the body." *Roe v. Grew*, 2 Wils. 322; *Grimes v. Shirk*, 169 Pa. St. 74; *Kleppner v. Laverty*, 70 Pa. St. 70. This is true even though the issue are to take as tenants in common. See 2 JARMAN, WILLS, 6 Eng. ed., 1944. The reason given is that this is the only way to carry the inheritance to the issue, since if they took by purchase they would take only for their lives. *Jackson v. Calvert*, 1 J. & H. 235. But where words of limitation are superadded which indicate that descent is to be traced, not from the ancestor, but from a new stock, "issue" will be construed as a word of purchase. *Hamilton v. West*, 10 Ir. Eq. Rep. 75; *Lees v. Mosley*, 1 Y. & C. 589. Cf. *Archer's Case*, 1 Co. 66 b. And likewise, if the context plainly shows that by "issue" the testator meant "children." *Ryan v. Cowley*, Ll. & G. t. Sugden, 7. Cf. *Jordan v. Adams*, *supra*. Where, as in the principal case, a statute does away with the necessity of using words of limitation to pass the fee, the reason for construing "issue" as a word of limitation no longer exists. Accordingly, the issue, whether now treated as including only children or all the lineal descendants, would take by purchase a fee simple by way of remainder, and the ancestor, therefore, a life estate only. See 2 JARMAN, WILLS, 6 Eng. ed., 1950, 1951; 27 HARV. L. REV. 673. This result has already been reached in this country and would seem to be sound. *Ward v. Jones*, 40 N. C. 400.

WILLS — UNATTACHED SHEETS — SIGNATURE AT END — PARTIAL REVOCATION.—A sealed envelope marked "Will of John Seiter" was handed by Seiter to his niece with the declaration that it was his will. In the envelope were four papers which evidence tended to show were the remnants of an original will after pieces had been cut out by the deceased himself. One page contained words expressing the *animus disponendi* and a legacy marked "first"; another page contained a residuary clause marked "eighth"; the third paper, an attestation clause; while on the fourth was nothing but the signature and seal of the deceased and signatures of witnesses. There was no reference to the other papers in any of the pages, nor was there continuity of language from sheet to sheet, each expressing a completed thought. *Held*, that probate was properly refused. *In re Seiter's Estate*, 108 Atl. 614 (Pa.).

In Pennsylvania and some other states, *pro tanto* revocation is allowed. *Tomlinson's Estate*, 133 Pa. St. 245, 19 Atl. 482; *Re Kirkpatrick*, 22 N. J. E. 463. See PURDON'S DIGEST (Pa.), 5130 ff. (P. L. 250, 409). See also 23 HARV. L. REV. 558. It may be accomplished by cutting out portions of the paper with intent to revoke the legacies set forth therein. *In re Brown*, 1 B. Mon. (Ky.) 56; *Nelson's Goods*, Ir. Rep. 6 Eq. 569. But before any doctrine of revocation can be applied a complete will must be shown to have existed. See PURDON'S DIGEST, *supra*. Of this there was not sufficient evidence in the principal case. The papers of themselves could not constitute a will in Pennsylvania, for the statutory requirement of a signature "at the end thereof" was probably not satisfied. Cf. *Stinson's Estate*, 228 Pa. St. 475, 77 Atl. 807. See PURDON'S DIGEST (Pa.), 5120, 5122 (P. L. 249). See also 13 HARV. L. REV. 686. Without such a statute it would seem that the papers might constitute a will. The physical position of the signature would be immaterial. *Gale v. Freeman*, 153 Wis. 337, 141 N. W. 226; *Le Mayne v. Stanley*, 3 Lev. 1. Physical connection from sheet to sheet without any lack of internal coherence is sufficient to bring pages together into a will. *Palmer v. Owen*, 229 Ill. 115,

82 N. E. 275; *Rees v. Rees*, L. R. 3 P. & D. 84. Inclusion in a single sealed envelope would seem to be enough physical connection. *Martin v. Hamlin*, 4 Strob. L. (S. C.) 188.

BOOK REVIEWS

THE LIFE OF JOHN MARSHALL. By Albert J. Beveridge. Vol. III: Conflict and Construction (1800-1815). pp. xxii, 644. Vol. IV: The Building of the Nation (1815-1835). pp. xviii, 668. Boston and New York: Houghton Mifflin Company. 1919.

The two volumes of former Senator Beveridge's "Life of John Marshall" now under review complete a work which will rank in American literature not only as the leading biography of the greatest of our Chief Justices, but also as one of the most instructive histories of the American nation in its formative period.

In the period covered by the present volumes — the years from 1800 to 1835 — John Marshall was the principal judicial moulder of American public law; and he was also one of America's leading statesmen. Owing to his learning and skill as a jurist, and especially to his sure grasp of the meaning and purpose of the American Federal Constitution, he was able, by means of his judicial decisions, to shape American institutions along the lines of strength and of unity. Not only did Marshall preserve the Union against disruptive influences in his own time, he also did more than any other statesman, if we except only Lincoln, to preserve the Union in the period of the Civil War. It was Marshall's great achievement that he established a body of sound constitutional doctrine which has served as the bulwark of the Republic in all the periods of its danger from the attacks of hostile forces. Lincoln and the men who worked with him for the Northern cause could hardly have held the states together as a complete and organic whole if they had not built upon the opinions, the sentiments, the tendencies, and the constitutional and legal framework of Federalism, which had been endowed by Marshall with the life and vigour emanating from his genius as a constructive jurist-statesman.

Senator Beveridge's two volumes place this great service of Marshall to his country in its setting of historical environment. In their pages the figure of the man himself stands forth among the other jurists and statesmen of the time. We see them all very clearly and distinctly as they play their parts in the drama of the national life in the early nineteenth century; but above Chase, Burr, Randolph, Wirt, Adams, Jay, and Jefferson, and even above Hamilton, Story, and Kent, towers the majestic personality of the Chief Justice. All of these men of the period were shaping the political and social forces of the nation, and especially the forces of Federalism and Republicanism. But John Marshall, as Chief Justice of the Supreme Court, was in control of a constitutional instrument of commanding power. In Senator Beveridge's volumes we have a vivid picture of Marshall as he uses this instrument in the shaping of those legal and political policies of Federalism which have ever since characterised the American Republic and given it its place among the nations. It is this service of Marshall to the Republic which Senator Beveridge emphasizes in his enlightening and dramatic story of the times.

It is well that the emphasis should be placed upon Marshall's personality and achievement. In a life of Marshall we want the great constitutionalist to play the leading rôle; and, after all, in the biographies of his contemporaries we may find the necessary readjustments of perspective. In reading the biographies of all great men we are entitled to be hero-worshippers if we wish it.

In reading Mr. Beveridge's "Life of John Marshall" we have a vision of the majesty of the Supreme Court; and we exercise our right to admire the heroic Chief Justice as the personification of this majesty.

The scope of the two volumes may be briefly indicated. Volume III deals with the period of "conflict and construction" (1800-1815). The victory of Republicanism led to the assault on the Judiciary; and the power of the Judiciary over legislation was the supreme issue. In this political environment Marshall delivered his celebrated opinion in *Marbury v. Madison*, that an Act of Congress was unconstitutional and void, and must be disregarded by the court. Then followed the Republican plan to subjugate the Judiciary: Federalist judges were to be ousted and Republicans put in their places by a programme of impeachment. The chief object of attack in the impeachment of Mr. Justice Chase of the Supreme Court was undoubtedly the Chief Justice himself; but Chase's acquittal saved the independence of the National Judiciary and made Marshall for the first time secure in the office of Chief Justice. Mr. Beveridge is right in his conclusion that "one of the few really great crises in American history had passed." The setting forth of the causes, progress, and termination of this crisis constitutes the first of the two main tasks of the biographer in Volume III; and any impartial critic of the biographer's work must pronounce it illuminating and just. The latter part of Volume III is concerned in large measure with the conspiracy, capture, and arraignment of Aaron Burr, and the part played by Marshall in the Burr trials. The contest, in the course of the Burr case, between Jefferson and Marshall — between the Executive and the Judiciary — is admirably set forth. To the lawyer the chapter dealing with the Chief Justice's views upon treason is one of the most interesting.

Volume IV deals with "the building of the nation" and with the great cases on constitutional and international law decided by the Supreme Court in the period from 1815 to 1835. Chapter IX presents to us John Marshall as "the supreme conservative," and incidentally tells us of his share in the work of the Virginia Constitutional Convention of 1829-1830.

Throughout both volumes the opinions of the Chief Justice are placed in their setting of political and social life. It is true, as Mr. Beveridge at one place remarks, that "the history of the times is a part of his greatest opinions." It is equally true to say that the history of his greatest opinions is a part of the times. One of the chief merits of both the volumes now under review is that the opinions and the times in which they were delivered are for the first time adequately treated as integral parts of one and the same thing. Mr. Beveridge's volumes do not profess to be treatises on law. Indeed, in his own words, "care has been taken to avoid making any part of the 'Life of John Marshall' a legal treatise." But the reader of legal treatises who wishes to see the law (as shaped by Marshall) in its historical environment, will be well advised to study it in Mr. Beveridge's volumes.

The volumes contain portraits of Marshall and of many of his contemporaries, and also lists of the works cited by the author. The appendices to Volume III contain the paragraph omitted from the final draft of Jefferson's Message to Congress of December 8, 1801; a letter of John Taylor to John Breckenridge containing arguments for the repeal of the Federalist National Judiciary Act of 1801; cases of which Chief Justice Marshall may have heard before he delivered his opinion in *Marbury v. Madison*; a valuable note on recent books and articles on the doctrine of judicial review of legislation; the text, as generally accepted, of the cipher letter of Aaron Burr to James Wilkinson, dated July 29, 1806; an excerpt from the speech of William Wirt at the trial of Aaron Burr; and the essential part of Marshall's opinion on constructive treason delivered at the trial of Aaron Burr on August 31, 1807. Volume IV (pp. 615-668) contains an Index to the four volumes of the complete work.

There are certain main features of the two volumes now under review which it is worth while to indicate. In the first place, these volumes are of great interest and value in that they give us the leading characteristics of Marshall's personality and the chief facts in his public and private life during the years from 1800 to his death in 1835 in his eightieth year. In the second place, the volumes give us much information, presented in an entertaining way, about the life of Marshall's judicial and political contemporaries. The life of Story finds, for instance, a fitting place in the "Life of John Marshall," his friend and colleague. In the third place, the volumes constitute a history of political movements and political parties in one of the most critical periods of American development. In the fourth place, the volumes are a valuable treasury of information on social conditions. In the fifth place, there is a great deal of light thrown by the volumes on the judicial and legal history of the times. In the sixth place, the student of international law will find much of interest. In the words of John Bassett Moore, "it was Marshall's lot in more than one case to blaze the way in the establishment of rules of international conduct." This aspect of Marshall's work is given special treatment in the third chapter of Volume IV. Finally, to the student of American constitutional law Mr. Beveridge's volumes are a storehouse of sound learning. In them the great cases of the early part of the nineteenth century are all set forth — from the point of view of Marshall's biographer and of the historian of the times. As remarked by James Bradley Thayer in his short masterpiece of biography, "John Marshall" — a masterpiece not displaced in the slightest degree by Mr. Beveridge's longer work — "in the field of constitutional law, . . . and especially in one department of it, that relating to the nature and scope of the National Constitution, he was preëminent, — first, with no one second." Senator Beveridge has dealt adequately with Marshall's achievements in this field in which he was so preëminent; and it is this feature of the biography which the lawyer will chiefly prize.

H. D. HAZELTINE.

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HISTORY OF ROMAN PRIVATE LAW: PART III, REGAL PERIOD. By E. C. Clark, LL.D., Emeritus Professor of Civil Law in the University of Cambridge, also of Lincoln's Inn Barrister-at-Law. Cambridge: University Press. 1919.

This is the third part of a work the first portion of which, on the Sources, was published as early as 1906 by the late Professor Clark. At his death the author left materials for a further continuation of it, but Mr. Buckland, who prepared the present installment for the press, is of opinion that they are not sufficiently advanced to warrant their publication under Dr. Clark's name.

In estimating the merits and importance of this work, then, it must be remembered that it is only a part, and a posthumous part, of a large plan, undertaken many years ago and never brought to completion. Obviously a judgment of the present volume must somewhat depend upon its place in the author's whole plan and upon the soundness of that plan itself.

Professor Clark was originally moved to undertake the large task of a new history of Roman law by the feeling that existing treatises generally failed sufficiently to distinguish between the law of one period and that of others; the conviction that a development of a thousand years from the primitive law of a small Italian city state to the refinement and universality of the "classical period" cannot be successfully compressed within the treatment of any single period.

This view had been obscured somewhat by the necessity under which many

of our modern German guides have hitherto labored of combining Roman law proper with *heutiges römisches Recht*. The writers of *Pandektenrecht* have been forced, as Tribonian's committee was itself required, to mould the earlier materials into a system of binding law, which obviously cannot be done without modification of those materials at many points. It is this which has created for the historian of Roman law his greatest problem, the distinguishing of the earlier law in the amended extracts of the Digest, and the difficulty has not been lessened by the fact that our German guides have been under an additional difficulty of the same kind. The German reception of Roman law has been a great stimulus to its study, but Roman law's becoming "common" has possibly further heightened the difficulty of disentangling the earlier from the later. Since the days of Cujas and the Humanists this has been true, at times increasingly so. In the seventeenth and eighteenth centuries it was the order of the "Law of Nature" that must be followed, *Les Loix Civiles dans leur Ordre Naturel* of Domat; in the nineteenth century it was the fusion of native and foreign rules into one practical system. Thus the history of Roman law has since the Glossators been oscillating between the extremes of the practical and the antiquarian, and now the adoption of modern codes seems to be sending the pendulum back again toward the antiquarian. In Germany the older books on *Pandektenrecht* are supplanted on the one hand by commentaries on the German civil code, and on the other by treatises on the pure Roman law, such as Mitteis's *Römisches Privatrecht bis auf die Zeit Diokletians*. In France, M. Cuq's *Institutions Juridiques des Romains* — to take one well-known handbook only — carefully distinguishes the primitive, the classical, and the Justinian law in its treatment, instead of fusing them all in one general account. In England, the late Professor Roby, in probably the best recent English book on Roman law, tried to confine his treatment to "Roman Private Law in the Times of Cicero and of the Antonines."

Such a method certainly makes for clearness of treatment and definiteness of statement and the adoption of this principle is the greatest merit of Professor Clark's general plan. The merits of its execution are possibly somewhat more open to question. The first part, on the Sources, for example, published in 1906, will hardly be much consulted by any one who has Krüger's *Geschichte der Quellen des Römischen Rechts*, an almost perfect book of its kind, which had appeared in both German and French when Clark's first part was published, and has since come out in a second German edition.

The present volume, the third installment of Professor Clark's work, is almost entirely composed of a discussion of the early Roman constitution with long excursions into ethnology. It is hardly possible to judge such a book as a history of Roman law, as most of the part on private law has not appeared, and probably never will appear. What has appeared is comparable in general scope to Karlowa's first volume without the second, but covering a much smaller period of time. In it the author gives an account, often very suggestive and evidently based on an independent examination of the sources, of the whole constitutional development roughly to the establishment of the Republic. This involves some examination of the historical value of the traditional account of early Rome, which the author has, however, made more fully in his first volume. He has included also detailed *excursus* on the patriarchal theory and the institutions of the early Germanic peoples analogous to those of ancient Rome. This makes the treatment somewhat rambling and discursive.

Dr. Clark first takes up the primitive family, and after an examination of the patriarchal theory and of the views of McLennan, Morgan, and others in opposition to it, ends by "preferring the Patriarchal Theory in its simpler fundamental principles . . . to the ingenious structure raised by Bachofen and McLennan upon supports the main recommendation of which appear to be their bizarre and repulsive character."

In like manner he treats the Roman family in the early historic period, comparing it with the kinship groups of the early Germanic peoples; and of the *gens*, with appendices on the Teutonic gilds and the Anglo-Saxon units of local government. Thus he proceeds through the early Roman assemblies to the pontiffs, and finally to the king and to kingship in general, with a section on the Servian system. The book ends with a discussion of the *Leges Regiae*, shorter than one might have expected from the extent of the constitutional part. The general authenticity of these laws as fragments of the customary law probably of the regal period the author is inclined to accept, on account of the nature of their subject matter and their archaic language. In Part I he had already discussed Pomponius's story of their publication by Papirius, whom he prefers with Pais to place in the third century B. C. instead of the first, as Mommsen and Girard conclude.

Taken as a whole, Professor Clark's "History of Roman Law" must be judged as a partial fulfilment of a plan first made nearly half a century ago. The appearance in this long interval of such books as Karlowa's *Römische Rechtsgeschichte*; Cuq's *Institutions Juridiques*, of which three editions have appeared; Krüger's and Kipp's *Geschichte der Quellen*; and others, has made this fulfilment much less important than would have been the case when the work was first undertaken; and Professor Clark's volumes have rendered none of those others obsolete. Nevertheless, though Dr. Clark's History is never likely to displace Krüger's abler discussion of the sources or Cuq's clearer exposition of the principles of Rome's early law, it does furnish stimulating and independent views on many a point in the history of Roman public and private law to which the student may profitably turn.

C. H. McILWAIN.

A LAWYER'S LIFE ON TWO CONTINENTS. By WALLIS NASH. Boston: Richard G. Badger. Copyrighted 1919. pp. 212. Illustrated.

The vast difference between practicing law in the world's metropolis and dabbling in it in a pioneer rural community such as Oregon was a generation ago is a topic full of suggestion both as to the adaptability of the common law system to widely divergent conditions, and possibly as to the limits of that adaptability. Wallis Nash plunged from the one into the other, when at the age of forty in 1879, he left England where he had been a successful solicitor, to make his home in Corvallis, Oregon. The venture that brought him here, the Oregon Pacific Railroad, failed, making some men rich and others, including Nash's little colony, poor, and driving him back to his old profession of law in the new surroundings.

He hardly seems conscious of the light that his experience might shed on one of the great juristic problems of the day — the adaptation of rural pioneer law to urban conditions. His simple narration is concerned rather with his pleasant recollections of vacations and of interesting meetings, both professional and social, with such men as Sir Henry Bessemer, Alexander Graham Bell, Charles H. Spurgeon, Canon Liddon, Herbert Spencer, Charles Darwin, and Mrs. Craik. Occasionally he introduces the lawyers of his day and his pen-sketches of a few of them are remarkably clear. Take, for example, his description of three well-known figures (p. 55): "Sir George Jessel was big, burly, rough-voiced, and with one movable eye that used to revolve in an alarming fashion. He was the most quick-witted of the three, and a most effective advocate. Sir Hugh Cairns was tall, graceful, light-haired, and one of the handsomest of men. His face was that of an ancient Greek. His voice was carefully modulated, but quite cold in tone. Sir Roundell Palmer was held to be the best-equipped lawyer of the day. His delivery in Court was most deliberate and every word counted."

The contrast between the community which he left and that which he entered

may best be illustrated by considering first the Dickens atmosphere of his early days, which he reproduces so successfully that it is sometimes hard to tell where Dickens leaves off and he begins. With this may be contrasted the situation in the New World, where old Mark Savage, the blacksmith in the Oregon wilderness, was heard to grumble, "The darn place is getting too thick for me anyhow — there's folks within half a mile of me whichever way I turn!" (p. 164).

It is a pity that Mr. Nash does not record more of his own impressions of the changed legal conditions — but perhaps it is unnecessary. The story speaks for itself. "I opened," he tells us, "a law office in Corvallis and had immediate introduction into the life of the country lawyer. Much was new, and I was often more at a loss than I showed, although I had been making careful study of the Oregon Code and reports and precedents." Imagine the dignified English solicitor who had encountered the greatest difficulty in winning conservative English capitalists over to that novelty, the telephone, transplanted to a place where he not only has to step out of his office and appear in court, but where as lobbyist on behalf of his clients he has to face a crowd of drenched Oregon farmer-legislators, to keep them in good spirits by speech-making while he breaks the news to them that the new railroad which they are inspecting cannot take them back safely to the capital because of the danger of washouts!

The habit of writing such legal autobiographies has not made so much progress on this side of the Atlantic as it has abroad, and for helping to import the charming tone of the English books of this type, Mr. Nash deserves warm appreciation.

NATHAN ISAACS.

THE YOUNG MAN AND THE LAW. By Simeon E. Baldwin. New York: The Macmillan Company. 1920. pp. 160.

Surely no one is better qualified than Judge Baldwin to tell from personal experience the possibilities which lie before a young man who enters the legal profession. In his well-rounded life of more than four-score years, he has been a successful practitioner at the bar, a member of the Commission which made his native State of Connecticut a leader in the reform of procedural law, Associate and later Chief Justice of the highest court of that State, Governor, author, President of the American Bar Association, and for fifty years a professor of law in a great University. Very naturally his account of the legal profession is given in an optimistic tone. His chapter on the Attractions of the Legal Profession is twice as long as that upon the Objections to Choosing the Legal Profession. The book is more optimistic than the briefer and more statistical book on "The Law as a Vocation," by Frederick J. Allen, recently published. (See 33 HARV. L. REV. 739.) Although he deals at length with the larger ideals of the profession, Judge Baldwin does not neglect such practical details as the amount of money a lawyer may make, or the danger a lawyer runs of becoming irritable and cross-grained, a nuisance to his wife and children. The book is full of quotations of the words of eminent lawyers from Cicero to Chauncey M. Depew. It is interesting and instructive. A young man pausing on the brink of choosing his life-work should read what the legal profession means to one of its foremost votaries.

A. W. S.

INTERNATIONAL PRIVATE LAW OF JAPAN. By J. E. de Becker. Linden: Butterworth and Company. 1919. pp. iii, 149.

This little book purports to give only a general outline of the Japanese Private International Law. Almost one half of its contents is devoted to the

subject of nationality and the position of aliens in Japan. The portion dealing with the Conflict of Laws proper summarizes the principal continental views relating to the subject in hand and states thereupon the rule selected by the Japanese legislator. The treatise is a most elementary one and contains no critical discussion of the subject. There are no references to any decisions nor to the views of Japanese text-writers. As in his many other works on Japanese law the author's object is an extremely practical one, namely, to familiarize Western jurists somewhat with the fundamentals of Japanese law.

Notwithstanding the modest character of the work, it will be welcomed by the students of the Conflict of Laws because it contains a more complete statement of the Japanese law than was available heretofore. Prior to the appearance of this book the only information concerning the Japanese Conflict of Laws accessible to persons not acquainted with the Japanese language was to be found in an article by Yamada, "*Le Droit International Privé au Japon*," 28 CLUNET, 632-639.

ERNEST G. LORENZEN.

A TREATISE ON THE LAW OF INHERITANCE TAXATION. By Lafayette B. Gleason and Alexander Otis. Albany and New York: Matthew Bender and Company. 1919. pp. lxvii, 1138.

The first edition of this book appeared in 1917, and now some three hundred pages have been added in the second edition. Twenty-five out of fifty jurisdictions have in those two years amended their statutes. This class of legislation, like the income tax situation, is still in the transition period. We hope that the authors will keep us up to date until the statutes harden into permanent form. The second edition is chiefly concerned in this worthy task. The original plan of the book is retained. It is: to discuss the nature of the tax, the transfers taxable, the parties and their interests, residence of the decedent, beneficiaries, exemption, remaindermen, etc.; to give procedure in New York, and statutes. The book also contains tables of mortality used throughout the country and much useful information in regard to stock corporations, and addresses of state officers. While emphasis is laid on New York law, lawyers elsewhere will find the state statutes and many of their local decisions in the earlier part of the book.

J. W.

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THE HISTORY OF THE TREATMENT OF *CHOSSES* IN ACTION BY THE COMMON LAW

“ALL personal things are either in possession or action. The law knows no *tertium quid* between the two.”¹ It follows from this that the category of *choses* in action is in English law enormously wide, and that it can only be defined in very general terms. This is clear from the terms of the definition given by Channell, J., in *Torkington v. Magee*,² which is generally accepted as correct. It runs as follows: “‘Chose in action’ is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.” In fact the list of *choses* in action known to English law includes a large number of things which differ widely from one another in their essential characteristics.³ In its primary sense the term “*chose* in action” includes all rights which are enforceable by action — rights to debts of all kinds, and rights of action on a contract or a right to damages for its breach; rights

¹ *Colonial Bank v. Whinney*, 30 Ch. D. 261, 285 (1885), per Fry, L. J., whose dissenting judgment was upheld by the House of Lords, 11 A. C. 426 (1886).

² [1902] 2 K. B. 427, 430.

³ For an exhaustive list see 4 HALSBURY, LAWS OF ENGLAND, 362-365; and for a discussion of the meaning of the term, and an account of the salient features of some of these varieties of *choses* in action, see the following articles in the LAW QUARTERLY REVIEW: H. W. Elphinstone, “What is a Chose in Action?” IX, 311; T. C. Williams, “Is a Right of Action in Tort a Chose in Action?” X, 143; Charles Sweet, “Choses in Action,” X, 303; Spencer Brodhurst, “Is Copyright a Chose in Action?” XI, 64; T. C. Williams, “Property, Things in Action and Copyright,” XI, 223; Charles Sweet, “Choses in Action,” XI, 238.

arising by reason of the commission of tort or other wrong; and rights to recover the ownership or possession of property real or personal. It was extended to cover the documents, such as bonds, which evidenced or proved the existence of such rights of action. This led to the inclusion in this class of things of such instruments as bills, notes, cheques, shares in companies, stock in the public funds, bills of lading, and policies of insurance. But many of these documents were in effect documents of title to what was in substance an incorporeal right of property. Hence it was not difficult to include in this category things which were even more obviously property of an incorporeal type, such as patent rights and copyrights. Further accessions to this long list were made by the peculiar division of English law into common law and equity. Uses, trusts, and other equitable interests in property, though regarded by equity as conferring proprietary rights analogous to the rights recognised by law in hereditaments or in chattels, were regarded by the common law as being merely *choses* in action. The first question, therefore, which must be answered by any one who is writing a history of *choses* in action is the question how English law came to include this great mass of miscellaneous rights under this one head.

It is clear that the diversity of the things included under the category of *choses* in action must lead to a diversity in the legal incidents of various classes of *choses* in action. In fact their legal incidents do differ very widely; for, being different in themselves, they have necessarily been treated differently both by the courts and by the legislature. It is impossible to treat fully of the law of *choses* in action in general; and the various classes of *choses* in action are usually treated, not under this one general category, but under the separate branches of law to which they more properly belong. If we want to know the law, for instance, as to bills and notes, or shares, or copyright, or patents, we should not think of looking for it in a treatise on *choses* in action, but rather in books on mercantile law, company law, or in special treatises devoted to these particular things. Nevertheless the fact that all these things are classed as *choses* in action has had some influence on the shaping of their legal incidents. The original meaning of a *chose* in action — a right to be asserted by an action — has never been wholly lost sight of, and has had some influence even upon

those classes of *choses* in action which differ most widely from the original type. In spite of all differences, they are *choses* in action; and, when questions have arisen which have not been specially provided for by the legislature or otherwise, it has been necessary in order to solve them to have recourse to the original conception of a *chose* in action.⁴ Here, as in other branches of the law, it has been necessary to seek authority on new problems from old cases, which were decided at a time when the law knew only the original type of *choses* in action. Hence the fact that all these things are classed as *choses* in action has left its mark upon the law; and, partly from this cause, partly by reason of the divergencies between the different classes of *choses* in action created from time to time by the courts and the legislature, the law upon many points connected with this subject was long, and still is, to some extent, confused, inconvenient, and uncertain. If, therefore, we would understand the history of the law upon this topic, we must consider the legal incidents of the original type of *choses* in action, and the modifications of those incidents made from time to time both in the original and the later types.

Therefore I shall deal firstly with the growth of the different varieties of *choses* in action; and, secondly, with the legal incidents of these different varieties.

THE GROWTH OF THE DIFFERENT VARIETIES OF *CHOSSES* IN ACTION

In dealing with this subject it will be necessary to say something of the meaning which came to be attached to the phrase "*chose* in action" in the mediæval common law. We shall see that during that period two tendencies are observable. In the first place, the term "*chose* in action" gradually becomes a technical term, and in the second place its meaning tends to expand. When these mediæval developments have been dealt with we shall be in a position to trace the history of the still greater expansion of its meaning which took place in the course of the sixteenth, seventeenth, and eighteenth centuries, firstly and mainly, under the exigencies of the growth of commercial law; and secondly, by reason of the growth of a separate and definite system of equity.

⁴ A very good illustration is afforded by the case of the *Colonial Bank v. Whinney*, 30 Ch. D. 261 (1885), 11 A. C. 426 (1886).

(1) *The Mediæval Development*

Bracton classes "actiones" amongst incorporeal things.⁵ These "actiones," he tells us, are distinguishable from other incorporeal things, such as rents or advowsons, in that they are not recognized as completely the property of a deceased person. He cannot leave them by his will till they have been put in suit and judgment got upon them.⁶ In fact these "actiones" differ widely from the other incorporeal things known to the mediæval common law; for these incorporeal things were regarded as property and assimilated to corporeal things.⁷ The "realism" of the mediæval common law made for the multiplication of these incorporeal things, and classed under this head such things as annuities and corrodies, which in our modern law would be created by contract, and would therefore be classed as *choses* in action.⁸ But mere rights of action were not touched by this realism. An action necessarily involves a definite plaintiff and a definite defendant. The right of action, therefore, is an essentially personal right of one person against another; and it is for this reason that they could not, as Bracton explained, be left by will. This conception of a right of action is reproduced by Fleta,⁹ who classes an "actio" with such inalienable things as "res sacra," "res coronae," and a "liber homo";¹⁰ and it became a recognised principle of the common law. Thus in Edward III's reign it is said that, though the lord of a villein may take an incorporeal thing like a rent which has been granted to the villein, and of which the villein is seised, "that which remains in action to the villein, as for instance the right under an obligation made to him or under a covenant of warranty, the lord cannot take."¹¹

⁵ "Incorporales vero res sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt sicut haereditas, usus fructus, advocaciones ecclesiarum, obligationes, et actiones, et hujus modi," f. rob.

⁶ "Item quaero, an testator legare possit actiones suas? Et verum est, quod non de debitis, quae in vita testatoris convicta non fuerunt nec recognita, sed hujusmodi actiones competunt haeredibus. Cum autem convicta sint et recognita, tunc sunt quasi in bonis testatoris, et competunt executoribus in foro ecclesiastico," ff. 61a, 61b; to the same effect f. 407b, where two cases are cited. Fleta repeats the same rule. 2 FLETA, 57, §§ 13, 14.

⁷ 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 301; 3 *Ibid.*, 85-88.

⁸ 2 *Ibid.*, 300-301; 3 *Ibid.*, 126-127.

⁹ *Supra*, note 6.

¹⁰ "Actio autem, res sacra, res coronae, liber homo, jurisdictio, pax, muri et portae civitatis, a nullo dari debent, ut valida sit donatio," 3 FLETA, 6, § 2.

¹¹ "Item dit fuit, que ceo que est en possession de villein come rent grante al villein de que il est seisi, le Seignior le puit happer, mes ceo que demurt en accion al villein

Thus it would seem that in its earliest sense the term "*choses in action*" meant, as Williams has said,¹² "things in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action."

It is obvious that the number and variety of these rights, and the manner in which they are developed by the law, must to a large extent depend on the law of procedure. The law of actions determines necessarily the conditions under which a right is asserted by action. Now in the mediæval common law the division of actions into real and personal was fundamental. It is to be expected, therefore, that rights which fell within the sphere of the one class of actions would be treated somewhat differently from rights which fell within the other class. This is to some extent the case. In fact it is probable that originally the term "*chose in action*" was applied to a right to bring a personal action. Bracton, following Azo, had laid it down that actions spring chiefly from obligations.¹³ He thus associated the term "action" mainly with the personal action. Apparently this idea took root; for we can see from the case just cited from the Book of Assizes,¹⁴ and from other cases in later Year Books,¹⁵ that the phrase "*chose in action*" is used mainly in connection with rights arising under some one of the personal actions, such as debt, detinue, or trespass. It is not much before the sixteenth century that it is extended to cover rights arising under the real actions. It is then sometimes called a "*chose in action real*," a phrase which points to the fact that *chose in action* was regarded as primarily connected with the personal actions.¹⁶ Even then its connection with the personal actions lived

le Seignior n'avera pas. Come si obligation de dette soit fait al villein, ou covenant ou garrantie fait au villein, de ceo le Seignior n'avera nul avantage," 22 Ass., pl. 37 = BROOKE, ABRIDGMENT, *Chose in Action*, pl. 8.

¹² PERSONAL PROPERTY, 17 ed., 29.

¹³ 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 219-220.

¹⁴ *Supra*, note 11.

¹⁵ See, e. g., Y. BB. 9 HEN. VI, Hil., pl. 7; 19 HEN. VI, Mich., pl. 100; 39 HEN. VI, Mich., pl. 36; 5 EDW. IV, Mich., pl. 22 — a right of action for ravishment of ward which was in the nature of Trespass, HOLDSWORTH, HISTORY OF ENGLISH LAW, 13, n.s.

¹⁶ Thus BROOKE, ABRIDGMENT, *Chose in Action*, pl. 14, abridging a case of 33 HEN. VIII, reports a case in which it was said that, "Si Abbe fuit disseisi de 4 acres de terre, le roy ne poct ceo graunt ouster devant entree fait per luy en ceo, pur ceo que est chose in accion reall, et nyent semble al chose in accion personall on mixt come dett garde et hujusmodi." Note that in Y. B. 2 HEN. VII, Mich., pl. 25, a grant by the crown of a right of re-entry and of a "*chose qui gist en accion*" are spoken of as

on in the definition given by the "Termes de la Ley"¹⁷ and in Blount's Law Dictionary;¹⁸ and signs of the old idea appear even in Blackstone.¹⁹ Long before Blackstone's time, however, it was quite clear that it applied to rights to be asserted by real as well as by personal actions.²⁰ The result of this development was to merge certain ideas which had their roots in the treatment of rights arising from these two classes of actions, and so to give rise to that common-law conception of a *chose* in action which was so largely extended in later law. We must therefore examine the nature of the rights which arose within the spheres of the real and personal actions respectively, and the manner in which these rights came to be merged in the general conception of a *chose* in action.

Since the conception of a *chose* in action was primarily connected with a right arising from a personal action, I shall, in the first place, say something of the manner in which rights of this kind were regarded, and of the contribution made by ideas derived from this source. In the second place, I shall say something of the contribution made by ideas derived from rights arising within the sphere of the real actions. In the third place, I shall indicate the results of the combination of these two sets of ideas.

(i) *The Rights Arising from the Personal Actions.* — In the language of Roman law, personal actions were founded upon an *obligatio*; and an *obligatio* might arise either out of contract or tort. Britton, though he discarded much of Bracton's Roman law, repeats this *dictum*;²¹ and though many of the personal actions of English law cannot be clearly grouped under these categories,²²

if they were separate things, though it would seem that the mention of a right of entry has suggested to Huse, C. J., the idea of a *chose* in action — their similarity is beginning to be perceived.

¹⁷ "Things in action is when a man hath cause or may bring an action for some duty due to him, as an action of debt upon an obligation, annuity, or rent, action of covenant or ward, trespass of goods taken away, beating or such like," cited 9 L. QUART. REV. 311.

¹⁸ "Chose in action is a thing incorporeal, and only a right: as an annuity, obligation for debt, a covenant, voucher by warranty, and generally all causes of suit for any debt or duty, trespass or wrong, are to be accounted choses in action," cited *Ibid.*, 311-312.

¹⁹ 2 COMM., 396-397.

²⁰ *Supra*, note 16. See the definitions given in SHEPPARD'S TOUCHSTONE, and JACOB'S LAW DICTIONARY, cited *infra*, notes 57, 58.

²¹ I. 29. 2.

²² 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 311-312.

the distinction was remembered, and necessarily emerged as the idea of contract came into greater prominence with the growth of the action of assumpsit. But it is clear that a personal action brought either on a contract or a tort is an essentially personal thing. The two parties have agreed, or the plaintiff has been wronged by the defendant. In both cases the cause of action arises from matters affecting these two persons and these only. On that account the common lawyers saw as clearly as the Roman lawyers that such rights of action were personal matters between these two persons. Therefore the assignment of such a right of action by the act of the two parties was unthinkable.²³ Indeed it was with difficulty, and only gradually and partially, that it was allowed to pass by operation of law to the representatives of a deceased person.²⁴ On the other hand, to allow the person entitled to bring the action to release his right to the person against whom it could be brought, involved no logical impossibility; for a personal right can as easily be dissolved as created by the act of the two persons concerned. Therefore just as a personal right, such as a debt, can be created by the agreement of the parties, so the debt and the right of action for it can be released by the converse agreement.²⁵

But as the common law developed, it soon became apparent that certain actions in tort were in substance actions to recover property; and by means of developments both in the actions of detinue and of trespass, the proprietary rights of the owner out of

²³ This was first suggested by 2 SPENCE, *EQUITABLE JURISDICTION*, 850, who pointed out that this was the foundation of the doctrine adopted in every other state in Europe; and that this is the correct view has been proved by Sir F. POLLOCK, *CONTRACTS*, 5 ed., 206, and Appendix, note F.; up to that time lawyers had been content to accept the view put forward by Coke in *Lampet's case*, 10 Co. Rep., f. 48a (1613), that the reason for the rule was the discouragement of maintenance; we shall see that the desire to discourage maintenance and kindred offences has had a very important influence on the law as to the assignability of *choses* in action, *infra*, 1016 *seqq.*; but, though it was a contributory cause to the continuance of their non-assignability, and to other points connected with the law relating to them, it cannot be regarded as being the sole or the earliest cause.

²⁴ 3 HOLDSWORTH, *HISTORY OF ENGLISH LAW*, 458.

²⁵ Litt., §§ 508, 511, 512. In commenting on § 512, which deals with the release of a debt before the time of payment has arrived, Coke says, Co. Litt., 292b, "For that the Debt is a thing consisting merely in action, and therefore, albeit no action lieth for the debt, because it is *debitum in praesenti quam vis sit solvendum in futuro*; yet because the right of action is in him, the release of all actions is a discharge of the debt itself."

possession were coming to be better protected. Thus it was recognised in the sixteenth century that a bailor who had bailed his property had the property in reversion.²⁶ It was also recognised that an owner of goods might retake them from a trespasser,²⁷ and that a mere release of rights of action to the wrongdoer would not bar his right of entry.²⁸ We might therefore have expected that the rights of the owner out of possession would come to be recognised as something more than a mere personal *chose* in action; and that they would develop into assignable rights of property. And, in fact, there are some hints that the law was tending to develop in this direction. Thus in 1431²⁹ Paston, J., said, "if I bail to you a deed to rebail to me, and then I grant the same deed to B, I shall not have writ of detinue against you after this grant, but the said B will have writ of detinue."³⁰ So too in 1491 the validity of a gift by a bailor seems to be maintained by Vavisor;³¹ but it was distinctly denied by Brian, C. J., who held that such rights could not be given.³² But Brian's view did not wholly prevail. The later cases show that modifications were being made. In 1561 it was held that where a woman had bailed property to another and married, her husband could release the right to the property to the bailee.³³ This clearly shows that the bailor's proprietary right was something more than a mere *chose* in action. It was sufficiently proprietary in its character to pass to the husband on marriage. Similarly, it was the fact that a contract of sale gave right to get possession which could be asserted by action of detinue, which is the origin of the rule that a sale passes the property in the goods without delivery.³⁴ In the case of a sale, therefore, it was recognised that a right to the property sold which

²⁶ 1 BROOKE, ABRIDGMENT, *Propertie et Proprietate Probanda*, pl. 33 = Y. B. 22 EDW. IV, Pasch., pl. 29, on which the question was discussed whether cattle let by the lessor for a term could be taken for his debt.

²⁷ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 244-245; *Chapman v. Thumblethorp*, Cro. Eliza. 329 (1594).

²⁸ Litt., § 498.

²⁹ Y. B. 9 HEN. VI, Hil., pl. 17.

³⁰ "Si jeo baille a vous un fait a moy rebailier, et puis jeo grant meme le fait a B., jeo n'aurai bref de Detinue vers vous apres cel grant, mes le dit B aura bref de detinue."

³¹ Y. B. 6 HEN. VII, Mich., pl. 4 (pp. 8-9).

³² "S'il n'ad forsque droit cel don est void; car on ne poit don son droit." *Ibid.*, p. 9.

³³ DAME AUDLEY'S CASE, MOORE, 25.

³⁴ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 282-284.

could be thus asserted was much more than an unassignable *chose* in action. Thus it was held in Sir Thomas Palmer's case³⁵ that the grantee of six hundred cords of wood, to be taken by the assignment of the grantor, had an assignable interest in the wood.³⁶ The ownership of the wood had passed to the grantee, and this ownership — this right to possession — was regarded not as a mere right of action to get possession, but as assignable property.

It would seem, therefore, that there was a tendency to think that rights to chattels, though they could only be asserted by a personal action, were something more than mere unassignable *choses* in action. But this tendency did not develop; and, though the law has come to be settled in this way, it has not, as we shall see,³⁷ been so settled till quite modern times. This was due mainly to two causes. Firstly, it was due to the peculiar development of the personal actions for the recovery of property. Detinue was superseded by the action on the case founded on a trover and a conversion; and this was an action which sounded in tort. It was originally not regarded as being of so proprietary a nature as detinue. Therefore such a right of action was necessarily purely personal and, consequently, a mere *chose* in action. Thus it was held in 1664 in the case of *Powes v. Marshall*,³⁸ by Twisden and Windham, JJ.,³⁹ that, though a husband could alone bring the proprietary action of detinue for things which belonged to his wife before marriage, both must join if an action of trover was brought, because such an action was founded solely on the tort of converting the things. According to this view, the right which was asserted in such an action, though in substance a right of property, was, on account of the character of the action, regarded as a mere *chose* in action. On the other hand, by this date the proprietary aspect of trover was beginning to develop. Hyde, C. J., and Keeling, J., dissented from the view of Twisden and Windham, JJ., holding that the husband could sue alone; and in 1674 in the case of *Blackborn v.*

³⁵ 5 Co. Rep. 24b (1601).

³⁶ "That Cornford had an interest which he might assign over, and not a thing in action or a possibility only." *Ibid.*, 25a.

³⁷ *Infra*, 1017-1018.

³⁸ Sid. 172.

³⁹ "Est diversity inter actions queux affirme property come replevin detinue, etc., car ceux doint estre port in le nosme del baron sole, quia le property est affirme, et actions queux disaffirme property, come trespass, trover, etc., car ceux doint estre port in ambideux lour nosmes, quia sont found sur le tort fait devant le couverture."

*Greaves*⁴⁰ it was held that such an action might be brought either by the husband alone or by husband and wife together. It would seem, therefore, that the objection arising from the form of the action was got over, and that the rights of the owner out of possession were recognised as something more than a mere *chose* in action. But this development was delayed by the second of the two causes mentioned above. Secondly, another very powerful reason, which strengthened the tendency to adhere to the old view that the right of the owner out of possession is a mere *chose* in action, is to be found in a development which was taking place in the law as to the rights arising in the sphere of the real actions.

(ii) *The Rights Arising in the Sphere of the Real Actions.*—The rights arising in the sphere of the real actions were rights to get seisin which were enforceable either by entry or action. The omission to pass any statutes of limitation in the Middle Ages enormously extended the time during which a disseised owner had a right of entry; the legislature extended the number of cases in which such an owner had a right of entry; and the result of these two causes was practically to limit the cases in which a disseised owner had only a right of action to the cases when there had been a descent cast or a discontinuance.⁴¹ This meant that the owner's right to get possession was better protected and more fully recognised, so that, as in the case of chattels, this right to get possession might easily have developed into something more than a mere *chose* in action. But all development in this direction was stopped by the extension which both the legislature and the courts gave to the offences of maintenance and champerty.

It is clear that all legal systems which permit owners out of possession to assign their rights to recover property and their rights under an *obligatio* must recognise that this privilege may be abused. They must recognise that these rights may be assigned to persons who, by their power or influence, may be in a position to put a greater and perhaps an illegitimate pressure on the possessor or on the person who owes the duty and that very dubious rights may be assigned to persons in such a position merely because they are dubious. When, in later Roman law, assignments of *choses* in action were permitted, it was found necessary to enact that the

⁴⁰ 2 Lev. 107, and note, p. 108.

⁴¹ 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 497.

purchaser should not be able to recover from the person liable more than he had paid,⁴² and to prohibit assignments to persons more powerful than the assignor;⁴³ and in 1912 Farwell, L. J., pointed out that a free permission to assign rights of action in tort might lead to blackmailing.⁴⁴ The risk, then, of maintenance is a risk which all legal systems must face if they permit the assignment of *choses* in action.

In England in the Middle Ages the disorderly state of the country, the technicality of the common-law procedure, the expense of legal proceedings, and the ease with which jurors, sheriffs, and other ministers of justice could be corrupted or intimidated, made maintenance and kindred offences so crying an evil that it was necessary to prohibit sternly anything which could in the smallest degree foster them.⁴⁵ Therefore the courts in the Middle Ages stretched the offence of maintenance to its utmost limits; and statutes repeatedly prohibited all practices which could favour it.⁴⁶ Thus it happened that all trafficking in rights of entry upon land were sternly forbidden; and as late as 1540⁴⁷ a statute was passed which sharpened the edge of the mediæval legislation. On the other hand, a permission to release a right of entry to the tenant in possession tends to stop litigation and therefore to discourage maintenance. Such a release was therefore permitted. But so serious and so dangerous was the offence of maintenance all through the Middle Ages and until the Tudors had created a strong and efficient government, so great was the risk that any permission to

⁴² CODE 4. 35. 22.

⁴³ CODE 2. 13. 2. These enactments are cited by MOYLE, JUSTINIAN, 5 ed., 484. At page 482, Dr. Moyle says that while the English lawyers based their opposition to the assignment of *choses* in action on the evils of maintenance, the Romans based it on the personal character of the relations created by an *obligatio*; we have seen that this is not wholly true (*supra*, 1002), but it is true that, owing to the disorderly state of the country in the fifteenth and early sixteenth centuries, the evils of maintenance were more acutely felt, and the need of suppressing it bulked larger than in Roman law.

⁴⁴ "I think it would be exceedingly bad policy to allow a person to sell rights of action for tort which he did not care to run the risk of enforcing himself; as for example to allow a liquidator to put such rights up for auction and sell them to some one who might buy for a small sum of money the chance of recovering a larger sum or possibly of blackmailing." *Defries v. Milne*, [1913] 1 Ch. 98, 110-111.

⁴⁵ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 159; 2 *Ibid.*, 348.

⁴⁶ 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 376; 35 L. QUART. REV. 59 *seq.*

⁴⁷ 32 HEN. VIII, c. 9.

assign rights of entry would lead to acts of maintenance, that it came to be thought that rights of entry upon land were not assignable, because of the risk of encouraging this offence.⁴⁸

In the case of rights of action, indeed, it was recognised that they were unassignable because, though rights to recover property, they were rights of *action*, and therefore essentially personal. For it was thought that as a right to bring a real action must be a right to sue a particular person in possession of the freehold, it was essentially a personal right, consisting only, as Coke said, "in privity."⁴⁹ Any chance that the law would recognise that a dis-seised owner's right to recover his ownership was merely incidental to that ownership, and that he would therefore be permitted to assign his right of ownership, and with it his right of action to recover it, was stopped by the fact that such a permission would obviously encourage maintenance. On the other hand, a release of a right of action to the tenant in possession was allowed for exactly the same reason as a release of a right of entry.⁵⁰

Thus it happened that these rights arising in the sphere of the real actions exactly resembled the rights arising from the personal actions in that they could be released, but could not be assigned. No doubt both their capacity of being released and their incapability of being assigned were partly due to their personal character; but their incapability of assignment was due also and chiefly, in the case of many of these actions, to the dread of encouraging maintenance. The dread of encouraging maintenance bulked so large that the fact that their incapability of assignment was due to the personal character of many of these actions was overlooked; and

⁴⁸ "And first was observed the great wisdom and policy of the sages and founders of our law, who have provided, that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice. . . . But all rights, titles, and actions may by wisdom and policy of the law be released to the terre tenant, for the same reason of his repose and quiet, and for avoiding of contentions and suits, and that every one may live in his vocation in peace and plenty." Lampet's case, 10 Co. Rep. 46b, 48a (1613).

⁴⁹ "Such right, for which the party had no remedy but by action only to recover the land, is a thing which consists only in privity, and which cannot escheat, nor be forfeited by the common law. . . . And it was observed by the justices, that by no act of attainder that ever hath been made, actions were given, but rights of entries, etc." Winchester's case, 3 Co. Rep. 1a, 2b (1583).

⁵⁰ Lampet's case, 10 Co. Rep. 46b, 48a (1613), cited *supra*, note 48.

thus it came to be thought that all rights of action were unassignable for this cause — a point of view which made for the permanence and rigidity of the rule. Indeed, as we shall now see, this dread of maintenance, which arose from the state of law and society in the Middle Ages, has had both a permanent and an unfortunate influence on this branch of the law.

(iii) *The Results of the Combination of the Ideas Derived from the Treatments of Rights of Action Personal and Real.* — Of the effect of the dread of encouraging maintenance upon the power to assign *choses* in action I shall speak in my next section, when I am dealing with the legal incidents of *choses* in action.⁵¹ Here I wish to point out another of its effects — its contribution to the making of a common-law conception of a *chose* in action. It seems to me that it was the influence of this idea which led to the extension of the conception of a *chose* in action to cover rights to bring not only personal but real actions, and therefore to include in this conception not only rights which depended on a contractual or delictual obligation, but also rights which depended upon a claim to the ownership of property. The manner in which this influence was exercised was, it seems to me, somewhat as follows: It is quite obvious that a right of action which is based on a contractual or delictual obligation is entirely personal in its character, and that on that account its release can, but its assignment cannot, logically be allowed. But this is not by any means so obvious where an owner out of possession is claiming from a possessor a thing in his possession by virtue of his right as owner to get possession. There is, as we have seen, no logical reason why such ownership and, with the ownership, the right of action should not be assigned; and in fact there are some signs that the lawyers of the fifteenth and sixteenth centuries might, on this ground, have allowed a modified right to assign the ownership of chattels personal, and, with the ownership, the rights of action.⁵² But the dread of encouraging maintenance had led to the permission to release and to the refusal to permit any assignment of rights of entry and action to land. Thus it happened that rights of action, whether real or personal, had these two important features in common — both could be released, and neither could be assigned. Naturally lawyers did not stop to analyse the reasons why they could be released and

⁵¹ *Infra*, 1016 seqq.

⁵² *Supra*, 1003–1005.

could not be assigned. They looked merely at these two resemblances, and more especially at the fact that both were unassignable; and, as the reason for the non-assignability of rights of entry upon and action for land was only too obvious, they naturally adopted the idea that this reason was applicable to all these rights of action.⁵³ When this had happened it was inevitable that all these rights of action should be grouped together under the comprehensive title "*choses in action*."

Thus we arrive at the original common-law conception of a *chose in action*. We have seen that in 1486 the similarity of a right of entry to a "*chose qui gist en action*" is beginning to be perceived, and that rights of entry or rights to bring a real action were called "*choses in action real*" in 1542.⁵⁴ The fact that all these *choses in action* were treated by the law in a similar manner, coupled with the disuse of the real actions, soon obliterated the distinction between real and personal *choses in action*; and so the common law widened its conception of a *chose in action*, and came to include in it all rights of action, whether enforceable by real or by personal actions. According to the definition given by the "*Termes de la Ley*," it includes more than rights to bring personal actions;⁵⁵ and, though the older idea which connected it with the personal actions lived on,⁵⁶ it is clear both from "*Sheppard's Touchstone*"⁵⁷ and Jacob's *Law Dictionary*⁵⁸ that it included rights to be

⁵³ Mr. Sweet has pointed out, 10 L. QUART. REV. 308, 309-310, that "the fulminations against maintenance and champerty, which abound in the old books, were directed not so much against the maintenance of actions of debt and the like, as against abuses arising from the practice of buying up rights of entry and rights of action for the recovery of land"; and that "one kind of maintenance was distinguished by the old writers as 'maintenance in the countrey,' *manutentio ruralis*, being confined to claims in respect of land, and the very name of champerty shows that the offence had a similar origin;" but the same idea was applied to chattels certainly as early as 1431. Y. B. 9 HEN. VI, Hil., pl. 17. And see POLLOCK, CONTRACTS, 5 ed., App. 700, for a clear account of this case.

⁵⁴ *Supra*, note 16.

⁵⁵ *Supra*, note 17.

⁵⁶ *Supra*, 1002.

⁵⁷ "Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entry to any real or personal thing," page 231, cited 10 L. QUART. REV. 307.

⁵⁸ "Generally all causes of suit for any debt, duty or wrong are to be accounted *choses in action*. . . . A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action and suit for it, and so for the goods, is a *chose in action*: So a debt on an obligation, and power and right of action to sue for the same," *sub. voc. Chose*, 3 ed. (1736).

asserted both by real and personal actions. Thus all memory that there had ever been a distinction between the rights enforceable in the spheres of the real and personal actions, and the possibilities involved in it, disappeared.

(2) *The Later Developments*

It was this mediæval development of the conception of a *chose* in action which paved the way for further extensions in later law. Already at the close of the Middle Ages we can see that the way is being prepared for these extensions. In fact in the late fifteenth and in the sixteenth centuries we can detect three distinct lines upon one or other of which the extensions made in later law will proceed by way of analogy, sometimes more and sometimes less close.

(i) During the sixteenth century *choses* in action were extended from a right to bring an action to the documents which were necessary evidence of such a right. Thus in 1535 a bond was said to be a *chose* in action;⁵⁹ and in 1584 in Calye's case⁶⁰ it was said that charters and evidences concerning freehold or inheritance, obligations, and other deeds and specialities, all came under this head. When the law had reached this point it was inevitable that the many new documents which the growth of the commercial jurisdiction of the common-law courts was bringing to the notice of the common lawyers should be classed in this category. Thus during the seventeenth, eighteenth, and nineteenth centuries such documents as negotiable instruments,⁶¹ stock,⁶² shares,⁶² policies of insurance,⁶³ and bills of lading⁶⁴ were declared to be *choses* in action; and this classification was sometimes recognised by the legislature when it provided that, though *choses* in action, their legal incidents should be in some respects varied.⁶⁵

⁵⁹ 1 Dyer, f. 5b.

⁶⁰ "The said words . . . do not of their proper nature extend to charters and evidences concerning freehold or inheritance, or obligations, or other deeds or specialities, being things in action." 8 Co. Rep. 32a, 33a.

⁶¹ *Master v. Miller*, 4 T. R. 320, 344 (1791), per Grose, J.

⁶² 10 L. QUART. REV. 311-312.

⁶³ *Re Moore*, ex parte Ibbetson, 8 Ch. D. 519 (1878).

⁶⁴ *Caldwell v. Ball*, 1 T. R. 205, 216 (1786).

⁶⁵ 4 WILLIAM AND MARY, c. 3; 9 & 10 WILLIAM III, c. 44 — stock in the funds, cited 10 L. QUART. REV. 312; for the stock and shares of other companies see *infra*, 1027.

(ii) We have seen that the large class of incorporeal things which were recognised by the mediæval common law were treated as far as possible like corporeal hereditaments.⁶⁶ Thus they were taken out of the category of *choses* in action. But we have seen that certain of these incorporeal things, such as annuities and corrodies, had always approximated to personal obligations to pay or perform.⁶⁷ It is not surprising, therefore, that when, in the fifteenth century, the conception of a *chose* in action was being extended to cover all sorts of rights which could be asserted by action, some should have thought that annuities should be included in this category. In 1482 Brian, C. J., said that an annuity was merely a "chose personal" which could not be granted;⁶⁸ and, if this opinion had prevailed there can be little doubt but that it would have been classed under the growing number of *choses* in action. But this view did not prevail. In the same case Catesby pointed out that an annuity was recoverable, not by writ of debt, but by a writ of annuity, and that if granted to a man and his heirs, it would descend to the grantee's heirs.⁶⁹ He argued, therefore, that, though the grantee had no tangible thing, but only a right enforceable by action, that right, like the right to a rent, was a thing which could be assigned;⁷⁰ and, though the view of Brian, C. J., is taken by

⁶⁶ *Supra*, note 8.

⁶⁷ *Ibid.*

⁶⁸ "C'est annuity ne puit estre grant, car c'est n'est que chose personel . . . et ou annuity est grant en fee, si rien soit descend a heir le grantor, l'issue ne serra charge, nient plus que serra per obligation fait per son pere, et ou est dit qu'il est enheritance et discende, et l'heir avera accion de ceo, jeo grant bien, mes quel accion est ceo? certes nul accion mes bref d'Annuity, que n'est que personel, car accion ancestral jamais il n'avera, ou si le pier fuit disseisi de ceo, il n'avera bref d'Entre sur disseisin, ne aura accion real, per que il est en nature de accion personal, est n'est semble a les cases de rent secke, car de ce home avera accion real . . . Et a ce que est dit, qu'il ad enheritance en l'annuity, et per ce il puit grant, Sir, home avera fee simple, et uncore il ne poit grant ce, come si jeo grant a un et ses heirs d'estre mon kerver, il est office de trust que il ne grauntera ouster." Y. B. 21 EDW. IV, Hil., pl. 38 (p. 84).

⁶⁹ "Et a ce que est dit que le bref (of annuity) est en nature de Det, pur ce que le bref est en le *debet*, ils ne sont semblables, car en Annuity home nemy puit aver son ley, mes en det auterment et les executors averont l'accion de Det sur obligation, et nemy le heir, car tiel action de Det ne puit descend, mes l'Annuity puit descend, et l'heir avera bref d'Annuity, quel prove qu'el n'est personnel, ne semblable a action de Det." *Ibid.*, p. 84.

⁷⁰ "Mesme le ley est ou il fuit rent secke devant, issint icy, c'est annuity est real, et coment que il (n') avera action, uncore le grant est bon. Et Sir moy semble qu'il avera bref d'Annuity." *Ibid.*

Perkins,⁷¹ it is Catesby's view which has prevailed.⁷² On the other hand, there was a tendency to regard any incorporeal thing which could not be assigned as a *chose* in action. The influence of this incident of non-assignability was by no means exhausted when it had led to the inclusion under one category of rights arising within the sphere both of the real and the personal actions. Thus an advowson was clearly an incorporeal hereditament. But in 1570 it was said that if the church was void, so that no grant of the next presentation of the church could be made, the right to present was merely a *chose* in action.⁷³ Coke, however, recognised that, though from the point of view of non-assignability it resembled a *chose* in action, it was "not merely a *chose* in action," because it had certain of the other qualities of tangible property.⁷⁴

It is clear, however, that there was a tendency in the sixteenth century to regard any intangible right which was not clearly an incorporeal hereditament, and any non-assignable right, even though it was only temporarily non-assignable, as a *chose* in action. It seems to me that it was due partly to this tendency that such incorporeal property as patents and copyrights came in the eighteenth century to be classed as *choses* in action. Probably if these forms of property had arisen at an earlier stage in the history of the law they would have been regarded as franchises, and therefore as incorporeal hereditaments; for it is obvious that, in the case of the patent, and of that species of copyright which depended upon royal grant, the analogy to the franchise is close;⁷⁵ and that, when

⁷¹ PERKINS' PROFITABLE BOOK, § 101.

⁷² *Baker v. Brook*, Dyer, 65a (1550); *Gerrard v. Boden*, Hetley, 80 (1628). Cf. Maund's case, 7 Co. Rep. 28b (1601).

⁷³ "By Harper, Weston, and Dyer holden, That the grant of the present avoidance is void, because it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right, power, and authority, and also a *chose in action*, and in effect the fruit and execution of the advowson, and not any advowson." *Stephens v. Wall*, Dyer, 282b, 283a.

⁷⁴ "Note, if the church becometh void, albeit the present avoidance be not by law grantable over, yet may the lord of the villein present in his own name, and thereby gain the inheritance of the advowson to him and his heirs: for albeit it be not grantable over, yet it is not merely a *chose* in action; for if a feme covert be seised of an advowson, and the church becometh void, and the wife dieth, the husband shall present to the advowson: but otherwise it is of a bond made to the wife because that is merely in action." Co. Litt. 120a.

⁷⁵ The origin and growth of copyright will be dealt with in a paper which will shortly appear in the YALE L. J. For patent rights see 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 117.

copyright had come to depend upon statute, it was still a privilege which was more like a mediæval franchise than a *chose* in action. But when these things had become recognised as objects of property, franchises were an obsolete and decadent class of property. The time had long passed when the law as to the classes of property protected by the real actions was the most highly developed branch of the law, when the easiest way to protect any right was to treat it as a thing and to give it the protection of an action which was modelled on the pattern of the real actions.⁷⁶ The law of contract was in the ascendant; and as the concept *chose* in action had been extended so as to include such documents of title to property as bills of lading and stocks and shares, it was natural that such property as patents and copyrights should be brought within it.⁷⁷ They were clearly not *choses* in possession, and they were analogous to other things classed as *choses* in action. Thus the way was prepared for the generalization that all personal property known to English law must consist either of *choses* in possession or *choses* in action.⁷⁸ But we shall see that, just as Coke in the sixteenth century was obliged to point out that certain of these *choses* in action were "not merely choses in action,"⁷⁹ so in our modern law the incidents of many of these things classed as *choses* in action show that they are in substance property of an incorporeal kind.⁸⁰ Their inclusion in the class of *choses* in action can only be explained by the history of the manner in which the concept *chose* in action has been gradually and continuously extended by analogy, until it has come to include so many heterogeneous rights that it is a work of some difficulty to discover any resemblance between certain classes of them.

(iii) In the Middle Ages the interest of the *cestui que use* was at first analogous to a *chose* in action; for the trust was originally enforceable only against the feoffee to uses, and not against his heir or assignee.⁸¹ *Cestui que use* had, as Coke said, "neither *jus*

⁷⁶ 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 300-301.

⁷⁷ For a discussion as to whether copyright is a *chose* in action, see 11 L. QUART. REV. 64, 223, 238.

⁷⁸ *Supra*, note 1.

⁷⁹ *Supra*, note 74.

⁸⁰ *Supra*, note 25; *infra*, 1027.

⁸¹ Though not called a *chose* in action by the older authorities, and even distinguished from a trust which was called a *chose* in action by Coke, *infra*, note 84, its legal incidents before it had been developed by the Chancery and regulated by the

in re nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedy was only by subpoena in Chancery."⁸² But the interest of the *cestui que use* had been so shaped not only by the Chancery, but also by the legislature, that his interest had become something very much more than a mere *chose* in action; and this fact was recognised in the sixteenth century.⁸³ But in the sixteenth century the conception of a *chose* in action was beginning to expand. Therefore the common lawyers of that period had no hesitation in asserting that at common law an equitable trust, consisted only "in privity," was unassignable on account of the risk of encouraging maintenance, and was therefore in the nature of a *chose* in action.⁸⁴ It is for this reason that many different kinds of equitable interests are classed as *choses* in action.⁸⁵ But inasmuch as the incidents of such interests are shaped by equity, the fact that they are at law classed as *choses* in action has had very little influence on their development.

Such, then, was the manner in which the concept *chose* in action came to include so many diverse rights. We must now consider the evolution of the law as to the legal incidents of these various classes of rights.

THE LEGAL INCIDENTS OF CHOSSES IN ACTION

The leading characteristics of *choses* in action were ascertained in the days when they were really rights enforceable either by real or personal actions; and these characteristics were either logical deductions from the nature of such rights, or were ascertained by the need to settle the relation of these rights to other branches of

legislature justifies Holmes's statement, COMMON LAW, 407, that it was in substance a *chose* in action.

⁸² Co. Litt. 272b.

⁸³ See note 84, *infra*.

⁸⁴ "It was resolved by all the Justices, that admitting that Sir Thomas Heneage had a trust, yet could not he assign the same over to the plaintiff, because it was a matter in privity between them, and was in nature of a *chose* in action, for he had no power of the land, but only to seek remedy by Subpoena and not like to *cestui que use*, for thereof there should be *possessio fratris*, and he should be sworn on juries in respect of the use, and he had power over the land by the statute of 1 R. 3 Cap. and if a bare trust and confidence might be assigned over, great inconvenience might thereof follow by granting of the same to great men, etc." COKE, FOURTH INSTIT., 85.

⁸⁵ 4 HALSBURY, LAWS OF ENGLAND, 364.

the law. The main characteristic which follows from the nature of these rights is their non-assignability; and this has always been so prominent a characteristic of *choses* in action that the lawyers were inclined to place any right permanently or temporarily unassignable in the category of *choses* in action. Indeed, as we have seen, it was largely due to this reason that all rights of this kind, whether arising within the sphere of the real or the personal actions, were classed together in the single category of *choses* in action.⁸⁶ Other characteristics of these rights were ascertained by the need to settle their relations to the king's rights to the chattels of persons outlawed or attainted, to the criminal law, to the husband's rights in his wife's property, to the law as to taking goods in execution, and to the law of bankruptcy. I shall therefore in the first place say something of the history of the manner in which the legal incidents of the original class of *choses* in action were ascertained by the application of the rules relating to assignment, and by the need to settle their relations to these other branches of the law. In the second place, I shall give some illustrations of the manner in which the legal incidents of this original class of *choses* in action were modified when they were applied to the other varieties which subsequently emerged.

(1) *The Legal Incidents of the Original Class of Choses in Action*

Assignability. — We have seen that the non-assignability of *choses* in action which arose from either a contractual or a delictual obligation was a necessary and logical deduction from the nature of such a cause of action.⁸⁷ They were essentially personal rights — personal to the parties bound by the obligation. We have seen, too, that though this reasoning does not apply so forcibly to actions in which an owner out of possession is claiming to recover his property from another, the same result was produced by the application of the law of maintenance.⁸⁸ No assignment of rights of entry or action to land was allowed till 1845,⁸⁹ because to permit such assignment would tend to encourage maintenance. Naturally the principle of the statutes which had prohibited these assignments in the case of land was extended to actions to recover chattels. In

⁸⁶ *Supra*, 1009-1011.

⁸⁸ *Supra*, 1008.

⁸⁷ *Supra*, 1002.

⁸⁹ 8 & 9 VICT., c. 106.

fact so prominent a place did this reason for prohibiting the assignment of *choses* in action take in English law that it came to be regarded as the only reason for the non-assignability of *choses* in action.

This then was the principle from which the common law started. The main interest of its later history consists in the manner in which it has been gradually and partially modified. In relating this history it will be necessary to deal separately with (i) rights of action of a proprietary character; (ii) rights of action for breach of contract; and, (iii) rights of action of a purely delictual kind.

(i) Rights of action of a proprietary kind can be quickly disposed of. The statutes which prevented any assignment of rights of entry upon or action for land⁹⁰ were so definite that no gradual modification of the rule was possible; and it was not, as we have seen, till 1845 that the legislature permitted their assignment. In the case of chattels both the fact that the action of trover, in which such rights had generally come to be asserted, was of a delictual character, and the objection based on the fear of maintenance, prevented the development of any of those modifications of the strict rule of which we can see some signs in the sixteenth century;⁹¹ and no statute, like the statute of 1845 in the case of land,⁹² has expressly enabled the owner out of possession to alienate.

But it is clear that at the beginning of the eighteenth century and during the nineteenth century the tendency towards some modification of the strict rule was again beginning to prevail. In 1705 Holt, C. J., seemed to assume that a bailor could make a gift of his right to the goods, though the donee might not be able to sue the bailee in *detinue*, since by such gift the bailee's special property was not transferred.⁹³ But as late as 1844, in the case of *Franklin v. Neate*,⁹⁴ Parke, B., held that the pawnor of a chattel had only an unassignable *chose* in action. This decision was, however, reversed, and it was held that the pawnor could, subject to

⁹⁰ See especially 32 HEN. VIII, c. 9.

⁹¹ *Supra*, 1008.

⁹² 8 & 9 VICT., c. 106, § 6.

⁹³ "If A. bail goods to C., and after give his whole right in them to B., B. cannot maintain *detinue* for them against C. because the *special property* that C. acquires by the *bailment*, is not thereby transferred to B." *Rich v. Aldred*, 6 Mod. 216. Holt clearly supposes the gift is good; he does not say, as Brian, C. J., said (*supra*, note 32) that the gift is void.

⁹⁴ 13 M. & W. 481.

the rights of the pawnee, sell his rights to a buyer; and that if the buyer tendered to the pawnee the amount due, and the pawnee refused to deliver, the buyer could maintain trover. At the present day the right of the owner out of possession to alienate his property was assumed in the case of *Cohen v. Mitchell*,⁹⁵ and was recognised in the case of *Dawson v. Great Northern and City Railway*.⁹⁶ And the courts have even gone further. They have held in *Whiteley v. Hill*,⁹⁷ that a hirer under a hire purchase agreement may assign not only the possession of chattels hired, but also his rights under the agreement to acquire the ownership; and in *Glegg v. Bromley*⁹⁸ that, though a cause of action arising from tort is unassignable, the fruits of such an action, if and when recovered, are assignable. Thus at the present day the owner of chattels in the possession of another is as well able to assign his rights as the owner of land.

(ii) Rights of action of a contractual kind must always be of a purely personal nature. Therefore in early law the prohibition against their assignment was absolute.⁹⁹ It is true that in most cases they became transmissible on death at a comparatively early date.¹⁰⁰ It is true also that it was recognised that certain covenants might be so annexed to a particular estate in the land

⁹⁵ 25 Q. B. D. 262 (1890.)

⁹⁶ "An assignment of a mere right of litigation is bad: *Prosser v. Edmonds*; but an assignment of property is valid, even although that property may be incapable of being recovered with one litigation. See *Dickinson v. Burrell*," [1905] 1 K. B. 260, 271. Both the cases here cited were cases of equitable interests; in *Prosser v. Edmonds*, 1 Y. & C. 481, 499 (1835), A, being entitled to certain property under his father's will, assigned the whole (except a certain reversionary interest) to B, his father's executor; but A could have set aside the assignment on the ground of fraud. Afterwards A assigned all his interest under his father's will to C. It was held that C could not make use of A's rights to set aside the assignment to B on the ground of fraud, as such a *chose* in action was unassignable. In *Dickinson v. Burrell*, L. R. 1 Eq. 337 (1866), A conveyed real estate to B, but the conveyance was liable to be set aside on equitable grounds. He then made a voluntary settlement of the same property. It was held that the beneficiaries under the later settlement could set aside the conveyance to B, on the ground that this was a right incident to the property conveyed to them, and not, as in *Prosser v. Edmonds*, the conveyance of a mere right to litigate. It would seem to follow from the two cases already cited in the text that if an owner out of possession conveyed his right to X, and the possessor wrongfully refused to hand it over to X, X could bring an action of conversion in the name of the owner if not in his own name.

⁹⁷ [1918] 2 K. B. 808.

⁹⁸ [1912] 3 K. B. 474.

⁹⁹ *Supra*, 1000.

¹⁰⁰ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 458.

that successive holders of that estate could enforce them.¹⁰¹ But to the end the common law never in theory departed from its rule that rights of a contractual kind could not be assigned by an act of the parties to the contract.¹⁰² As early, however, as the beginning of the fourteenth century the merchants had begun to circumvent this prohibition. If the right was to an ascertained sum of money, that is if it was a debt, the creditor could appoint the assignee his attorney, to sue for the debt, and could stipulate that he should keep the amount realised; and in the fifteenth century this method of assigning a debt was recognised as valid by the common-law courts.¹⁰³ Thus, as in Roman law,¹⁰⁴ the assignee sued for the debt in the assignor's name and as his attorney.

But upon this device the influence of the idea that the assignment of any *chose* in action was void because it tended to encourage maintenance exercised a retarding influence. Cases in which this device was employed were often attacked on this ground.¹⁰⁵ But, the fact that the person maintaining had some sort of common interest with the person maintained of a legal or moral kind, was recognised as a good defence to an action for maintenance. Therefore, if the assignment of a debt by way of the appointment of the assignee as the assignor's attorney was attacked on this ground, it was necessary to show that the assignee and the assignor had some sort of common interest. It was held that a sufficient common interest existed if it could be proved that the assignor owed money to the assignee, and that the assignment was made in satisfaction of the debt.¹⁰⁶ On the other hand, a common interest could not

¹⁰¹ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 130-135.

¹⁰² Thus in 1867 Willes, J., said in the case of *Gerard v. Lewis*, L. R. 2 C. P. 305, 309, "the rule against assigning a chose in action stood in the way of an actual transfer of the debt." Cf. Ames, "Disseisin of Chattels," 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 584.

¹⁰³ Y. B. 34 HEN. VI, Mich., pl. 15, per Wangford *arg.*, and Prisot, C. J.; in Y. B. 15 HEN. VII, Hil., pl. 3, it is said that, "Si on soit endette a moy et livre a moy un obligation en satisfaction de cest det, en que un autre est tenu a luy, jeo suivrai action en le nom cesty que fuit endette a moy"; BROOKE, ABRIDGMENT, *Chose in Action*, vl. 3, in abridging this case, says, "Et sic vide que chose in accion poet estre assigne oustre pur loyal cause come just det, et nemy pur maintenance." WEST, SYMBOLEOGRAPHY, § 521. Cf. Ames, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 584, note 2; POLLOCK, CONTRACTS, 5 ed. App. 700-701.

¹⁰⁴ MOYLE, JUSTINIAN, 5 ed., 482-483.

¹⁰⁵ Y. BB. 34 HEN. VI, Mich., pl. 15, 15 HEN. VII, Hil., pl. 3.

¹⁰⁶ *Ibid.*

be proved if it appeared that the assignee had merely purchased the debt from the assignor without any particular reason for so doing.¹⁰⁷ It is true that in 1590, in the case of *Penson v. Hickbed*,¹⁰⁸ it seems to have been held that any assignment of a debt, coupled with a power of attorney to sue for it, was valid, unless it was void for champerty. But this case does not seem to have been followed. Right down to the latter part of the seventeenth century it seems to have been held, both by the common-law courts and by the court of Chancery, that, unless the assignor owed money to the assignee and had made the assignment on this ground, the objection of maintenance was fatal. This principle was laid down in 1596¹⁰⁹ by the court of Common Pleas, and by Lord Keeper Bridgman (1667-72) in the court of Chancery.¹¹⁰

When this point had been reached it was inevitable that further developments should be made. At the beginning of the eighteenth century it was quite settled that equity would recognise the validity of the assignment both of debts and of other things recognised by the common law as *choses* in action.¹¹¹ In other words it would, as the Judicature Act expresses it,¹¹² recognise the validity of the

¹⁰⁷ Y. B. 37 HEN. VI, Hil., pl. 3 — a case which shows that the common-law courts and the court of Chancery took the same view on this question.

¹⁰⁸ Cro. Eliza. 170 — to the objection that buying of bills of debts was maintenance, the judge said it was not, "for it is usual among merchants to make exchange of money for bills of debt, *et e contra*. And Gawdy said, it is not maintenance to assign a debt with a letter of attorney to sue for it, except it be assigned to be recovered, and the party to have part of it." In the report of the same case in 4 Leo. 99 the objection was taken that though an assignment in satisfaction of a debt due to the assignee was good, this assignment was bad because it did not appear that any such debt was due; for these bills of debt see an article by the present writer, 31 L. QUART. REV. 377-381.

¹⁰⁹ South and Marsh's case, 3 Leo. 234 (1590) — though it can be assigned to the queen, "it cannot be assigned to a subject, if not for a debt due by the assignor to the assignee, for otherwise it is maintenance." Barrow v. Gray, Cro. Eliza. 551 (1597); Ames, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 584, and authorities there cited.

¹¹⁰ "The Lord Keeper Bridgman will not protect the assignment of any chose in action, unless in satisfaction of some debt due to the assignee; but not when the debt or, *chose in action* is assigned to one to whom the assignee owes nothing precedent, so that the assignment is voluntary or for money then given." Freeman Ch. Cas. 145. It was probably decisions like these that caused Bridgman to get the reputation of sticking too closely to common-law rules to be a good judge of the court of Chancery. LIVES OF THE NORTHS, 198.

¹¹¹ Warmstrey v. Tanfield, 1 Ch. Rep. 29 (1628-29); Squib v. Wyn, 1 P. Wms. 378, 381 (1717).

¹¹² 36 & 37 VICT., c. 66, § 25 (6).

assignment of "any debt or other legal chose in action."¹¹³ In equity, therefore, there was no need to show a special relationship between the assignor and the assignee in order to rebut the presumption of maintenance. During the same century the common-law courts, probably in consequence of the attitude of equity, soon adopted the same attitude with respect to the assignment of debts. The objection of maintenance was, it is true, a valid objection, both at law and in equity, if it could be proved;¹¹⁴ but the courts now took the view that it was absurd to suppose that an assignment *per se* involved a presumption of maintenance.¹¹⁵ Blackstone makes it quite clear that any such presumption was obsolete when he wrote.¹¹⁶ But this involved the consequence that it was no longer necessary to look at the relationship between the assignor and the assignee. It was no longer necessary, therefore, that the assignor should be the debtor of the assignee. It followed that a creditor could, by making the assignee his attorney, assign his debt to any one. The appointment of an attorney had come to be a formality — though to the end it was a necessary formality.¹¹⁷ In this way the common law managed to maintain in theory its doctrine that a *chose* in action was unassignable, while abandoning it in practice in the case of debts. The further inroads upon this theory made by equity and by legislation belong to a later period in the history of the law.

It is fairly clear that the common law was induced to connive

¹¹³ "I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable.'" *Torkington v. Magee*, [1902] 2 K. B. 427, 430-431, per Channell, J.; but the phrase "legal chose in action" is not a very happy one to express "a thing regarded by the common law as a chose in action."

¹¹⁴ *Prosser v. Edmonds*, 1 Y. & C. (Ex.) 481 (1835); *Dawson v. Great Northern and City Railway*, [1905] 1 K. B. 260, 270-271, per Stirling, L. J.

¹¹⁵ It would seem from the case of *Deering v. Farrington*, 3 Keb. 304 (1674), that Hale, C. J., was inclined to take this view at this early date. At the end of the eighteenth century Buller, J., could say that, "It is laid down in our old books, that for avoiding maintenance a *chose in action* cannot be assigned; or granted over to another. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case." *Master v. Miller*, 4 T. R. 320, 340 (1791).

¹¹⁶ 2 Comm. 442.

¹¹⁷ 2 Bl. Comm. 442. Cf. *Mallory v. Lane*, Cro. Jac. 342 (1615), where it is recognised that the delivery of statutes merchant without a power of attorney to sue was not an assignment.

at the introduction and extension of this evasion of its principle that a *chose* in action is not assignable by considerations of mercantile convenience or necessity. But this exception only applied to debts; and even equity did not go the length of permitting all contractual rights to be assigned in this manner. Some were too personal in their character to permit of any kind of assignment and others were too uncertain. But these limitations upon the power to assign can be better explained when the rights of action of a purely delictual kind have been dealt with.

(iii) In the common law the sphere occupied by actions in tort is very wide. The actions of replevin and detinue were recognised from the first as being of a mixed proprietary and delictual character;¹¹⁸ and of the action of trover, which came to be the action generally used by owners who sought to recover their chattels, was at first purely delictual in character, and only gradually acquired proprietary characteristics.¹¹⁹ With these causes of action in tort which were of a proprietary character I have already dealt. We have seen that, from a comparatively early date there was a tendency to think that the rights of the owner of chattels who was not in possession should be assignable, and that the assignee should be able to sue; but that the fact that the rights of owners of land who were not in possession could not be assigned, and the great importance attached to the prevention of maintenance, prevented the clear recognition of the fact that such rights could be assigned till modern times.¹²⁰ On the other hand, no relaxation has ever been suggested in the rule that a right of action for unliquidated damages for a tort to property or to the person is unassignable.¹²¹ Such claims were not debts; they were both too uncertain and too personal to admit of the application to them of the indirect method of assigning debts by the process of making the assignee the attorney of the assignor.¹²² Clearly these considerations apply also to certain rights arising out of contract. A contract may stipulate for services

¹¹⁸ 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 311; 3 *Ibid.*, 248-249.

¹¹⁹ *Infra*, 1005-1006.

¹²⁰ *Infra*, 1016-1018.

¹²¹ *Dawson v. Great Northern and City Railway*, [1905] 1 K. B. 260, 271, per Stirling, L. J.; *supra*, 1018.

¹²² Thus in 1456 Wangford *arg.* said, "Sir jeo entend que un duty de chose que (est) certain poit estre assez bien assigne pur un satisfaction; mes de chose (que) est non certain come en le cas de Trespass jeo grant bien" (*i. e.* that it cannot be assigned); and to this Prisot, C. J., agreed. Y. B. 34 HEN. VI, Mich., pl. 15.

of so personal a character that to allow an assignment of rights under it would be unfair to the contracting parties;¹²³ or, if a contract has been broken, the amount of damages recoverable may be too uncertain to permit of assignment.¹²⁴ But it was not till certain classes of rights recognised as *choses* in action by the common law became more freely assignable in equity that it was necessary to distinguish between the cases in which assignment was permitted and cases in which it was not; and it is for this reason that we find very little clear authority on these questions till quite modern times. Until it became necessary to draw this distinction, authority was hardly needed for the obvious proposition that these *choses* in action were unassignable. As the result of the modern discussions on the limitations of the right to assign, it would seem that, subject to exceptions which modern cases appear to have allowed, either if the assignment of certain of these rights of action in tort is merely incidental to an assignment of property,¹²⁵ or if such assignment comes within the scope of the application of the doctrine of subrogation to the rights of insurers,¹²⁶ the modern law refuses to allow the assignment of a right to sue in tort for a merely personal wrong, and for damages of uncertain amount; and that it applies the same rule to rights of action arising under contracts.

In laying down these rules the judges have, for the most part unconsciously, followed lines of reasoning which their predecessors followed in solving different, but some analogous problems. From an early date the courts were faced, firstly, with the problem of the extent to which the maxim "*action personalis moritur cum persona*" interfered with the transmissibility on death of rights and liabilities arising from contract and tort; and secondly, with the problem of the limits of the king's rights to the *choses* in action of an outlaw or a felon. Of the first of these problems I have spoken elsewhere. We have seen that rights of action for unliquidated damages for torts against person or property, and for the breach of contracts which involve personal skill or the continuance

¹²³ *Robson v. Drummond*, 2 B. & Ad. 303 (1831); *Stevens v. Benning*, 1 K. & J. 168 (1854).

¹²⁴ *Torkington v. Magee*, [1902] 2 K. B. 427, 434.

¹²⁵ *Williams v. Protheroe*, 5 Bing. 309 (1829); *Dawson v. Great Northern and City Ry.*, [1905] 1 K. B. 260, 271.

¹²⁶ *King v. Victoria Insurance Co.*, [1896] A. C. 250.

of the deceased's personality, were not at common law (apart from statutory modifications) transmissible on death; but that a right to recover property taken by the deceased and added to his estate has always been transmissible.¹²⁷ Clearly these rules rest on principles which are based on considerations very similar to those now applied to determine whether or not a *chose* in action is assignable. The second of these problems is indirectly connected with the problem of assignability, but it falls more properly under the following head:

The Relation of these Choses in Action to Other Branches of the Law. — The first of the branches of the law which have helped to elucidate the legal incidents of *choses* in action is the law as to the king's rights to the chattels of persons outlawed or attainted. I shall deal first with this branch of the law; and then more briefly with the other branches of the law which have contributed to this elucidation.

(i) From the earliest days of the common law it had been recognised that the king could assign a *chose* in action.¹²⁸ This exceptional rule was no doubt due to the king's extensive rights to forfeiture on an outlawry or on a conviction for treason or felony.¹²⁹ Unless the king had been allowed to assign these rights his revenue might have suffered. Moreover, an additional reason based on much the same principle was found in the fact that such a power was essential in order to enable him to deal with debts due to him from his officials,¹³⁰ and in order to enable him so to deal with the proceeds of taxes granted to him that they could be made to produce an immediate revenue.¹³¹ It was probably for the same reasons that these rights of the king tended to expand. Not only could the king assign, but the king's grantee was allowed to sue

¹²⁷ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 455-456, 458.

¹²⁸ As Sir F. Pollock points out, before the Jews were expelled the king "claimed and exercised an arbitrary power of confiscating, releasing, assigning or licensing them to assign, the debts due to them." CONTRACTS, 5 ed., App. 699; the Year Books accept the rule as well settled. BROOKE, ABRIDGMENT, *Chose in Action*, pl. 1 = Y. B. 3 HEN. IV, Mich., pl. 34; pl. 6 = Y. B. 2 HEN. VII, Mich., pl. 25.

¹²⁹ POLLOCK, *op. cit.*, 699.

¹³⁰ See Y. B. 39 HEN. VI, Mich., pl. 36, when it was said that "le comon cours de l'Exchequer est, quand le Roy per ses Lettres done ou grant un duity que est due a luy per ascum, le grantee le Roy de ce det aura bon action a son nom sole, et issint ne puit nul autre faire."

¹³¹ See Y. B. 1 HEN. VII, Hil., pl. 5, where there was a question as to assignments of money in the hands of the collectors of the tithes granted to Richard III.

in his own name;¹³² and any one was allowed to assign a *chose* in action to the king.¹³³

These exceptional rules were the more necessary because, in some respects, the king's rights over *choses* in action personal were larger than his rights over *choses* in action real. In the case of *choses* in action personal a mere right of action was forfeited to the king; but, in the case of a *choses* in action *r  el*, it was decided, doubtless from motives of public policy, that a mere right of action was not forfeited to the crown.¹³⁴ But though the rights of the crown to *choses* in action personal were wide, they were not unlimited. It was recognised that there were some rights of action of so personal and so uncertain a character that they would not pass to the king. Thus it was laid down in the reign of Edward III that debts on which the debtor might wage his law could not pass to the king;¹³⁵ and in the reign of Edward IV that the same principle was applicable to a right to sue in trespass for damages.¹³⁶ But, in the sixteenth century, wager of law was being discouraged and circumvented as far as possible, and the older precedents were not wholly consistent;¹³⁷ so that it is not surprising that on grounds of public policy and in accordance with the practice of the Exchequer, it was held in Slade's case that such debts were forfeited.¹³⁸ On the other hand, the view prevailed that the right to sue for unliquidated damages for trespass was too uncertain to be forfeited.

¹³² Note 130, *supra*.

¹³³ Y. B. 21 HEN. VII, Hil., pl. 32.

¹³⁴ "Note a diversity between inheritances and chattels; for as it hath been said, a right of action concerning inheritances is not forfeited by attainder, but obligations, statutes, recognisances, etc., and other such things in action are forfeited to the King by attainder or outlawry." Winchester's case, 3 Co. Rep. f. 1, 3a (1538). The reason why "a right of action concerning inheritances" is not forfeited is said to be that "it would be very vexatious and inconvenient, that estates of purchasers and others, after many descents and long possession, should be impeached at the King's suit . . . against the reason and rule of the common law." *Ibid.*, f. 2b. See the King v. the Executors of Dacombe, Cro. Jac. 512 (1619), where it was held that a beneficial contract to supply goods to the king held on trust is forfeited on the attainder of the *cestui que trust*.

¹³⁵ BROOKE, ABRIDGMENT, *Chose in Action*, pl. 9; 16 EDW. IV, Pasch., pl. 49; Anon., Dyer, 262a (1567).

¹³⁶ "Fuit dit que le Roy poet granter son action que est certain, come de det al Roy, mes nemy de trespass fait al Roy, que est non certain." Y. B. 5 EDW. IV, Mich., pl. 22.

¹³⁷ FITZHERBERT, ABRIDGMENT, *Corone*, pl. 343 (3 EDW. III).

¹³⁸ 4 Co. Rep., ff. 95a, 95b (1602); Bullock v. Dodds, 2 B. & Ald. 258, 275-276 (1819), per Abbott, C. J.

We have seen that in 1456 the same test was suggested to determine whether or not a *chose* in action was assignable,¹³⁹ and that this is in substance the test applied by the judges at the present day for this purpose.¹⁴⁰

(ii) At common law all the wife's chattels passed to her husband. But for this purpose a *chose* in action was not a chattel. The husband could reduce it into his possession, but, till he had done so, it was not his; and, if he died without reducing it into his possession it remained the property of the wife.¹⁴¹ Again, the fact that a *chose* in action was evidenced by a written document did not make it any the less a *chose* in action. Therefore the document being *per se* valueless, could not be the subject of larceny.¹⁴² For somewhat similar reasons neither a *chose* in action nor the document which evidenced it could be seized under a writ of *fiери facias*.¹⁴³ The *chose* in action was not a tangible thing which admitted of physical seizure, and the document was not saleable.¹⁴⁴ It is true that by the special customs of London and certain other cities, and by virtue of a writ of execution issued at the suit of the crown, debts owed to a debtor could be attached by a creditor.¹⁴⁵ But it was not till 1854 that this principle was introduced into the common law by the Common Law Procedure Act passed in that year.¹⁴⁶ It was only by virtue of the interpretation put upon the provisions of the Bankruptcy Acts that the *choses* in action of a bankrupt were made available for his creditors;¹⁴⁷ and in this case,

¹³⁹ *Supra*, note 57, 122.

¹⁴⁰ *Supra*, 1023. Cf. 10 L. QUART. REV. 157.

¹⁴¹ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 410.

¹⁴² *Ibid.*

¹⁴³ See *Ex parte Foss*, 2 De G. & J. 230, 237 (1858), per Knight-Bruce, L. J.; *Colonial Bank v. Whitney*, 11 A. C. 426, 439 (1886), per Lord Blackburn.

¹⁴⁴ *Francis v. Nash*, Case t. Hard. 48 (1734).

¹⁴⁵ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 105-106, 312.

¹⁴⁶ "We are not aware of any process either in the superior courts of law or equity, in suits between subject and subject, by which this can directly be done, though the course of proceeding under writs of execution at the suit of the crown, and by way of foreign attachment in the Mayor's Court of London and some other cities, as well as in the courts of many foreign countries, shows that such a remedy would be practical and useful. . . . We recommend that a creditor, having obtained a judgment, should be allowed to proceed, by a process similar to foreign attachment, against the debtors of his debtor." Second Report of the commission to enquire into the Process Practice and System of Pleading of the Courts of Common Law, Parl. Papers xl 740 (1852-53); 17 & 18 VICT., c. 125, § § 60-67.

¹⁴⁷ See 10 L. QUART. REV. 316, note 4.

as in the case of assignability, we must make an exception in the case of rights which arise from causes of action of a purely personal character.¹⁴⁸

It is clear from these illustrations that the law started from the idea that a *choses* in action is a personal non-assignable right. But, having found that a rigid adherence to the theory is in practice inconvenient and impossible, it has partially modified it in many different directions; and these modifications have been carried further both by equity and by the legislature. The result is that, though very little is left of the broad principle from which the law started, it is necessary to know it, because it is still operative unless it has been modified by the common law, by equity or by statute. We shall now see that the difficulties arising from these causes have been increased by the further modifications which have necessarily been made in those other classes of *choses* in action which, as we have seen,¹⁴⁹ emerged during the seventeenth and eighteenth centuries.

(2) *The Legal Incidents of the Later Varieties of Choses in Action*

The later varieties of *choses* in action all differ from the original class of *choses* in action in that they are assignable. Negotiable instruments were assignable by the law merchant. Stocks and shares were in early days expressly made assignable by charter or Act of Parliament.¹⁵⁰ Patent rights were by their terms always assignable.¹⁵¹ Copyright, whether it depended upon the rules of the Stationers Company and the Licensing Acts, or upon royal grant, was always assignable, and when it came to be dependent on the terms of the Act of 1709 it was assignable by the express provisions of the Act.¹⁵²

In respect, however, to some of the other legal incidents of these *choses* in action the law is not so clear or certain. Thus, at the beginning of the nineteenth century it was a very doubtful question how, if at all, a husband could reduce into possession stock belong-

¹⁴⁸ *Beckham v. Drake*, 2 H. L. Cas. 579, 626-628 (1847), per Parke, B.

¹⁴⁹ *Supra*, 1013.

¹⁵⁰ *Supra*, note 65.

¹⁵¹ WILLIAMS, PERSONAL PROPERTY, 17 ed., 43.

¹⁵² 8 ANNE, c. 19, § 1.

ing to his wife. "It is obvious that if stock were a chose in action of the same nature as a debt or claim to goods, it could never be reduced into possession unless the government voluntarily redeemed it."¹⁵³ It was ultimately held that, if the husband got a transfer of the stock into his own name, he had reduced it into his possession.¹⁵⁴ What would amount to the reduction into possession of such choses in action as a copyright or a patent right does not seem to have been absolutely settled;¹⁵⁵ and the question is now of course academic. The rule that choses in action were not capable of being stolen has produced much legislation to take certain classes of choses in action out of this rule. Thus a statute of 1729¹⁵⁶ made it felony to steal "Exchequer orders or tallies or other orders entitling any other person or persons to any annuity or share in the parliamentary fund, or any Exchequer bills, South Sea Bonds, Bank notes, East India bonds, dividend warrants of the Bank, South Sea Company, East India Company, or any other company, society, or corporation."

In order to remedy the difficulty that these choses in action could not be taken in execution under a writ of *fiери facias*, the Judgments Act of 1838¹⁵⁷ enabled the sheriff to seize money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities of money. But clearly this did not enable all classes of choses in action to be seized to satisfy a judgment debt. In some cases equity intervened to remedy the hardship occasioned by the difficulty of realising a claim. Thus, by means of the appointment of a receiver it permitted a species of equitable execution.¹⁵⁸ But even this device is not wholly adequate, nor are the limits within which it is available wholly clear. In 1909, in the case of *Edwards v. Picard*, the question whether a receiver could be appointed of the receipts of the profits of certain patents, when it was not shown that the debtor was actually in receipt of any profits, divided the court of appeal.¹⁵⁹ Similarly the application of

¹⁵³ 10 L. QUART. REV. 313.

¹⁵⁴ *Ibid.*

¹⁵⁵ 11 *Ibid.*, 236, 238-239.

¹⁵⁶ 2 GEORGE II, c. 25, cited 10 L. QUART. REV. 312-313; 3 STEPHENS, HISTORY OF THE CRIMINAL LAW, 144, 148.

¹⁵⁷ 1, 2 VICT., c. 110.

¹⁵⁸ See generally, 14 HALSBURY, LAWS OF ENGLAND, 115 *seqq.*

¹⁵⁹ [1909] 2 K. B. 903.

the Bankruptcy Laws to some of these *choses* in action has raised some very nice problems — largely because the draftsmen of these Acts have used the term “*chose* in action” without appreciating the fact that it covers a miscellaneous mass of very different things which have or should have very different legal incidents.¹⁶⁰ Thus in 1885, in the case of *Colonial Bank v. Whinney*¹⁶¹ the question whether shares were taken out of the reputed ownership clause of the Bankruptcy Act of 1883 by the proviso in that clause excluding *choses* in action, also divided the court of appeal.

It is thus apparent that the modern English law as to *choses* in action can hardly be called satisfactory; and this history shows that its unsatisfactory character is due mainly to the following causes: Firstly, the enormous extension given to the term has included in this category a very large number of things of very different kinds. Rules which were made for *choses* in action, when the term meant literally rights of action against some person, are obviously inapplicable to proprietary rights of an incorporeal nature; but it is clear that these rules must be applied to these rights because they are *choses* in action, unless some authority — legislative or otherwise — can be produced which shows that they are subject to some other rule. Secondly, even in the case of some of the original class of *choses* in action, the old rule of non-assignability has been gradually modified; and in this work of gradual modification both law and equity have lent a hand. The result has been that some of these *choses* in action have changed their original character, and become very much less like merely personal rights of action and very much more like rights of property. But this process has been retarded and the whole question obscured by the distorting influence of the fear of encouraging maintenance. Owing to the disorderly state of the country in the fifteenth and early sixteenth centuries this fear rightly exercised a large effect upon this branch of the law; but unfortunately its effect lasted long after the cause for it had been removed. The result has been that the development of the law was slow, and the slowness of the modification of the original conception of a *chose* in action as a personal unassignable thing has caused a long continued uncertainty in the modern law. Thirdly, a further source of complication has

¹⁶⁰ 11 L. QUART. REV. 240.

¹⁶¹ 30 Ch. D. 261 (1885).

been added by the piecemeal exceptions introduced by the legislature to the general rules applicable to *choses* in action in favour of some or all of them. It is sometimes difficult to ascertain the sense in which the legislature has used the term "*chose* in action" — we have seen that the Bankruptcy Act affords one illustration;¹⁶² and, as we can see from the case of *Edwards v. Picard*,¹⁶³ the modifications introduced by the courts have sometimes occasioned a similar difficulty. Some of these difficulties might be perhaps mitigated by a codifying Act, for which there is plenty of material. But it is probable that a branch of the law which comes at the meeting place of the law of property and the law of obligation can never be anything but difficult to formulate and apply.

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¹⁶² *Colonial Bank v. Whinney*, 30 Ch. D. 261 (1885).

¹⁶³ [1909] 2 K. B. 903.

RAILWAY VALUATION AND THE COURTS

III

IF the analysis of the relation between a railroad and the community, contained in a previous paper, is correct, we have an important clue to the significance of the series of decisions in which the Supreme Court has tried to fill in the gaps and ambiguities of the rule in *Smyth v. Ames*. The decisions themselves have been often reviewed, and it is not my purpose to discuss them *seriatim*, or in any detail. The discussion will be confined to those general aspects in which the decisions and opinions reflect most clearly the consequences of an attempt to ascertain by juristic speculation what could only have been settled by practical adjustment and compromise.

The most striking feature of these decisions is that nowhere has the Supreme Court ever given a workable definition of the term "fair value," which it said in *Smyth v. Ames* was "the basis of all calculations" as to the reasonableness of rates.

The most obvious meaning of that term, to the economist, as well as to the lawyer who approaches the problem by way of the analogy of the law of eminent domain, is of course exchange value. Were we dealing with wheat, or cotton, or pig iron, exchange value could be mathematically ascertained by referring to current quotations. Even when we are dealing with property which is not quoted in the market, it is possible to reach a fair approximation by considering the elements of attractiveness to hypothetical buyers and sellers, and securing an expert judgment on the probable net result. But to ascribe this meaning to the term "value," in a rate case, leads into a logical *impasse*, the nature of which I have already described.¹ The elements of attractiveness which would influence the purchaser of a public utility relate entirely to present and prospective earning power. An expert charged with ascertaining the price at which an established business would be most likely to change hands in an open market would find out its present earning power, and capitalize it at a rate which took into account the probability of a prospective increase or diminution of net earnings. Net earnings, of course,

¹ See "Railway Valuation and the Courts," 33 HARV. L. REV. 902.

depend largely upon the level of rates. But it is precisely the level of rates which the regulating commission is trying to fix. Whenever it reduces rates it reduces earnings, and whenever it reduces earnings it reduces value. Obviously such a rule of rate-making involves us in a hopeless vicious circle. We cannot tell what rates the company is to charge until we know what its value is, and we cannot tell what its value is till we know what rates it may charge.

Practically, perhaps, because of the imperfections of human knowledge and the vagaries of investors, it might be possible to apply such a rule despite its theoretical absurdity. Shares of stock of a public utility, and even the utility itself, may change hands although the rates which the company will be allowed have not yet been determined. Purchasers are willing to take a sporting chance. The result of taking a speculative exchange value of this sort as a rate base would be a curious one. If the investing public is convinced that under the Constitution rates cannot be reduced, that conviction will at once tend to establish a market value. The result will automatically follow that rates cannot constitutionally be reduced, since to reduce them would decrease earnings so that they would no longer bring a fair return on the speculative market value. If the public is convinced that rates must be increased, it will likewise follow that they must be increased. But if a sufficiently effective propaganda is set in motion to convince them that as a matter of law rates may be lowered, the market value will fall, and at once it will be legally possible to reduce rates. Obviously a rule that has such fantastic consequences cannot be seriously considered.

In one of the cases preceding *Smyth v. Ames*² the Supreme Court seemed for a moment to be trapped in this vicious circle, when it intimated that it would be unconstitutional to take the "use" of a railroad for public purposes at less than the market value.³ Outside of this *dictum*, the court has never in terms approved the theory. In other quarters, however, although the logical fallacy of a rule of rate-making has been often exposed,⁴ it still has vigorous champions.⁵

² *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 410 (1894).

³ See the passage quoted, *supra*, p. 908.

⁴ See especially WHITTEN, VALUATION OF PUBLIC SERVICE CORPORATIONS, § 57, and HALE, VALUATION AND RATE-MAKING, ch. 1, 80 COLUMBIA UNIV. STUDIES IN HISTORY, etc., ch. 1.

⁵ See especially Stevens, The Valuation of Railroad Right of Way, and the Valuation Brief submitted to the Interstate Commerce Commission by the President's Conference Committee, for recent expositions of this point of view.

So persistent is the theory that one suspects there must be some significance to it which mere logic fails to destroy. It must satisfy some objective which its proponents have at heart, and which the bare formula does not reveal.

To find out what lies behind the theory, a slight shift in our method of approach is necessary. Theoretically, the rule calls for an inquiry into an ultimate fact, exchange value, the price, that is, at which the property as a whole would change hands. Practically it calls for a piecemeal appraisal of a number of factors which, in the judgment of the appraisers, would appeal to a hypothetical purchaser.

Assume, for instance, two railroads, both operating between the same terminal cities. One runs through mountainous, sparsely settled country, the other through populous plains. The first was more expensive to build, and it is more expensive to operate and maintain. Moreover, it is forced to rely almost entirely on through traffic, whereas the second road has profitable short haul business to eke out its earnings. Yet for commercial reasons the rate between the terminal cities must be the same over both roads. If it were not, the road with the lower rate would get all the traffic. Obviously in appraising the property we must disregard the level of freight rates, since the freight rates themselves are in issue. But at any level of rates (as long as the level is the same for both roads), the road with the lower operating costs and denser traffic will have the greater earnings, and hence the greater exchange value. Its strategic location, with reference to the physiography of the country as well as to the currents of commerce, is therefore an element of value which advocates of the theory believe should be constitutionally protected.

Assume, again, two railroads between the same termini, one under a management which has a reputation for public spirit and integrity, the other in the hands of financial pirates. The first has been able in the course of years to build up an operating staff, which contains the best railroad men in the country, and the personality of its president and the wise policy of its directors have combined to create an *esprit de corps* which cannot be duplicated. The other is managed by discontented and second rate men, and is rent with faction and intrigue. Here again, whatever the level of rates, the first road has an element of value which the second lacks, and which the usual process of physical valuation would fail to reveal.

In the two instances I have given the existence of a less efficient road is believed to give the more efficient one an increment of value. The less efficient railroad may, however, be only potential. To take a stock example, imagine a railroad built through a narrow gorge between precipitous mountains. There is no competing railroad, but if one is ever built, it will be necessary to build a tunnel at great expense, since the gorge is already occupied to its full capacity. According to the advocates of the exchange value theory, the right to occupy the gorge has a value measured by the difference between the cost of laying tracks in the gorge, and the cost of tunnelling the mountain. The argument, moreover, goes further. Fortunate physical location, density of traffic, efficient organization and leadership, are elements of value wherever they may be found, whether there are competitors, existing or potential, or not. They are factors, that is, which an intelligent purchaser would consider in deciding what to pay for the property. Whatever the rate, they add to the value of the railroad.

The practical result of this piecemeal exchange value theory is that after all the physical property of a carrier has been appraised at its present value, the appraisers, in their expert capacity, proceed to estimate the value of each of the intangible elements which a purchaser would consider in setting a price. The sum total of these intangible elements plus the value of the physical property is the "value" of the railroad as a going concern, and it is a result in which the level of freight rates has been disregarded, and hence, it is believed, the vicious circle avoided.

The validity of this belief rests on the assumption that the "intangible" factors which I have described have a measurable exchange value, which can be expressed without reference to the level of freight rates. To test this assumption let us return to the railroad with a right of way through the gorge between impassable mountains. Assume first that the mountains are literally impassable, and that the cost of tunnelling or circumventing them is such that the traffic would not bear a rate high enough to earn a return on this cost. What, now, is the value of the right to occupy the gorge? Suppose that the gorge is still in the hands of the original settler, and the promoter is attempting to purchase it. He will arrive at the value somewhat as follows: He will estimate the probable annual net earnings of the whole road, and will capitalize them

at a rate which takes into account the risk of unexpected loss and the chance of unexpected gain. From this capital sum he will deduct the estimated cost of building the whole road, excepting only the cost of acquiring the gorge. The balance is the largest sum which he will be justified in offering for the gorge. How large this balance will be depends upon the expected net earnings, and these depend directly on the level of freight rates. If rates are not regulated, the promoter will offer, and the settler, if he is shrewd, will demand, the difference between the cost of the road and the capitalized net earnings when rates are as high as the traffic will bear. If rates are regulated, he will offer a sum ranging all the way down to the value of the land for farming purposes, the exact sum depending upon the level of freight rates which the regulating body will allow. Here, clearly, we have not escaped the vicious circle.

The situation is not changed if we assume that the cost of tunnelling the adjoining mountains is not prohibitive. In such a case the amount which the prospective purchaser will offer will be calculated in precisely the same manner, except that the upper limit will depend not upon the highest rate the traffic will bear, but upon the cost of tunnelling the mountain. He will under no circumstances offer more than this cost. He may not offer as much, if the regulating commission reduces the rate which he may charge to a point at which it would not bring a fair return on such a price. The vicious circle is still there. We are still trying to determine rates by ascertaining value, and we are still unable to ascertain value until we know what the rates will be.

Is the situation any different if we assume that the mountain actually has been tunnelled, and that a competing line is already in operation? If we assume that the line through the tunnel is allowed to charge a schedule of rates high enough to pay its operating expenses, and earn a fair return on its cost of construction, and that the line running through the gorge is allowed to charge the same schedule of rates, it cannot be denied that the strategic location of the latter road gives it an increment of exchange value, over and above the physical investment, which is both real and readily ascertainable. The difficulty is that the assumption is one that we have no right to make. We cannot assume that rates will be high enough to pay the cost of operation and fixed charges on the most expensive line in existence between two given points. It is

just as reasonable to suppose that the cheapest line between the two points will govern the rate. If we indulge in the latter assumption, the "strategic location" of the road running through the gorge will not add anything to the physical investment, and the line through the tunnel may be worth much less than it cost. We are back again in the vicious circle. We are still unable to tell what exchange value, if any, the right to occupy the gorge may have, until we know what rates the road will be allowed to charge.

The same reasoning applies to the other "intangible" factors which I have described. Denser traffic and lower operating costs due to the commercial or physical geography of the country, higher operating ability, and better *esprit de corps*, doubtless confer increments of value if we assume that the road with the lighter traffic and the higher operating costs is to govern rates. But the assumption cannot be made. It would be entirely possible (and indeed eminently sensible) for the community to say that its traffic should go entirely on the road which could carry it the most cheaply and efficiently, and that if anyone else ventured to build a competing road, it was up to him to operate the road as cheaply as the cheapest in existence, or forego his profits. It is possible, of course, that traffic might grow so large that the railroad with low operating costs could no longer handle it. But even there we cannot assume that the community would sanction the construction of a less efficient railroad by a less efficient company. It might appeal to the duty of a common carrier to handle all traffic that is properly tendered, and compel the efficient railroad to extend its facilities. Even if the increment of traffic could be handled only at an increasing cost (even if, for instance, the railroad between the mountains would have to widen the gorge at great expense), it would not follow that the cost of handling the increment would set the rate for all the traffic. Rates would be raised, perhaps, but only to a point at which they would pay for the average cost of all traffic, and bring a reasonable return on the whole investment, old as well as new. Such a rate policy would entirely wipe out any increment of value arising out of strategic location or greater operating efficiency.

It follows that any attempt to value separately these "intangible" elements, without reference to the level of freight rates, is entirely illusory. All that an expert appraiser can ascertain is the relation between the value of a railroad which has these intangible elements

of value, and the value of an existing or potential competing railroad which does not have them. He can make up an algebraic formula somewhat as follows: Let P equal the value of the physical property of Railroad A, and X the sum of its "intangible" values. Let V equal the exchange value of Railroad B, considered as a going concern. The appraiser can ascertain that Railroad B, because of lighter traffic and higher costs, is worth (under uniform rates) say three fourths of the value of Railroad A. His equation will then be: $\frac{3}{4}(P + X) = V$, or $X = \frac{4}{3}V - P$. Now according to hypothesis V depends upon the level of rates, and is therefore a variable. And with V a variable, the equation is necessarily indeterminate, and the task of ascertaining X impossible.

Such being the case, it is not surprising to find that when expert appraisers report the value of a railroad's "good will" or of its "strategic location" or the value arising from the fact that it is a "going concern," they are never able to indicate the rational process by which the result is reached. They almost always resort to a general and inarticulate exercise of judgment. The report of the master in chancery, quoted by the court in *Des Moines Gas Co. v. Des Moines*,⁶ is typical. He found that the value arising out of the fact that the gas company was a going concern was \$300,000. "I think," he said, "that a seller would not be willing to sell unless he got that much more than its physical value, but I could not give the mental process by which this conclusion is reached any more than a jury could do so, but it is nevertheless my judgment under all the evidence in the case."

There are some decisions and *dicta* of the Supreme Court which can be explained only on the assumption that the court had in mind a theory of piecemeal exchange value of the kind I have just outlined. The question of strategic location of a railroad has never been passed upon. *San Joaquin Co. v. Stanislaus County*⁷ presents, however, a close analogy. A water company had acquired, the court assumed by prescription, the right to draw water up to a certain quantity from the San Joaquin River. The county regulated water rates under a statute, and in a suit which was carried up to the United States Supreme Court, the company contested the rates on the ground that they were confiscatory. The decision turned on whether the water rights had a value which should be taken into

⁶ 238 U. S. 153, 163 (1915).

⁷ 233 U. S. 454 (1914).

account for rate-making purposes. The Supreme Court held that they had, and overturned the county's rate schedule. The court did not pass upon the exact value of the water rights. The master in chancery considered them "worth" fully \$1,000,000, but the report of the case does not reveal how the figure was obtained. Undoubtedly the rights had a considerable value for other than "public utility" purposes. The riparian owners presumably would be willing to pay a certain price for them, without any thought of selling or distributing the water for profit. Such a value corresponds, in our illustration of the railroad running through a gorge, to the value of the gorge as farming land. But if a larger value was allowed, as seems to have been the case, it must have been because the court considered that the demand for the water on the part of public utility companies, for distribution further inland, had enhanced the value. But the intensity of the demand on the part of these water companies would depend directly upon the price they were allowed to charge. In the San Joaquin case the state constitution declared that water appropriated for sale was appropriated for public use. The price was therefore subject to regulation. It is difficult to see how the master could have made any finding as to the value of the water right (assuming that he gave it a value above what the riparian owners would pay for it), without first making up his mind what rates would be reasonably charged.⁸

The other instance in which the court seems to have been influenced by the theory of piecemeal exchange value is in its treatment of the increment of value arising from the fact that the company is a "going concern."

The court's record on this subject is somewhat confused. Three supposedly separate intangible elements of value — franchise value, good will, and "going value" have been separately treated. In *Willcox v. Consolidated Gas Co.*⁹ a number of gas companies had combined under authority of a statute which fixed the capital of the consolidated corporation at not more than "the fair aggregate value

⁸ Cf. the analogous case of a water power company, in possession of the only available source of water power, and supplying power in competition with steam power. The exchange value theory would place a value on the water rights of the company equal to a capitalization of the difference between the cost of producing steam power and water power. There have been several such cases in Wisconsin. See a detailed discussion in HALE, p. 71 ff.

⁹ 212 U. S. 19 (1909).

of the property, franchises and rights" of the constituent companies. The companies agreed on a franchise valuation of \$7,781,000, and stock was issued accordingly. Some years later a legislative committee reported that in its judgment this was a reasonable figure. The court held that the franchise could not now be valued at a higher figure than that fixed at the time of the consolidation, but it stated unequivocally that "the courts ought now to accept the valuation of the franchises fixed and agreed upon" by the companies. The *dictum* is an arbitrary one, and seems to rest on no more than a kind of estoppel by act of a legislative committee — surely a novel doctrine in American public law. The court made it clear, however, that the case was not to be considered a precedent except on identical facts, and in no subsequent case has it ever allowed any increment of value under the name of franchise value.

In this same case the court disposed of the second of these intangible elements, good will. Following Judge Hough, in the district court, it rejected the item of good will as an element in valuation, on the ground that good will exists only in a competitive business, and not in a business in which the consumer has no choice but to patronize the company. The reasoning is not satisfactory. Good will can exist in a monopolistic business. It represents the predisposition of the public to patronize the company, and a company in sole possession of the field will find it worth while to spend money in advertising and solicitation merely to encourage this disposition and bring persons who have not been using gas at all to subscribe. There is, moreover, always the indirect competition of other methods of illumination to be considered.

The controversy in the Supreme Court, however, has mainly centered about the item of "going value." In *Knoxville v. Knoxville Water Co.*,¹⁰ decided the same day as the Willcox case, the lower court had added an item of \$60,000, about ten per cent of the appraised value of the physical property, under the heading "going value." This item, the court said, "we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return." The court found, however, that even assuming that the item was properly included, the rates complained of were not confiscatory, and de-

¹⁰ 212 U. S. 1 (1909).

clined to express an opinion as to whether or not it was properly included. In addition the court below had included \$10,000 as "organization expenses," and this item also the court declined to pass upon.

In *Omaha v. Omaha Water Co.*¹¹ the court was reviewing litigation arising out of a franchise allowing the city of Omaha to take over the water company at an appraised valuation. The Supreme Court held that the valuation should include an item of \$562,712.45 (somewhat under ten per cent of the whole valuation), on account of "going value." In this case the franchise expressly excluded any franchise value from the purchase price. The court said:

"The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers."¹²

It is clear from the language that the court had in mind not only an excess over the junk value (or as the court puts it, the "bare bones" of the plant), but an excess over the cost of reproducing the individual items of physical property. But the opinion and the reported facts leave it in doubt whether the cost of reproducing the individual items included the so-called "overhead" costs, such as legal expenses of organization, interest on the investment during construction, engineering superintendence, etc. In the Knoxville case, it will be recalled, "organization expenses" were separately stated. In view of the later cases, it is important to bear this in mind.

In *Cedar Rapids Gas Co. v. Cedar Rapids*,¹³ the company claimed that its physical property was "worth" \$365,564, whereas the municipal experts gave it a value of \$278,621. Included in the former valuation, but not in the latter, were items totalling \$56,038 representing interest during construction and expenses of promo-

¹¹ 218 U. S. 180 (1910).

¹² *Ibid.*, 202.

¹³ 223 U. S. 655 (1912).

tion and supervision.¹⁴ The company claimed in addition an increment of \$100,000 for "going value." The Iowa Supreme Court found a total value "somewhere between \$300,000 and \$350,000, and sustained a rate schedule estimated to bring somewhat more than seven per cent on the former and six per cent on the latter valuation. Since some of the physical items were in dispute, it is impossible to tell what sum the court added as "going value," nor to what extent, if any, it exceeded the overhead costs above mentioned. The ultimate fact which it purported to find was "the value of the system as completed, earning a present income." But "in so far as influenced by income, however, the computation must be made on the basis of reasonable charges." "Good will" was expressly excluded, in deference to the Consolidated Gas case. This decision of the Iowa Supreme Court the United States Supreme Court affirmed, Mr. Justice Holmes observing:

"An adjustment of this sort under a power to regulate rates has to steer between Scylla and Charybdis. On the one side if the franchise is taken to mean that the most profitable return that could be got, free from competition, is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. This is not a matter of economic theory, but of fair interpretation of a bargain. Neither extreme can have been meant. A midway between them must be hit."¹⁵

The case in which "going value" has received the most extended discussion is *Des Moines Gas Co. v. Des Moines*.¹⁶ In this case the master in chancery who reported the facts included in his valuation an item of fifteen per cent of the physical value under the title "overhead." He included in this item promotion costs and legal expenses, engineering costs of preparation and superintendence, insurance against liability and compensation during construction, cost of administration during construction, contingencies, and the interest on the investment while it was unproductive. He then tentatively added another sum of \$300,000, which he estimated as the value arising out of the fact that the company "possessed a well

¹⁴ See *Gas Light Co. v. Cedar Rapids*, 144 Iowa, 426, 120 N. W. 966 (1909), for a more detailed statement of facts than is contained in the United States Supreme Court reports.

¹⁵ 223 U. S. 655, 669, 670 (1912).

¹⁶ 238 U. S. 153 (1915).

developed and paying business." "It is worth that much more," he said, "than a plant would be that had to develop its business." But on reconsideration he excluded this item, apparently because of the decision in the Cedar Rapids case. The Supreme Court sustained this final disposition of the matter. It said:

"That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use."

But it concluded that in view of the allowance of 15 per cent for "overhead" expenses, "it cannot be said, in view of the facts of this case, that the element of going value has not been given the consideration it deserves."

As yet the decisions are not inconsistent with the theory that "going value" is an item which represents the investment in general overhead expenses not directly traceable to specific items of physical property, although the language of the court does imply that it is the existence of customers, and the harmonious operation of the property, which accounts for the added value. In *Denver v. Denver Union Water Co.*,¹⁷ however, there is a direct decision that an item must be allowed in addition to these overhead expenses.

In this case it is stated that the physical valuation included the costs of producing the structures under competitive bidding, plus the engineering and superintendence costs, and to this value was added \$800,000 as "going concern" value. The Supreme Court justified this item by quoting, without further comment, the language in the Des Moines case. It is clear that the sum was intended to represent not a part of the cost of reproducing the property, but an increment arising out of the fact that the company was "doing business and earning money."

It is curious that this result, so difficult to justify on any rational grounds, should have been reached with so little analysis of terms or discussion of principles. What difference is there between value arising out of the fact that the company is "doing business and earning money," allowed in the Denver case, and value due to the fact that it has many customers, rejected in the Willcox case, or

¹⁷ 246 U. S. 178 (1918).

value due to the fact that it has a franchise which permits it to do business and earn money, partly rejected and partly accepted in the Willcox case? And what was it that the court rejected in the Cedar Rapids case and the Des Moines case, if it was not value arising out of business and earnings? The only ground the court has ever given for including "going value" is that a plant in operation and with customers is "worth more" than a plant without business. That is obviously true, but why should the difference be *added* to the appraisal of the physical property? Does the court really mean that a plant, with its full complement of physical equipment, but without personnel or business, is "worth" what it would cost to build it, and that a plant in full operation and with customers is therefore worth considerably more? Surely a plant without customers, and without a strategic location which will attract customers, is worth much less in the market than the cost of producing it. No business man in his senses will build at all unless he is sure of a substantial amount of business. It is only when a plant has a franchise to operate, when it is a "going concern," when it has a "strategic location" and a "good will" sufficient to attract customers, that we can reasonably expect it to be worth what it cost. To embody these items in an increment of value to be added to the cost of construction is sheer duplication.

The result reached by the court may perhaps be attributed to the manner in which cases of this sort usually come up. The record almost invariably contains an engineering report in which each item of physical property is separately scheduled, with a figure set against it to represent the present reproduction cost of the items, due allowance being made for overhead charges. It also contains a separate figure based upon expert testimony as to the intangible value of the plant as a going concern. Since a plant with business is obviously "worth more" than the bare physical structure described in the engineering record, it seems reasonable to add the two figures to obtain the final result. The engineering record is accepted as one of the facts in the case, without realizing that the appraisals which it contains necessarily imply a plant in full operation, with franchise, customers and good will. And the appraisal of intangibles is accepted as another fact supported by expert testimony, without realizing that from the nature of the case the experts could not have reached any conclusion as to the value of the busi-

ness without first making up their minds as to the proper level of rates.

The Supreme Court's adherence to the exchange value theory is, however, limited to these special intangible elements of value. None of the cases indicate any inclination to base rates on the market value of the plant taken as a whole. When the court has spoken of the "fair value" of the whole plant, it is clear that it has intended to designate some other quality of the plant, of which, perhaps, the exchange value of the intangible elements might form a part, but which, in itself, was something other than exchange value.

Is it possible to discover an intrinsic quality of railroad property, which leaves earnings entirely out of account, and to which the term "value" can be applied? The physical plant is always there, the land, the rolling stock, the stations and freight houses, and they have a value apart from their earning power as constituent parts of a railroad. The buildings could be razed, the equipment sold as junk, and the land put on the market. Perhaps in the aggregate a railroad scrapped and sold in this way would yield ten or fifteen per cent of what it cost. But it is equally clear that the Supreme Court did not attach any such meaning to the term "value." The court has repeatedly said that it is not the "bare bones" of the plant that must be valued, but its value as a going concern must be ascertained, its value as a railroad, not as scrap iron and farm land.

The view is generally held that what the Supreme Court meant was neither change value, nor scrap value, but the "present value," *i.e.* the present cost of reproducing the property. Superficially the theory seems attractive. It appears to break the vicious circle by divorcing value entirely from earning power, and resting it on a pure appraisal and engineering estimate. Certainly there is much in Supreme Court language, and a good deal in Supreme Court decisions, which looks in this direction. Let us disregard the *dicta* in *Smyth v. Ames*, calling for a consideration of original cost, capitalization, market value of securities, etc., and the various *dicta* intimating that reproduction cost was merely a preliminary or evidentiary step toward ascertaining a further and different fact known as value. The court has held that the test of the value of land is not its original cost, but the price which it would bring

today.¹⁸ In most of the cases before the court the appraisal was in fact made on the reproduction theory, and the court has not expressed disapproval of the theory, but has confined its discussion to individual disputed items. In a recent case a majority of the court expressly approved "the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures."¹⁹ There are some decisions and *dicta* inconsistent with this view. The court has held that where gas mains were originally laid in unpaved streets, and a few years later pavements were laid at the city's expense, the hypothetical expense of ripping up and relaying these mains was not an item to be included in the value of the mains, although clearly it would be an element in the cost of reproducing the plant.²⁰ As to land the court has expressly rejected the reproduction (or rather reacquisition) test, since it involved addition of speculative increments based on the probable excessive cost of acquiring land for public utility purposes.²¹ Instead, it takes the market value of adjoining property. But with these modifications the court has on the whole stood by the reproduction less depreciation test.

A closer examination, however, reveals many theoretical difficulties, on which Supreme Court decisions throw but little light. A railroad was built fifty years ago into the wilderness. Its terminals were small settlements, and a few scattered homesteads lay along its path. Now the country is thickly populated, and the small settlements have become cities with thousands of inhabitants. The problem is to ascertain what it would cost to build the railroad through this populated territory today. What conditions shall the engineer who makes the estimate assume? He must, of course, assume present costs of materials and labor. Shall he assume present physical and economic conditions of the territory through which the road is to be built? When the original road was built, the right of way ran through virgin forests. Now there is cleared and level farming land. Shall the present cost of cutting and grubbing a hypothetical strip of virgin forest be included in the valua-

¹⁸ *Willcox v. Consol. Gas Co.*, 212 U. S. 19 (1909); *Minnesota Rate Cases*, 230 U. S. 352 (1913).

¹⁹ *Denver v. Denver Union Water Co.*, 246 U. S. 178, 191 (1918).

²⁰ *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153 (1915).

²¹ *Minnesota Rate Cases*, 230 U. S. 352, 452 (1913).

tion? Today the road runs through the heart of a city, with sky-scrapers, parks and valuable residences on either side. To reproduce the railroad we must first wipe it out of existence. Can we assume that the right of way is a bare strip of land? Must we not assume that it also is covered with hypothetical skyscrapers, parks and residences, and that the cost of reproducing the road includes the cost of tearing down the buildings, however valuable, and paying compensation to the owners? Fifty years ago there were large stretches of swamp land, and it was necessary to carry on extensive engineering operations to make a solid foundation for the roadbed. Today the land has been drained by the government. Must we reconstruct a hypothetical swamp? When the road was built men, materials and supplies were hauled many miles in ox teams. Today they could be delivered in car-load lots on freight trains. Is it the present cost of ox teaming or the present cost of rail transportation that is to govern?

One reservation we can perhaps make. The railroad itself, which we are valuing, we must assume to be non-existent. Even if we can assume that other railroads are available to carry rails and cross ties and labor to the scene of construction, we cannot assume that the road we are reproducing is available. But how far can we drive the consequences of such a hypothetical elimination? In estimating the market value of the surrounding real estate are we to assume that the railroad is not in existence? Millions of dollars' worth of factory sites would be wiped out on such an assumption. Whole cities may have grown up merely because the railroad developed their commerce and industry, and whole suburban regions because the railroad made them available for commuters. Shall we assume that these cities and suburban districts are still present and flourishing, or must they, also, be hypothetically wiped out, and the value of the railroad land reduced accordingly?

A solution of these perplexing problems is impossible so long as we have before us the bare phrase, "cost of reproduction less depreciation." No mere grammatical interpretation of its content will help us, for the content is not sufficiently rich to contain the solution. We must go back of the phrase and look for the underlying considerations of policy out of which it has grown. But such an inquiry only presents further difficulties. Why should a railroad have a constitutional claim to a fair return on the present cost of

reproducing it? It has been suggested that there is an ethical principle by which the public is entitled at all times to the service at the present cost of producing that service. In a competitive business that is, very roughly, the measure of remuneration. In a business in which competitors are kept out, the same measure should be applied. This would lead, however, to a test based not on the present cost of reproducing that particular physical property, but on the cost of reproducing a plant capable of rendering equivalent service. That is not the test generally applied.²² Moreover, it would require a theory of reproduction cost new, not of reproduction cost less depreciation. A hypothetical competitor must build a new plant. He cannot buy one second hand. The Supreme Court, however, has decided that depreciation must be deducted from the cost of reproduction new.²³ But waiving these discrepancies, is there anything logically compelling about the theory? Have we any right to assume that the community is willing at all times to pay for a service at its present cost of reproduction? Would a railroad be built at all, today, into the heart of New York City if skyscrapers and residences had to be razed to build it? Would we not perhaps content ourselves with a passenger terminal in the outskirts, easily reached by subway or elevated lines? Railroads are not generally built through full-grown cities. They are built while the city is young, while construction is cheap, and as population increases the railroad and the city mutually adapt themselves to each other along the lines of least resistance.

The Supreme Court has nowhere made any articulate inquiry into the underlying considerations of theory or policy on which its doctrine of reproduction less depreciation rests. Hence we have no principle to guide us in deciding the disputed questions which I have enumerated. To hold that for purposes of construction every railroad is deemed to be in existence except the one we are valuing is purely arbitrary. It makes the final result depend entirely on the accident of ownership. If all the railroads serving a given territory are under common ownership, so that for purposes of rate-making they are valued as a whole, they must all be deemed to be non-existent for construction purposes. If they are separately owned, and are valued separately, each one in turn must

²² See Whitten, "Fair Value for Rate Purposes," 27 HARV. L. REV. 419.

²³ *Knoxville v. Knoxville Water Co.*, 212 U. S. 1 (1909).

be deemed non-existent and all the others in operation. On the other hand, to "reproduce" all or even a substantial portion of the railroads at once, as a single national system, would involve a sudden strain on the labor and material market which would itself enormously enhance the hypothetical cost of reproduction. In short, the cost of reproduction rule, however solidly it seems at first to rest on arithmetic and engineering data, is in truth not a rule at all. It does not point to any rationally ascertainable conclusion. The conclusion depends upon which one of a great number of possible sets of hypothetical conditions we are to assume, and the rule gives us no assistance in determining which particular set we are to select.

In a recently published study²⁴ Mr. Robert Hale has made a valiant attempt to reconcile the exchange value theory and the reproduction cost theory, and to establish the resultant on a rational basis. Mr. Hale thinks that there is such a thing as the exchange value of the physical plant, divorced from all "intangible" elements, and that this value can be ascertained without becoming enmeshed in the vicious circle of values and earnings.

Mr. Hale asks us to conceive of a plant, completed and ready for operation, and in the hands of an owner who has no franchise right to operate it. He asks us to imagine further a man in possession of a franchise right to operate a public utility, but with no physical plant to operate. The price at which the owner of the plant-less franchise would buy the franchise-less plant, Mr. Hale denominates the exchange value of the physical property. Mr. Hale points out that since the owner of the franchise has the alternative of himself building a new plant, the exchange value of the plant cannot under any circumstances exceed the present cost of reproducing an equally efficient substitute (due allowance being made, of course, for depreciation). And since the owner of the franchise will not under any circumstances pay more than the capitalized prospective earning power of the business, the exchange value may be less than the cost of reproduction. The exchange value of the physical property, then, is its reproduction cost less depreciation, provided that is not more than the capitalized prospective earning power.

Mr. Hale does not contend that the exchange value, so defined,

²⁴ Valuation and Rate-Making, ch. 1.

has been adopted by any court as the basis of rate-making, or even that it should be. His contention is that it could be adopted, without logical fallacy, since it provides an ascertainable quality which can be termed "value," and since it avoids the vicious circle of the market value theory. It seems to me that even this modest claim cannot be sustained. It is true that the hypothetical owner of a plant-less franchise would not pay more for a plant than the cost of building an equally efficient substitute. But the utmost figure which a purchaser will pay is not a fair criterion of exchange value. We must consider also the lowest figure which the seller will take. Obviously the owner of a franchise-less plant has no possible use for the plant himself. As a last resort he can sell it for junk, but unless he sells it, it is worth nothing to him. When a purchaser and a seller approach each other under these conditions, there is no possible method of estimating what the exchange price will be. All we can tell is that it will range somewhere between reproduction cost less depreciation, and junk value. At what point between these limits the parties will strike a bargain depends upon their relative trading ability, the intensity of their respective desires to part with or acquire the property, their ability and willingness to wait, and similar factors. Such a property has no ascertainable exchange value. Mr. Hale has simply taken the upper limit of the possible range of price, and called it exchange value.

Of course it is possible to conceive of a situation in which this upper limit would be the price at which the property would change hands. There might be some other use to which the property could be put, just as lucrative as the use covered by the franchise. Or there might be several competing owners of plant-less franchises bidding for the plant. But the first supposition is almost invariably contrary to fact. The second is possible, but the possibility should not be taken into account in establishing a general constitutional rule. The number of franchises which a state may grant is entirely within its own discretion. It is entirely free to decline to grant more than one franchise to operate in a given field. If it has granted more than one franchise, it is entirely free to revoke all franchises but one, either under the reserved power in the state constitution or by eminent domain, and such revocation cannot be complained of by the owner of physical property suitable for use under the franchise, however much the market value of his physical

property may have been impaired. And if we may assume the existence of several franchises and only one plant, why may we not with equal propriety assume several plants and one franchise? In such a case, in a free market the exchange value of the plants would be close to their junk value.

The second part of Mr. Hale's thesis seems to me to be equally untenable. The argument is that while the exchange value of the physical property will certainly never exceed the reproduction cost less depreciation, it may be less than this sum, if the anticipated net earning power of the whole business (the plant operated under the franchise) is not sufficient to promise a fair return on the cost of reproduction. The consequence which Mr. Hale draws from the argument is that while the government cannot *reduce* rates which do not bring a fair return on the cost of reproduction less depreciation, it can never be compelled to *increase* rates, since the exchange value of the physical property will itself be governed by the existing level of rates. Here it seems to me that Mr. Hale has not succeeded in escaping the vicious circle. The owner of the franchise will not bid more than the capitalized prospective earnings, but these earnings depend on prospective rates. If the purchaser is convinced that the commission and the courts will allow rates which bring in a fair return on the full reproduction value, he will pay that value rather than lose the plant. If he is not so convinced, he will pay less. We may assume, perhaps, that a commission has announced its determination not to permit an increase in rates. But this announcement will not influence the sagacious buyer, who has access to learned counsel, for he must know that unless the rates are constitutionally correct the courts will upset them. In other words, to establish the validity of this thesis, we must first assume its validity.

I do not think it is possible to read with an open mind the series of Supreme Court decisions on valuation, beginning with *Smyth v. Ames*, without coming to the conclusion that the court has failed to accomplish what it set out to do. The court started with the problem of enunciating a legal principle which would preserve the authority of the state to regulate rates, and yet restrain that authority within reasonable limits. It was under the necessity of so formulating this principle that it would rest on a finding of fact, rather than on an exercise of political discretion. The fact which

it selected was the "fair value" of the property. That the first case in which the rule was formulated contained no intelligible directions by which the fact could be ascertained is not a conclusive argument against the rule. The facts in *Smyth v. Ames*, as interpreted by the court, were such that rates would have been confiscatory under any definition of value. It is a common and a wholesome practice for courts to state new doctrines in general and perhaps ambiguous form, leaving to the process of exclusion and inclusion in subsequent cases the development of the precise limits and implications of the rule. My quarrel with the rule in *Smyth v. Ames* is that twenty years of active judicial elaboration has failed to reveal any logical principle, or any consistent basis of policy on which the rule rests, and according to which it can be interpreted and developed. Only a very few of the doubtful questions which it raises have been settled by Supreme Court precedents, and they have been settled arbitrarily. It is impossible to forecast how the court will decide the questions which are still open. That is not the result which we should expect from a rule founded on a fixed and ascertainable fact.

Our excursion into imaginative history in the previous installment of this paper gives us the clue to the true reason for this failure. The relation between the public utility and the community cannot be expressed in terms of a simple, quantitatively ascertainable fact, for the relation involves numerous and complex factors which depend on compromise and practical adjustment rather than on deductive logic. The whole doctrine of *Smyth v. Ames* rests upon a gigantic illusion. The fact which for twenty years the court has been vainly trying to find does not exist. "Fair value" must be shelved among the great juristic myths of history, with the Law of Nature and the Social Contract. As a practical concept, from which practical conclusions can be drawn, it is valueless.

IV

If it is true that as a matter of economic and legal theory the doctrine of *Smyth v. Ames* is fallacious and fair value a juristic illusion, several consequences of a practical nature are forced upon us. I shall deal primarily with two, each of immediate and pressing importance.

The first consequence is one that must be faced by the legislature.

When a constitutional theory has led a court into a twenty-year search for a fact which does not exist, when the outcome of these twenty years of active litigation is that most of the practical questions upon which a regulating commission desires guidance are as yet undecided, and when no indication has been given of what the future may bring, the time has come to consider whether it is wise to continue a relation between the railroads and the public which is based upon such a theory. A serious defect in our traditional system of rate regulation has always been its uncertainty. In an industry in which speculative profits are no longer possible, the great essential of financial health is certainty of earnings. The volume of traffic and the level of operating expenses, two of the three factors which directly affect railroad earnings, must to a certain degree depend upon unforeseeable contingencies, but there is no reason why the third factor, the level of rates, should remain uncertain. A system of regulation in which the level of freight and passenger rates becomes the fortuitous outcome of a process of juristic speculation upon the missing terms of an ambiguous contract cannot produce certainty. The investor cannot tell upon what level of rates to calculate the prospective earning power of the stock he is purchasing. He cannot even tell whether the equity upon which he supposes his stock to be based may not be completely wiped out by a subsequent decision of the Supreme Court. The lack of any certain rule of rate-making is recognized as one of the major factors in the instability of railroad finances.

To anyone who is able to free his vision of the hazy juristic concepts which surround the current theory of public utilities, it must be apparent that the terms of the public utility relation are intolerably vague. No rational group of business men would today enter into an undertaking on such a basis. Imagine a contract, let us say, for the construction of a large modern warehouse, which merely provides that the contractors shall build an "adequate" and "serviceable" structure, and shall receive in return "just" and "reasonable" compensation, the adequacy of the structure and the reasonableness of the compensation to be determined by the courts, from time to time, as particular questions come before it in actual litigation. Obviously the contractors would find it impossible to induce bankers to finance such an undertaking.

The whole policy of private ownership and public regulation

of American railroads is now undergoing the most searching criticism. There are counts in the indictment, which seem to me to be valid, and which go far beyond the features I have attacked in this paper. If, however, the policy is to survive, it seems to me clear that the least that can be done is to render certain and specific, once and for all, the particulars of the relation between the railroads and the public. It will not be enough to place a definite valuation upon the railroads for rate-making purposes. The valuation is merely one among many terms of the relation which are now indefinite. The whole contract, as to the nature of which the Supreme Court has for twenty years been speculating, must be set down in black and white, with all the clarity and certainty which the best legal draftsmanship can achieve. The contract must state what elements are to affect the valuation in the future, whether, for instance, appreciation of existing investment is to be included, and if so how it is to be measured, or whether only new investment is to be recognized. The rate of return must be stated in cents on the dollar, not in vague formulae. There must be a detailed formulation of the risks which the railroad companies are to assume and the risks which are to fall on the community. There must be an explicit definition of the standard of service which the stipulated compensation is to cover, and a careful machinery for adjusting compensation where a higher standard of service is required or sanctioned by the government. The disposition of annual surpluses and deficits must be taken care of. Every item which is now enveloped in doubt and ambiguity must be made certain and unequivocal.

Clearly this means that the formulation of the incidents of the public service relation must cease to be a matter of constitutional theory. The relation must in some way be drawn out from under the Fifth and Fourteenth Amendments. Either by voluntary agreement or by compulsory reorganization under the federal power of eminent domain, the vague constitutional fetters which the courts have woven about the subject must be shaken off.

It is apparent that no such result was achieved or even aimed at in the Esch-Cummins legislation passed by Congress and approved by the President last February.²⁵ In instructing the Interstate Commerce Commission to divide the country into rate

²⁵ Transportation Act, 1920.

groups, and to fix rates in each group so that they will bring a stated percentage of return on the "value" of the railways in that group,²⁶ the law marks an advance in the direction of certainty, but it is only a slight one. It will still be the duty of the Interstate Commerce Commission, and ultimately of the Supreme Court, to determine from time to time that elusive and imaginary quantity, the "value" of the railroads. There is no authority either for compulsory reorganization by eminent domain, or for an agreement setting at rest for the future the ambiguities of the public utility relation.

The second practical consequence of the nature of the public utility relation, as I have analyzed it in this paper, is one that must be faced by the courts. Whether under the Esch-Cummins Act and the Valuation Act, or under some new policy of reorganization or nationalization, it will before long be necessary for the Supreme Court to determine what value should be allowed for the railroads of the United States, as a basis of regulation or condemnation. The circumstance that the problem is logically insoluble, that "fair value" as a juristic concept signifies nothing, will not relieve the court of its duty under the Constitution. A practical decision must be reached, however intellectually distasteful the task may be.

Whether the valuation is for purposes of rate regulation, or for purposes of condemnation, will not substantially alter the problem. The traditional measure of just compensation in eminent domain cases is of course market value, yet it does not seem possible that this measure will be applied in the case of property subject to state regulation. If it were applied to the railroads in their present condition, the railroads themselves would be the first to deny its validity, for the market value of the railroads as measured by the market price of stocks and bonds is exceedingly low. The Supreme Court has said that an attempt to reduce the just compensation due to the owners of a public utility, by first reducing their rates below the level of reasonableness, cannot succeed,²⁶ and the converse must be equally true, that inflated market value due to unreasonably high rates cannot be recognized. Market value under reasonable rates seems the only sound measure of just compensa-

²⁶ Section 15a of the Act to Regulate Commerce, as amended by the Transportation Act, 1920.

tion, but it is a measure which throws us back again on the formula of *Smyth v. Ames*. Even railroad nationalization will not relieve the courts of the necessity of fixing the "fair value" of the railroads.

Yet the fact that "fair value" is a myth, that it cannot be scientifically ascertained by observation and induction, that it is in reality merely a cloak which conceals a process of arbitrary decision based on considerations of policy, cannot be without its influence on the judicial method of approach to the problem. That the decision must turn largely upon considerations of justice and policy which cannot be juristically formulated, is a circumstance which should influence the court to widen largely the scope of discretion accorded to the non-judicial body which in the first instance conducts or directs the valuation. If Congress formulates general principles of rate-making or of compensation, the court should not upset these principles merely because it is of opinion that a different formulation would be juster. The principles formulated by Congress should stand unless so clearly unfair as to outrage the common sense of justice. If a commission is appointed to investigate the relevant facts, to negotiate with the railroad interests, and to fix a fair and workable measure of compensation, and if it appears that the commission has examined the evidence honestly and impartially, and has given all parties a fair hearing, and if it does not appear that the commission has been influenced by legal theories which are clearly erroneous, then the Supreme Court should, it seems, give a very wide latitude to the discretion of the commission. I do not mean merely that findings of fact if supported by evidence should be sustained. I mean that conclusions based upon considerations of justice and policy should not be overruled unless utterly beyond the pale of fairness and common sense. We must bear in mind constantly that a constitutional yardstick by which the valuation can be measured does not exist. The value of property devoted to the public service is in its nature indeterminate, subject to the will of the very government which is ascertaining it. Valuation must be regarded as a task which is largely legislative and administrative, in which the judgment of Congress, or of an administrative tribunal which adheres to the forms of due process, must within wide limits of discretion be deemed conclusive.

It is true that such an attitude on the part of the Supreme Court would necessitate a departure from the traditional conception of

the respective functions of court and of legislature in eminent domain cases, as well as in rate-regulation cases. "The legislature may determine," the Supreme Court has said,²⁷

"what private property is needed for public purposes — that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

Property engaged in an enterprise of which the earnings depend on state regulation is, however, in its nature different from property of the usual kind. It has voluntarily surrendered its value as ordinary private property. When the land, the cross ties, the rails and building materials, and the other forms of "private" property were converted into an operating public utility plant, they assumed a new form and acquired a new kind of "value." Their value became, within constitutional limits, precisely what the legislature or its administrative agency declared it to be. That there are constitutional limits must of course be conceded; the court has so held. But from the nature of the case those limits must be flexible. The constitutional function of the courts should be merely to guard against a rule of compensation so outrageous as to shock the common sense of justice. This peculiar characteristic of property devoted to public uses affords a clear ground for an exception to the general rule of the *Monongahela* case.

I have expressed no opinion, in this paper, as to what value should be placed upon the railroads, nor as to the considerations which should govern in determining their value. I have discussed merely the constitutional limitations which should surround such a determination. My plea is that the formulation of principles and weighing of policies should be entrusted to an administrative body, acting under general instructions from Congress, and frankly and honestly basing its conclusions upon considerations of public policy, rather than to a court, acting upon principles which bear a delusive semblance of juristic precision, but which from the nature

²⁷ *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893).

of the case can be no more than inarticulate expressions of the political or economic view of the judges. My hope is that the court may recognize the essential legislative character of the problem, and reserve for itself only the modest task of keeping the legislative discretion within decent bounds.

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THE PROGRESS OF THE LAW

MUNICIPAL CORPORATIONS

I

LEGISLATIVE CONTROL

THE Legislature has full power to divide, to increase the territory or to abolish municipal corporations, without asking the consent of the inhabitants. This perfectly well settled principle is illustrated by several of the cases of the year under review.¹ If a new corporation is created by the division of an older one, the new corporation is not responsible for the debts of the old unless provision is made to that effect by the Legislature;² but if the Legislature chooses it may prescribe as it will for a division whether of the debts or of the property of the corporation.³ It may also provide for an equitable division of the taxes already levied.⁴ In order to carry on local improvements, the Legislature frequently creates special municipal corporations within the territory of the city or town. This it may do at its absolute will, using the same or a part of the same territory for the new corporation.⁵

In all public matters, the Legislature may make any requirement it desires with respect to the acts of the municipal corporation. For instance, it may require a court district to deposit its public funds with the county's treasurer, to be placed in a certain bank;⁶ or it may prescribe a course of studies in all the school districts of the state.⁷ On the other hand, it may not interfere in purely local affairs such as the appointment of merely local officers.⁸

¹ *Kramer v. Renville County*, 175 N. W. (Minn.) 101 (1919), *school district*; *Pershing County v. District Court*, 181 Pac. (Nev.) 960, 183 Pac. 314 (1919), *county*; *Strasburg v. Chandler*, 97 S. E. (Va.) 313 (1918), *city*.

² *West Paterson v. Little Falls*, 105 Atl. (N. J. L.) 452 (1918).

³ *Yazoo County v. Humphreys County*, 83 So. (Miss.) 275 (1919); *State v. Baca County*, 182 Pac. (N. Mex.) 865 (1919).

⁴ *La Salle v. Catahoula*, 83 So. (145 La.) 250 (1919); *Boettcher v. McDowall*, 174 N. W. (N. Dak.) 759 (1919).

⁵ *Dahler v. Washington S. S. Comm.*, 133 Md. 644, 106 Atl. 10 (1919).

⁶ *State v. Gaines*, 186 Pac. (Wash.) 257 (1919).

⁷ *State v. Totten*, 175 N. W. (N. Dak.) 563 (1919).

⁸ *New Orleans v. New Orleans R. & L. Co.*, 82 So. (145 La.) 280 (1919).

In the administration of these general principles several interesting cases have arisen. In North Carolina a county had been compelled to erect stock-law fences and for that purpose had collected a large fund by special taxation and had built the fences. By a later change in the state legislation the stock-law fences were made unnecessary, and the county was directed by the Legislature to sell them and turn the proceeds into the general fund of the county. Objection was made to this by some of the persons who had been compelled to pay the special tax for building the fences; but the court held that this was a perfectly constitutional law and that the Legislature had the right to dispose of the money as it would.⁹

In *Martin v. Wachovia Bank*¹⁰ the Legislature provided for the construction of a bridge and causeway between Martin and Bertie Counties. It appeared that the principal cost was in the causeway which was constructed entirely within Bertie County, but it also appeared that the principal benefit of the bridge and causeway accrued to Martin County. The Legislature provided that three-quarters of the cost should be paid by Martin County. It was held that this was a perfectly proper statute.

In *Duffy v. Burrill*¹¹ provision was made for the collection by the state of an income tax, and its division, after the expenses had been paid, among the cities and towns of the state in proportion to the amount paid by them to the state tax; this being different from the proportion adopted for the assessment of the income tax. The court held that this was entirely within the power of the Legislature; that there was nothing to prevent their making such distribution, provided the property raised by taxation was devoted to a public purpose; and as no city or town could devote such money to any other than a public purpose, the provision was entirely legal.

The opinion of the justices was asked in Massachusetts as to the constitutionality of a proposed law by which the street railways should charge a fare of only five cents, and the expected deficit should be made up by taxes on the people of the benefited territory. The court gave its opinion that this would be proper, being within the power of the Legislature over its municipal corporations. This is a matter of public interest to all the cities and towns

⁹ *Parker v. Johnston County*, 100 S. E. (N. C.) 244 (1919).

¹⁰ *Martin County v. Wachovia Bank & Tr. Co.*, 100 S. E. (N. C.) 134 (1919).

¹¹ *Duffy v. Burrill*, 125 N. E. (Mass.) 135 (1919).

involved, and therefore the state could tax them for the carrying on of the public enterprise; it could, therefore, divide the expense among the cities and towns in any way which seemed to the Legislature proper.¹²

The formation of municipal corporations under general statutes passed by the Legislature has become very common, especially in the West and Southwest; and this practice has given rise to an amount of litigation which may properly be described as enormous, but uninteresting.¹³

II

ELECTIONS

A question often arises from the ineligibility of one of the candidates in an election. If such an ineligible candidate is elected on the face of the returns, will the person who receives the next highest vote be declared elected, or will there be no election? The generally adopted rule is that unless the ineligibility was well known to the voters at the time of the election, there will be no election in case the person receiving the highest number of votes is ineligible. This general rule was affirmed in the interesting case of *Heney v. Jordan*.¹⁴ It was provided by statute that if in a primary election a man chose to be a candidate for both party nominations he might receive both nominations provided he was nominated by his own party; but if he failed of nomination by his own party, he could not then be the candidate of the other party. A person running on both the Republican and the Democratic tickets, but being himself a Republican, failed of nomination on the Republican ticket; he was therefore ineligible under the statute for nomination on the Democratic ticket. It was held that the person having the next vote to him

¹² Opinion of the Justices, 231 Mass. 603, 122 N. E. 763 (1919).

¹³ For cases of this sort see the following selected from scores, if not hundreds, decided during the year under review: *Busby v. Reid*, 210 S. W. (Ark.) 625 (1919); *Harpham v. Ventura County*, 182 Pac. (Cal. App.) 324 (1919); *Ludlow v. Ludlow*, 216 S. W. (Ky.) 596 (1919); *Bowman-Hicks Lumber Co. v. Oakdale*, 144 La. 849, 81 So. 367 (1918). The arguments in favor of these general laws is that they save the time of the legislature, and promote self-government. The time of the legislature appears to be saved at the sacrifice of the time of the courts; opinions might possibly differ as to which time is more valuable. Self-government in this case proves to be the power of an irresponsible majority to oppress a minority. It may be doubted whether anything is gained in the long run by this sort of legislation.

¹⁴ *Heney v. Jordan*, 175 Pac. (Cal.) 402 (1918). See comments on this decision in 7 CAL. L. REV. 63; 32 HARV. L. REV. 435.

was not nominated, but that there was a failure to nominate. On the other hand, in the case of *Justice v. Justice*,¹⁵ the court reached a contrary conclusion. In that case the nominee who received the highest number of votes was not legally on the ballot because of some informality in his nomination papers. It was held that the other party on the ballot, who received less votes, was elected. It is submitted that this decision is not in accordance with the general rule, nor does it seem to be at all justified by any consideration of *justice*.

III

OFFICERS AND ADMINISTRATIVE BOARDS

The distinction between an officer and an employee, — that the officer must have definite duties laid down by law and not be subject to direction by any one else in the performance of his duties, that he must take the oath of office and exercise a special public trust, — is illustrated by several interesting cases. In Arkansas the majority of the court held that a city manager is a public officer, and incidentally that the provision in the statute creating the office, that he need not be a resident of the city, is unconstitutional where the constitution requires that any officer of the city shall have the qualifications of an elector.¹⁶ In the Federal Court it was held that a person who manages a public utility board for the city is not an officer, since the utility is a commercial function and has no governmental significance; and the manager of a municipal lighting plant is therefore on the same plane as the manager of a private lighting plant.¹⁷ In a Florida case, it was held that a "rural school instructor" is a public officer.¹⁸ The old rule that the city council is the city finds an interesting development in a Texas case.¹⁹ The question there was as to the domicile of a school district; it was held that the Board of Trustees represented the district legally and that the domicile of the district was "where the trustees reside or have their place of business." It seems clear that the regular meeting-place, the "place of business," of the trustees is the domicile of the district, and not the residences of the individual trustees.

¹⁵ *Justice v. Justice*, 184 Ky. 130, 211 S. W. 419 (1919).

¹⁶ *McClendon v. Hot Springs*, 216 S. W. (Ark.) 289 (1919).

¹⁷ *Rockhill I. & C. Co. v. Taunton*, 261 Fed. 234 (1919).

¹⁸ *State v. Sheats*, 83 So. (Fla.) 508 (1919).

¹⁹ *State v. Waller*, 211 S. W. (Tex. Civ. App.) 322 (1919).

In *Grosjean v. San Francisco* ²⁰ a rule of the Board of Education had been unanimously suspended at a meeting of the Board, and a new rule passed under the suspension of the rule. The rules contained a provision that no alteration of the rules should be adopted unless it had been presented in writing at a previous meeting. This had not been done. There was no provision in the rules for a suspension of a rule. It was held that the new rule had been properly adopted, on the ground that the rule was

“merely a rule of parliamentary procedure adopted for the guidance, and it may be protection, of the members of the board, and which they had power to suspend or ignore when occasion required, and, in respect to their action in so doing, no one but the members of the board themselves would have a right to complain.”

Authorities were cited in favor of this view; there are equally strong authorities against it.²¹

The position of the court here seems to the writer untenable. It is based upon the assumption that the majority of a legislative body may act as it pleases, and cannot tie its own hands from so acting by any rule requiring time for consideration or the vote of more than a majority before action is taken. But this does not seem sound. The action of a legislative body is more than the mere agreement of the members. If the members, in open meeting, all signed a proposed act this would not constitute an act of the body. To be the act of the body rather than that of its members, the vote must be proposed, put, and passed in accordance with parliamentary law and the rules that govern the body. In order to provide for a case of emergency, where all the members desire to avoid a requirement of a rule, it is customary to provide for a suspension of the rules by a large majority or by a unanimous vote. Here there was no such provision.

The result may perhaps be reached by a different line of reasoning. All acts of a subordinate body acting under a general power must be reasonable or they are invalid. The rule as adopted, without provision for suspension, seems unreasonable as unduly tying the hands of the board; the action of the board, therefore, in suspending the rule by a unanimous vote was valid.

²⁰ 181 Pac. (Cal. App.) 113 (1919).

²¹ *Swindell v. Maxey*, 143 Ind. 153, 42 N. E. 528 (1895).

IV

PERFORMANCE OF DUTY

In *Valentine v. Independent School District*,²² a pupil who had passed all grades in a public school brought a petition for mandamus to compel the school authorities to give her her diploma and a record of her grades. It appeared that the scholars had been required to wear a cap and gown at the graduating exercises, and that the cap and gown provided by the school department had previously been worn by a person afflicted with contagious disease, but had been fumigated. The pupil refused to wear cap and gown on the ground that it was dangerous, and she was thereupon excluded from the graduating exercises and refused a diploma and information about her grades. The court held that this was arbitrary and unreasonable treatment, that the diploma had been earned by the passing of the required tests and that being present at the graduating exercises was not one of these tests, that the grade of a pupil in a public school is a public record to which such pupil is entitled to access, and therefore granted the petition. This case illustrates very neatly the requirement of reasonableness in every action of a legislative or administrative board, acting under the general authority of the law.

In *Beem v. Davis* ²³ the court required the city to administer its own fire ordinance by tearing down a building built in violation of the ordinance. This seems an unusual exercise of the writ of mandamus, since generally officers are not required by the court to do any discretionary act in the ordinary administration of the law. The general acceptance of the doctrine of this case, however, would lead to a better administration of government. The danger is, that the judges might allow themselves to be substituted, as instruments for good government, for the officers elected by the people.

The power of the mayor or prosecuting attorney to acquire information for the purpose of preventing violation of the law is not popular in the far West. In two cases it has been denied.²⁴ Whether the nature of the offence to be detected influenced these decisions does not appear.

²² *Valentine v. Independent School District*, 174 N. W. (Ia.) 334 (1919).

²³ *Beem v. Davis*, 31 Ida. 730, 175 Pac. 959 (1918).

²⁴ *Tate v. Johnson*, 181 Pac. (Ida.) 523 (1919); *Irwin v. Klamath County*, 183 Pac. (Ore.) 780 (1919).

V

RESIGNATION AND REMOVAL OF OFFICERS

The appointing power included at common law the full power also of removing any employees not employed for a given term.²⁵ Under the Civil Service laws now almost universally passed an employee cannot be removed except for cause and after a hearing. In the case of *Eisberg v. Mayor*²⁶ the question whether a policeman had a fair hearing on the complaint for his removal came before the court. In that case a policeman was complained of by one of the members of the Council, a second one did not hear the testimony against him, but merely appeared as a witness against him, and two other members of the Council also appeared as witnesses against him. He was ordered removed by a vote of 4 to 2. It was held he had not had a fair trial; a conclusion which seems well within the bounds of reason. In a similar case, an old employee gave evidence of suffering from nervous prostration or from mental derangement. He was removed for insubordination without any inquiry as to the condition of his health. This also was held to be unfair and his reinstatement ordered.²⁷

Where a county officer was drafted into the army, it was held that this involuntary action from service would not deprive him of office.²⁸

The fact that resignation of an officer does not terminate his office, but that acceptance of the resignation by the proper authorities is required, is perfectly clear, but appears to be ignored by many lawyers. It has been necessary to reaffirm this doctrine in two cases during the year under review.²⁹

VI

ORDINANCES

The general principle that an ordinance in order to be valid must be reasonable has been discussed in several cases. The ordinance has been found to be valid in a case where the keeping of

²⁵ *State v. Wunderlich*, 175 N. W. (Minn.) 677 (1920).

²⁶ *Eisberg v. Mayor of Cliffside Park*, 92 N. J. L. 321, 105 Atl. 716 (1919).

²⁷ *People v. Connolly*, 184 App. Div. 587, 172 N. Y. Supp. 48 (1918).

²⁸ *Hamilton v. King*, 206 S. W. (Tex. Civ. App.) 953 (1918).

²⁹ *State v. Bush*, 208 S. W. (Tenn.) 607 (1919); *State v. Jefferis*, 178 Pac. (Wyo.) 909 (1919).

livery stables within a residential district was forbidden,³⁰ where an inspection of dairies was ordered,³¹ and where a fee was placed upon an outside merchant doing business within the city.³² In *ex parte* Blois³³ it was held that a city ordinance of Palo Alto requiring an inspection of all laundries in which clothes from that place were washed was legal, although in its application it covered laundries in other cities; but that in the particular case a mileage fee of 30 cents per mile both ways for the inspector was unreasonable. On the other hand, in a Florida case³⁴ an ordinance ordering the closing of places of business at 6.30 o'clock P. M. was held unreasonable. In *Rhea v. Board of Education*³⁵ the Supreme Court of North Dakota held that a regulation of the board of health, requiring vaccination before a child was enabled to attend the public schools, was invalid. It seemed to the majority of the court enough to say that the schools were public schools and every member of the public had a right to attend them. The reasoning of Mr. Justice Robinson is as interesting as always. In *St. Louis Poster Advertising Co. v. St. Louis*³⁶ an ordinance limiting the size and strength of billboards was allowed to stand, and Mr. Justice Holmes made the important remark that "if the city desired to discourage bill boards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in Thomas Cusack Co's Case."

VII

HIGHWAYS

The right of everyone to the use of a public highway is asserted in *Sumner County v. Interurban Transportation Company*,³⁷ where it appeared that the plaintiff was using trucks of a heavier sort than usual, which injured the roadway. The court held that the right to use the highway was not limited to use with light vehicles, and that the plaintiff had a perfect right to make use of the highway

³⁰ *Boyd v. Sierra Madre*, 183 Pac. (Cal. App.) 230 (1919).

³¹ *Creaghan v. Baltimore*, 132 Md. 442, 104 Atl. 180 (1918).

³² *State v. Cater*, 182 Ia. 905, 169 N. W. 43 (1918).

³³ *Ex parte* Blois, 176 Pac. (Cal.) 449 (1918).

³⁴ *Ex parte* Harrell, 79 So. (Fla.) 116 (1918).

³⁵ *Rhea v. Board of Education of Devils Lake Dist.*, 171 N. W. (N. Dak.) 103 (1919).

³⁶ *St. Louis Poster Advertising Co. v. St. Louis*, 39 Sup. Ct. Rep. 274 (1919).

³⁷ *Sumner County v. Interurban Transp. Co.*, 141 Tenn. 493, 213 S. W. 412 (1919).

with his truck. For the same reason a charge cannot be made for the ordinary use of the street, unless it is allowed by statute.³⁸

A right granted by a city to a public utility to use the streets is often called a franchise; wrongly, as it seems to the writer, since the city has no right in the street except as a regulator of the public use. If the public use requires the operation of the utility, then, in the exercise of its duty to regulate use, the city should allow the utility to use the streets. On the other hand, if the public does not require such use, the city has no authority whatever to grant it, any more than it would have to grant the use of any private property. This right to use the streets is more properly called a license than a franchise.³⁹ This license, when acted upon by the utility, becomes, as it is sometimes called, a contract,⁴⁰ so far, at least, that the city cannot interfere with the property of the utility used in the exercise of the granted right.⁴¹ Such a contract may be modified in the exercise of the police power of the city, since that is a governmental power, the use of which cannot be affected by any contract of the city. But in any other case the city is bound by its contract. This appears in two interesting cases in the Supreme Court of the United States. In the first, the city having granted a right to two electric companies to use the streets, thereupon decided itself to go into the business of supplying electricity to the city, and ordered the removal of poles by one of the companies. It was held that it could not thus violate its obligation, since the only thing in question was its desire itself to engage in a commercial business.⁴² In the other case, an ordinance required the street railway company to sprinkle the roadway between its tracks; this was held to be an exercise of the police power and to be valid, notwithstanding the fact that the city had granted the company the use of its streets for the purpose of running a street railroad.⁴³ The police power of the state also justified an order of the city of Denver, requiring the removal from the street of certain tracks which had become a danger to traffic.⁴⁴

³⁸ *Forbes P. B. Line v. Everglades Drainage Dist.* 82 So. (Fla.) 346 (1919).

³⁹ *Sullivan v. Central Ill. P. S. Co.*, 287 Ill. 19, 122 N. E. 58 (1919).

⁴⁰ *Sullivan v. Best*, 281 Ill. 315, 121 N. E. 565 (1919).

⁴¹ *Burlington L. & P. Co. v. Burlington*, 106 Atl. (Vt.) 513 (1918).

⁴² *Los Angeles v. Los Angeles G. & E. Corp.*, 40 Sup. Ct. Rep. 76 (1919).

⁴³ *Pacific G. & E. Co. v. Sacramento*, 40 Sup. Ct. Rep. 79 (1919).

⁴⁴ *Denver & R. G. R. R. Co. v. Denver*, 39 Sup. Ct. Rep. 450 (1919).

Where the time set for a franchise has expired, the city may undoubtedly require the removal of the tracks from the streets, since in its capacity as caring for the traffic of the streets, it may clear the streets for the promotion of traffic.⁴⁵ If, however, the city does not so order, the street railroad continuing to operate after the expiration of its franchise is not trespassing but is making a proper use of the streets; and it has been held that while the city may order the company under those circumstances to leave the streets altogether, it may not impose an illegal exaction upon the company as compensation for its continuing to use the streets. Such an exaction being illegal, is void, and the order does not drive the company off the streets if it refuses to submit to the void exaction.⁴⁶

The right of the city, even the obligation of the city to exact compensation for the grant of a franchise has been asserted in some cases.⁴⁷ It is submitted, however, that this is entirely improper, since the city as has been seen can make no charge upon an individual for the use of the public highway; and since the public utility is exercising the right of the individuals who are primarily benefited by the franchise to use the streets, and whose right to use the streets is in question, it seems clear that no charge can be made against the utility. It is said that this is for the privilege of granting the franchise; but, as has already been seen, the city is entitled to no compensation for doing this public duty, for it has nothing to sell. If the public's requirements compel the use of the streets in this way it is already the duty of the city to grant the permission. If they do not, the city cannot by granting the license cause a public inconvenience in order to secure money from the utility.

A question sometimes arises between the city, county and state as to its highways. In a case where the city had been extended by annexation to include territory of the surrounding county, it was held that a county highway in that territory continued to be a county highway, although the city had come to have the power of regulating the use of it.⁴⁸ In two Pennsylvania cases, where

⁴⁵ *Detroit United Ry. Co. v. Detroit*, 39 Sup. Ct. Rep. 151 (1919).

⁴⁶ *Doherty v. Toledo R. & L. Co.*, 254 Fed. 597 (1918).

⁴⁷ *Valley Rys. v. Mechanicsburg*, 108 Atl. (Pa.) 629 (1919).

⁴⁸ *Morrison v. Lafayette*, 184 Pac. (Col.) 301 (1919).

former county highways had become part of a state highway, it was held that the county still had the obligation of repair.⁴⁹

VIII

POWERS

While it is clear that the power of regulating the charges of public utilities is in the state,⁵⁰ it has nevertheless been held in *City of Denver v. Mountain State Telephone Company*⁵¹ that a city which has been given full home-rule powers may exercise this power of regulating rates without express authority from the state.

In *St. Hedwig's Industrial School v. Cook County*⁵² it was held that the city might, by contract, pay a certain amount per month for the support and teaching of children of the city in the industrial school. Wherever the city has entire control over the teaching in the school, and over the treatment of the children, this would seem to be correct; otherwise it appears to be an appropriation of money for private purposes.⁵³

In *Kirksey v. Wichita*⁵⁴ the court asserted the power of a city by ordinance to provide for the removal of all house waste and offal, even though it contained things which were still valuable for food.

IX

PROPERTY AND FUNDS

The city having raised funds for a certain purpose, cannot divert them to other purposes. Thus a school fund cannot be diverted to the general purposes of the city,⁵⁵ nor can a fund raised to repair roads be diverted to a general fund.⁵⁶

Where land has been dedicated to a certain public purpose, it cannot be diverted from that purpose and used for another; for

⁴⁹ *Com. v. Dickey*, 262 Pa. 121, 104 Atl. 870 (1918); *Dougherty v. Black*, 262 Pa. 230, 105 Atl. 82 (1918).

⁵⁰ *Kalamazoo v. Titus*, 175 N. W. (Mich.) 480 (1919).

⁵¹ *Denver v. Mountain States T. & T. Co.*, 184 Pac. (Col.) 604 (1919).

⁵² *St. Hedwig's Industrial School v. Cook County*, 289 Ill. 433, 124 N. E. 629 (1919).

⁵³ *Hitchcock v. St. Louis*, 49 Mo. 484 (1872).

⁵⁴ *Kirksey v. Wichita*, 103 Kan. 761, 175 Pac. 974 (1918).

⁵⁵ *Miami B. & T. Co. v. Broward County*, 80 So. (Fla.) 307 (1918); *Hylan v. Finegan*, 105 N. Y. Misc. 685, 174 N. Y. Supp. 45 (1919).

⁵⁶ *Dickinson v. Blackwood*, 184 Pac. (Okla.) 582 (1919).

instance, a park cannot be changed into a boulevard.⁵⁷ If, however, the property has ceased to be used for a public purpose, or if property is held by the city which never was dedicated to a public purpose, it may be sold or leased by the city at its will,⁵⁸ and its control over the property cannot be taken away by mandamus.⁵⁹ So where the title to a highway is in the city on vacating the highway the city may sell the land, if no private rights or easements prevent.⁶⁰

Unused public land of the city may be leased to a private person for any use which does not interfere with the city activities. For instance, land which is part of a park, but not necessarily used for the moment for park purposes, may be leased for beautiful gardens⁶¹ or for a museum.⁶²

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HARVARD LAW SCHOOL.

⁵⁷ *MacLachlan v. Detroit*, 175 N. W. (Mich.) 445 (1919).

⁵⁸ *Islip v. Havemeyer Point*, 224 N. Y. 449, 121 N. E. 351 (1918).

⁵⁹ *People v. Malone*, 175 N. Y. Supp. (Misc.) 465 (1919).

⁶⁰ *Krueger v. Ramsey*, 175 N. W. (Ia.) 1 (1919).

⁶¹ *International Garden Club v. Hennessy*, 104 N. Y. Misc. 141, 172 N. Y. Supp. 8 (1918).

⁶² *Williams v. Gallatin*, 108 N. Y. Misc. 187, 178 N. Y. Supp. 148 (1919).

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THE LAW SCHOOL. — A tablet has been put up in the reading room of Langdell Hall containing an original copper plate of a portrait of the late Professor John Chipman Gray. By gilding, the plate is preserved from rust and made into a permanent portrait. One of the etchings from this plate has been hung in the alcove in Austin Hall just above the place where for many years Professor Gray was accustomed to sit. He chose this place that he might be accessible to students seeking advice and information. The tablet and engraving are the gift of Professor Gray's family. "*Qui autem docti fuerint fulgebunt quasi splendor firmamenti et qui ad justitiam erudiunt multos quasi stellae in perpetuas aeternitates.*"

WINDING UP PROFESSIONAL PARTNERSHIPS. — The recent case of *Stem v. Warren*¹ in New York raises important questions concerning

¹ Two firms of architects, Reed & Stem and Warren & Wetmore, entered into a partnership agreement to devote their joint labor and talent to the performance of such architectural work as might be entrusted to them by the N. Y. Central & H. R. R. Co. in connection with the Grand Central Terminal Improvements, New York City. The profits and losses of the joint adventure were to be shared equally by the firms. Reed was to be the executive head of the work. At the same time a contract was entered into with the railroad company. It was provided in both agreements that in the event of a vacancy in the position of executive head, due to the death, resignation, or removal of Reed, the company should appoint his successor from among the associated architects. The railroad reserved the right to terminate the employment of the associated architects at any time by notice in

the rights and duties of surviving partners of professional firms dissolved by the death of a member, especially in connection with contracts for professional services made prior to the dissolution. Surprisingly few cases dealing with professional firms are found in the reports, and practically all of these have to do with law partnerships. The dissolution of a firm by the death of a partner or otherwise does not relieve the partners or their legal representatives from liability on ordinary commercial contracts.² If however, the contract was one for personal services, it may, under certain circumstances, be terminated. If the personal services of the deceased partner were contracted for, or his character was relied upon, the other contracting party may at his option terminate the contract.³ A client who employs a firm of lawyers, without stipulating for the services of any particular member of the firm, has the option of terminating the contract of employment upon the death of one of the partners, on the ground that the contract impliedly entitles him to the joint activity and services of all the partners. But the option is for the client alone, and if he is willing to go on with the contract, the surviving partners are under an obligation to fulfill it.⁴

In winding up the affairs of a dissolved partnership, the general rule is well settled that the surviving partner is not entitled to any compensation.⁵ The rule is subject, however, to many exceptions. Compensation

writing. From 1904 till 1911, the firm designed numerous buildings under contracts awarded by the company. In November, 1911, Reed died, and the railroad, at the suggestion of the firm of Warren & Wetmore, terminated the employment of the associated architects, and entered into a new contract with Warren & Wetmore to complete the unfinished work. Subsequently the company awarded to the same firm the contract for the Biltmore Hotel, the preliminary plans for which had been made by the associated architects before the death of Reed. No dispute arises over the profits made up to the end of 1911. Action by Stem, as surviving partner of Reed & Stem, against Warren & Wetmore, the representative of Reed being joined as a co-defendant, for an accounting of the subsequent profits. *Held*, that Stem and the representative of Reed are entitled to share in the profits of the work assigned to the firm prior to and unfinished at the time of Reed's death; also that Warren & Wetmore should account for the use of the preliminary plans of the Biltmore Hotel to the extent of 1% of the cost of the hotel. (125 N. E. 811 (N. Y.))

² *Ayres v. C., R. I. & P. R. Co.*, 52 Ia. 478 (1879); *Rust v. Chisolm*, 57 Md. 376 (1881); *Madden v. Jacobs*, 52 La. Ann. 2107, 28 So. 225 (1900).

³ *Strange v. Lee*, 3 East, 484 (1803); *Fulton v. Thompson*, 18 Tex. 278 (1857).

⁴ *Griffiths v. Griffiths*, 2 Hare, 587 (1843); *Little v. Caldwell*, 101 Cal. 553, 36 Pac. 107 (1894); *Clifton v. Clark*, 83 Miss. 446, 36 So. 251 (1904).

⁵ The classic statement of the rule is found in *Beatty v. Wray*, 19 Pa. St. 516 (1852). The law will imply a promise, it is held, on the part of each partner to wind up the business in the event of the death of his associate. The court will not undertake to appraise the value of the services of the respective partners. "Every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartners, and without comparison of values; for services to the firm cannot, from their very nature, be estimated and equalized by compensation of differences . . . If this be the nature of services to the firm before dissolution, it is the nature of services to the firm after it." In *Colgin v. Cummins*, 1 Port. (Ala.) 148 (1834), the court bases the rule on the fact that the property of the surviving partner has by his own act become mingled with the property of the deceased, and it is his right and his duty to do all the acts necessary to effect a separation. The harshness of the rule in certain cases was recognized in *Gyger's Appeal*, 62 Pa. St. 73 (1869). In North Carolina the rule has been repudiated and a surviving partner allowed compensation for his services in an ordinary case of winding up. *Royster v. Johnson*, 73 N. C. 474 (1875). The modern tendency is illustrated by *Thayer v. Badger*, 171 Mass. 279, 50

will usually be allowed when the business has been carried on over a considerable period of time in order to complete existing contracts,⁶ to enable it to be closed up advantageously,⁷ to preserve the good will and sell the business as a going concern,⁸ or pending proceedings for winding up by the court.⁹ It may also be allowed where the continuance, though unnecessary, has proved profitable.¹⁰ Moreover, the rule denying compensation applies only to cases where the business can be wound up speedily and the surviving partner is called upon to perform only the ordinary tasks of collecting claims, paying debts, selling the property of the firm, and distributing whatever surplus may remain.¹¹ If in addition to these ordinary services he performs any service of an unusual or extraordinary nature, he will always be compensated therefor according to the character and value of such service.¹²

If the surviving partner, instead of winding up the business, continues it, and employs therein the assets of his deceased partner, and profits are made by such continuance, the question arises as to the proportions in which the surviving partner and the representatives of the deceased shall share in these profits. The survivor may have continued the business in the belief that he had a right so to do, or he may have been conscious of his wrongful conduct. Ordinarily one who employs the property of another wrongfully and thereby subjects it to the risk of loss is not entitled to lay claim to any part of the increase of such property. But a distinction may properly be made in partnership cases. Here the property was originally embarked in the business by its owner, and the wrong of the survivor consists in his failure to make at the proper time a segregation of this property from property of his own. Lord Eldon, in a series of cases at the beginning of the nineteenth century, established the principle

N. E. 541 (1898), where the court, by Holmes, J., said that such questions should be dealt with on their particular circumstances rather than by absolute rules. Under the UNIFORM PARTNERSHIP ACT, § 18 (f), a surviving partner is entitled to "reasonable compensation" for his services in winding up partnership affairs.

⁶ *Schenkl v. Dana*, 118 Mass. 236 (1875).

⁷ *Griggs v. Clark*, 23 Cal. 427 (1863).

⁸ *Cameron v. Francisco*, 26 Oh. St. 190 (1875); *Peck v. Knapp*, 137 N. Y. Supp. 70 (1912).

⁹ *Livingston v. Livingston*, 26 D. L. R. 140 (1916).

¹⁰ *McElroy v. Whitney*, 12 Ida. 512, 88 Pac. 349 (1906).

¹¹ *Maynard v. Richards*, 166 Ill. 466, 46 N. E. 1138 (1897); *Lamb v. Wilson*, 3 Neb. (Unof.) 496, 92 N. W. 167 (1902).

¹² *Hite's Heirs v. Hite's Ex'rs*, 1 B. Mon. (Ky.) 177 (1841). The surviving partner managed over a number of years a large landed estate owned by the partnership, prosecuted and defended lawsuits, and disposed of the property. The court called the services extraordinary and perplexing. In *Zell's Appeal*, 126 Pa. St. 329, 17 Atl. 647 (1889), the surviving partner recovered, more than twenty years after the dissolution of the firm, a large amount of money by setting up a dubious claim, which was bought off after four years of litigation. In *Maynard v. Richards*, *supra*, affirming 61 Ill. App. 336, the surviving partner gave practically all his time for six years to the prosecution of an action for breach of contract in behalf of the firm. The court held the services to be "so extraordinary and unusual as to give rise to the presumption of an implied contract. The long and successful prosecution of the suit may be regarded as service in excess of the mere winding up of the partnership business." And in *Condan v. Callahan*, 115 Tenn. 285, 89 S. W. 400 (1905), the completion of a valuable railroad construction contract by the surviving partner was held to be service in excess of a mere winding up, for which he was entitled to compensation.

that the surviving partner who continues the business and makes profits thereby is entitled, in addition to the share of the profits which he can claim because of his capital employed in the business, to compensation for his skill and services in conducting the business.¹³ And the right to compensation is not contingent upon the absence of any conscious wrong on the part of the surviving partner, although his conduct is a circumstance to be considered in determining the amount of his compensation. In the middle of the century several English cases broadened the rule so as to include more than mere compensation for services. An inquiry was directed to determine how much of the subsequent profits could be attributed to the skill and services of the surviving partner and how much to the capital employed in the business.¹⁴ It is this extended rule which the English Partnership Act of 1890¹⁵ has probably codified. In the

¹³ *Crawshay v. Collins*, 15 Ves. Jr. 218 (1808), 2 Russ. 347 (1826). The case was before the court of Chancery for more than twenty years. On its final appearance before him, Lord Eldon said that claims for personal labor and other just allowances could be taken into consideration in the account. *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 208 (1810); *Cook v. Collingridge*, Jac. 607 (1822); *Brown v. De Tastet*, Jac. 284 (1821). In this last case Lord Eldon said: "It cannot be denied that if the business be such, that on the death of the party other persons are concerned in aiding it by the application of their skill, their services, and their money, a great deal may be included under the head of just allowances."

¹⁴ *Willett v. Blanford*, 1 Hare 253 (1842). In discussing the division of the profits made subsequently to the dissolution, Wigram, V. C., said that no general rule was applicable to all the cases. "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties." In *Simpson v. Chapman*, 4 De G., M. & G. 154 (1853), Lord Turner expressed his entire concurrence in the views of Wigram, V. C., which he described as "a most accurate and masterly summary of the principles by which the court is to be guided in cases of this description." And he emphasized the necessity of distinguishing clearly between the profits which were attributable to the skill and industry of the surviving partner and those due to the capital of the deceased. In *Wedderburn v. Wedderburn*, 22 Beav. 84 (1856), the business was in a precarious condition upon the death of one of the partners. Insolvency would have resulted from an attempt to wind it up immediately. Instead the surviving partners struck a book balance and found what was due to the deceased. This amount was ultimately paid to his children. They continued the business for more than thirty years, during which time the difficulties of the firm were surmounted and great profits realized, in which the children of the deceased partner claimed the right to share. The Master of the Rolls, Sir John Romilly, held that this was not a case where the profits were realized from the continuance in the business of the assets of the deceased, but rather from the great ability, skill, and reputation of the surviving partners. He concurred with Lord Turner's approval of the doctrine laid down in *Willett v. Blanford*, *supra*. But in *Mellersh v. Keen*, 27 Beav. 236 (1859) and *Yates v. Finn*, 13 Ch. Div. 839 (1880), the court reverts to the old form of stating the rule, *i. e.*, the surviving partner will be given an allowance for his services.

¹⁵ 53 & 54 VICT. c. 39, § 42. The act provides that when the capital of a deceased or retiring partner is continued in the business, in the absence of any agreement, the retiring partner or the representative of the deceased may at his option demand interest on such capital at the rate of five per cent, or "such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets." See LINDLEY, PARTNERSHIP, 7 ed., 635: "If it can be shown that, having regard to the nature of the business or other circumstances, the profits which have been made cannot be justly attributed to the use of the capital or assets of the late partner, his *prima facie* right to share such profits will be effectually rebutted." In *Page v. Ratliffe*, 75 L. T. 371 (1896), the court in applying § 42 gave it this interpretation and held that a considerable portion of the profits was due to the

United States the trend of recent cases is in the direction of the modern English view, and the surviving partner will be entitled to the profits which can reasonably be attributed to his ability and services.¹⁶

In the case of professional firms the sole source of income is usually the skill and services of the partners, and the winding up of such firms consists generally in fulfilling contracts for personal service made prior to the dissolution. Little capital is employed, and the subsequent profits can therefore be attributed almost entirely to the services of the surviving partner. If the rule mentioned in the preceding paragraph were to be applied to such cases, the bulk of these profits would go to him. The more recent American cases recognize the justice of such a division, but they go no further than to hold that the survivor is entitled to compensation for his services in completing the contracts.¹⁷ Of course the amount

exertions of the surviving partner and was not attributable to the share of the deceased partner's capital. The most recent case on the point is *Stevenson v. Aktiengesellschaft*, [1918] A. C. 239. A partnership between an English and a German company was dissolved by the outbreak of war, but the English partner continued to use the plant and machinery of the partnership in carrying on business. It was held that he must account to the German partner for the profits made after dissolution, but Lord Finlay, L. C., said: "The German partner is, of course, not entitled to any share of the profits attributable to the skill or industry of the English partner."

¹⁶ *Robinson v. Simmons*, 146 Mass. 167, 15 N. E. 558 (1888). The court said: "We think a just rule to be deduced from the authorities is, that, where there are no circumstances which render its application inequitable, the profits should be divided according to the capital, after deducting such share of them as is attributable to the skill and services of the surviving partner." In *accord*, *Rowell v. Rowell*, 122 Wis. 1, 99 N. W. 473 (1904); *Whittaker v. Jordan*, 104 Me. 516, 72 Atl. 682 (1908). In *Phillips v. Reeder*, 18 N. J. Eq. 95 (1866), the court refused to allow the retiring partner to participate in the subsequent profits in any degree on the ground that the main contribution to the success of the firm was the skill, time, and diligence of the partners. Interest on the capital from the date of dissolution was decreed. *King v. Leighton*, 100 N. Y. 386, 3 N. E. 594 (1885), is not opposed to these authorities. In that case the retired bankrupt partner had never contributed his personal services to the business, which was managed entirely by the partner who continued the business after the dissolution. The court properly held that the latter was not entitled to any additional compensation, since the respective contributions of the two partners after the dissolution were the same as before. The UNIFORM PARTNERSHIP ACT, § 42, follows the English Partnership Act, and allows the retiring partner or the representative of a deceased partner the option of demanding the value of his interest at the date of dissolution plus interest, or in lieu of interest, "the profits attributable to the use of his right in the property of the dissolved partnership."

¹⁷ In *Denver v. Roane*, 99 U. S. 355 (1878), the court suggested that there might be reason for applying a different rule to the winding up of professional partnerships from the one applicable to commercial partnerships. In the case *sub judice*, however, an agreement between the partners provided for the apportionment of fees in case of the death of a partner. In *Sterne v. Goep*, 20 Hun (N. Y.), 396 (1880), the court characterized the rule as harsh which would require the surviving partner to devote his professional skill and service over a possible period of years to the closing up of pending litigation, for the benefit equally of the estate of the deceased partner. In *Lamb v. Wilson*, *supra*, the right of the surviving partner to compensation for his skill and labor is said to be founded "upon the plainest principles of equity and justice, especially when applied to partnerships among professional men, where the profits are almost wholly the result of professional skill and labor." In *accord* with these cases, *Carrere v. Whaley*, 17 S. C. 595 (1882); *Justice v. Lairy*, 19 Ind. App. 272, 49 N. E. 459 (1897); *Roth v. Boies*, 139 Ia. 253, 115 N. W. 930 (1908); *Jones v. Marshall*, 24 Ida. 678, 135 Pac. 841 (1913). *Contra*, *Little v. Caldwell*, 101 Cal. 553, 36 Pac. 107 (1894), in which the court refused to make any distinction between professional and commercial firms as regards compensation for winding up.

of such compensation may be made large enough to include all or almost all of such profits, but the rule is not phrased in such a way as to entitle the surviving partner, as a matter of law, to all of the subsequent profits. Some participation in these profits by the estate of the deceased partner seems inevitable, for the contract is itself an asset of the firm, and the estate as well as the surviving partner remains liable for the proper performance of it.¹⁸

In the case of *Stem v. Warren*, referred to above, two firms of architects, Reed & Stem and Warren & Wetmore, entered into a partnership to perform certain work awarded to the joint adventure by a railroad company. In both the partnership contract and the contract with the railroad the intention of the parties was clearly shown that the employment should not be terminated in the event of the death of the partner Reed, who was chosen as the executive head of the work. The court properly held that the death of this partner, which occurred in the course of the work, did not *ipso facto* terminate the contract between the firm and the railroad company. It lay with the railroad alone to say that the personal services of the deceased partner were so important an element in the contract as to entitle it to terminate the contract on the ground of failure of consideration. Until the railroad indicated its attitude, it was the duty of the surviving partners to continue under the old contract. The initiative taken by the firm of Warren & Wetmore in inducing the railroad company to terminate the old contract and to award it a new contract to complete the unfinished work was a gross breach of the fiduciary relation,¹⁹ from which it very properly was not permitted to profit. But in one important respect the judgment of the court is open to serious doubt. In the accounting the firm of Reed & Stem was allowed to participate in the profits earned subsequently to Reed's death equally with the firm of Warren & Wetmore. Clearly Stem, the surviving partner of the firm of Reed & Stem, was entitled to participate in these profits to the extent originally contemplated, although, by reason of the wrongful conduct of the other firm, he did nothing to aid in completing the unfinished work. But in view of the fact that the profits earned after the death of Reed were attributable to the skill and services of the surviving partners, it seems inequitable to allow the Reed estate to share to the same extent as Reed himself would have shared had he continued to live and devote his time and talent to the work.

¹⁸ See *McClellan v. Kennard*, 9 Ch. App. 336 (1874); *Clifton v. Clark*, 83 Miss. 446, 36 So. 251 (1904). But in the latter case the court admitted that the surviving partner might have an equitable claim for a larger share of the compensation received for his services rendered after the death of his partner.

¹⁹ Partnership furnishes one of the strongest cases of the fiduciary relation. A surviving partner is bound to act in perfect fairness and good faith, according to the highest standard of honor. *Freeman v. Freeman*, 136 Mass. 260 (1884). A partner who clandestinely competes with the firm holds whatever he secures in trust for the partnership. *Featherstonhaugh v. Fenwick*, *supra*. He cannot upon a dissolution of the firm appropriate to himself all the partnership assets, or transfer to a third party the share of his former partner. *Pearce v. Ham*, 113 U. S. 585 (1885). Nor can a surviving partner extinguish a contract belonging to the partnership and substitute for it a contract in the profits of which he alone is to participate. *Little v. Caldwell*, *supra*; *Clifton v. Clark*, *supra*.

FINALITY OF DECISION FOR PURPOSES OF APPEAL. — A principle inherited from the common law,¹ and to-day given wide effect by statute,² is that appeal or error will lie only after final decision.³ But there seems to be much uncertainty as to just what a final decision is.⁴ The great trouble is with the word "final." In its most common sense it means last, but last is a relative term; it invites the inquiry — last as to what? The answer may be expressed, *e.g.* "the final year of the war," but frequently it must be implied from the context, *e.g.* "the final match" — the context showing final to mean "last in a tournament." That is the case with "final decision" as used above. With different contexts it might well mean several different things. Now the true context seems clear enough. The rule was formulated to answer the question whether appeal should be allowed from the various decisions rendered in the progress of an action. The answer is that appeal may be taken only after final decision. The context shows that final can only mean "last in the action."⁵

And authority supports this analysis. In one of the earliest cases on the subject one finds that "it was resolved that no writ of error lies till the last judgment."⁶ To be sure, the orthodox modern definition of final decision is "one that completely determines the action,"⁷ but this is just another way of describing the same legal situation, since the decision which completely determines must be "last in the action."⁸

¹ *Metcalfe's Case*, 11 Coke, 68 (1614); *Samuel v. Judin*, 6 East, 333, 102 Reprint 1314 (1805).

² See, for example, JUD. CODE, §§ 128, 210, 237; COMP. STAT., §§ 1120, 1000, 1214, providing respectively that the Circuit Court of Appeals will review certain final decisions of the District Courts, that the Supreme Court will review certain other final decisions of the District Courts, and will review certain final decisions of the highest court of a state.

³ The rule originated in connection with writs of error, and was later applied to appeals at law. Originally it did not apply in equity, but modern statutes have generally made it applicable both at law and in equity. Does it apply to *certiorari*? Apparently not at common law, but it frequently seems to in the United States. See POWELL ON APPELLATE PROCEEDINGS, 348; JUD. CODE, § 237; COMP. STAT., § 1214, providing for *certiorari* in certain cases after final decision.

⁴ In *In re Jerome*, [1907] 2 Ch. 145, 146, Cozens-Hardy, M. R., after commenting on the difficulty of this question, remarked that recently the full bench had been summoned to lay down some rule on the matter, but declined so to do, confining itself to the decision of the particular case, and this course he proposed to follow.

And in *McGourkey v. Toledo, etc. Ry. Co.*, 146 U. S. 536, 544 (1892), it is stated: "Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. The cases, it must be conceded, are not altogether harmonious."

⁵ And the policy of the rule is also most fully carried out by such interpretation. That policy has been stated by no less an authority than Marshall as being to prevent the delay and expense incident to repeated trials of error on appeal from decisions reached in the progress of an action, but instead to have one trial of error on appeal from final decision. See opinion of Marshall, C. J., in *United States v. Bailey*, 9 Pet. (U. S.) 267, 272 (1835); *McLish v. Roff*, 141 U. S. 661, 665 (1891). This rule also renders unnecessary trials of error in those cases in which the court itself later corrects its own errors, or in which the aggrieved party nevertheless recovers.

⁶ See *Metcalfe's Case*, *supra*, 70.

⁷ *Belt v. Davis*, 1 Cal. 134 (1850); *Bostwick v. Brinkerhoff*, 106 U. S. 3 (1882). See FREEMAN ON JUDGMENTS, § 16.

⁸ Whichever expression is used, one limitation should be noted. A decision is regarded as final although all the matters involved in the case are not settled, provided

"Last in the action," however, seems the better definition, as it brings out the true meaning of final,⁹ whereas the orthodox definition not only effectively conceals that meaning, but actually leads to confusion with another meaning of the word. This other meaning will be seen if one compares the use of the word in the expressions "the final game of a series" and "the final result of a series." In the former, final is used in the sense considered above of "last of several," but in the latter it is merely used in an indefinite sense, indicating in general that the matter was finally settled after having long been in doubt. Now the orthodox definition leads one to suppose that a decision is final not because of being last in the action, but because of being a final determination of the action. Indeed this expression is frequently found in the cases.¹⁰ In it of course final is used in the indefinite sense. That is why the orthodox definition leads to confusion with that sense. To be sure where the indefinite sense is applied to "determination of the action"¹¹ no wrong result will follow, since the decision which determines the action is also final in the true sense of last in the action. But in other cases the indefinite sense will bring about wrong results, since many decisions are final in that sense which are not last in the action.

It has been stated above that authority supports the conclusion that the true meaning of final is last in the action. The contrary decisions seem broadly to fall within two classes. In the first place there are those which hold that a decision is final if it involves the immediate payment of money,¹² or determines a property right and is immediately to be carried into execution,¹³ or, more generally, if it "divests some right in such manner as to put it out of the power of the court to place the parties in their original positions after the expiration of the term."¹⁴ Final is here used as indicating irrevocableness of the matter decided. These decisions are final in the same way that a decision to break a bottle is final. This is the sense in which the word is

any further steps necessary to dispose of the action would be ministerial rather than judicial. It is final if it is the last judicial decision in the action, or if it completely determines the action judicially. Thus a judgment by default for damages, which, however, must be assessed by a jury, as in tort, is interlocutory; but where damages are readily ascertainable, as in debt, no interlocutory judgment is necessary. *Maury v. Roberts*, 27 Miss. 225 (1854). See *BLACK ON JUDGMENTS*, § 28. And this is the line used to differentiate those difficult cases in equity where there is a decree settling many of the issues, but leaving the case somewhat open for a reference to a master. See *Lodge v. Twell*, 135 U. S. 232 (1889); *McGourkey v. Toledo, etc. Ry. Co.*, 146 U. S. 536 (1892); *BLACK ON JUDGMENTS*, §§ 44, 45.

⁹ It seems extraordinary how seldom this natural meaning of final as "last in the action" has been pointed out. Only one modern case has been noted which draws attention to this meaning of the word. See *Bossier v. Hollingsworth*, 117 La. 221, 226, 41 So. 553, 555 (1906).

¹⁰ See *Walb v. Eshelman*, 176 Ind. 253, 260, 94 N. E. 566, 570 (1911); *BLACK ON JUDGMENTS*, §§ 21, 22; *FREEMAN ON JUDGMENTS*, § 16.

¹¹ "The final determination of an action" is not a definition of "final decision" but of "final final decision." The true sense of final is used up in saying "the determination of an action" (since final means "last in the action," e.g. "which determines the action"), and to say "the final determination of an action" is to borrow another final from somewhere and use it in the indefinite sense.

¹² See *City of Eau Claire v. Payson*, 107 Fed. 552 (1901).

¹³ See *Forgay v. Conrad*, 6 How. (U. S.) 201, 204 (1848).

¹⁴ See *City of Batesville v. Ball*, 100 Ark. 496, 500, 140 S. W. 712, 714 (1911).

used in statutes providing that certain decisions of a court shall be final,¹⁵ meaning unappealable; but it will hardly be contended that this is the correct sense of final as used in the rule.

Secondly, there are those cases which hold that the determination of a separable or collateral matter is final.¹⁶ In these cases final seems to be used in that indefinite sense just discussed. If that is the correct sense of final, the rule is meaningless. Any decision may be regarded as final in that sense; every decision is final to the extent that it decides something. Why then limit the application of this sense to the case of the decision of a separable matter? Of course if the matter is so separable that it is really a separate action, then the decision last in that action is final.¹⁷ That was the only question seriously considered in the recent case of *Coastwise Lumber and Supply Co. v. United States*,¹⁸ in which an order refusing a petition for the return of books and papers seized in connection with a criminal investigation was held interlocutory. As the petition was made only after the petitioner had been indicted, it could hardly have been held a separate action.¹⁹

¹⁵ See, for example, JUD. CODE, § 128; COMP. STAT., § 1120, providing that certain decisions of the Circuit Court of Appeals shall be final.

¹⁶ See *Cassatt v. Mitchell Coal Co.*, 150 Fed. 32 (1907); *Brush Electric Co. v. Electric Improvement Co.*, 51 Fed. 557 (1892); *Jackson v. Jackson*, 175 Fed. 710 (1909). See WILLIAMS, JURISDICTION AND PRACTICE OF FEDERAL COURTS, c. 20, § 5 *et seq.*

¹⁷ At common law a proceeding in error was technically a separate action. Judgments of reversal have been held final on that account. In substance, however, such a judgment seems interlocutory, and the weight of modern authority is to that effect. *Haseltine v. Bank*, 183 U. S. 130 (1901); *Schlösser v. Hemphill*, 198 U. S. 173 (1906). See POWELL ON APPELLATE PROCEEDINGS, 407.

¹⁸ 259 Fed. 847 (C. C. A., 2d Circ.) (1919).

¹⁹ Commentators frequently state all these views of finality without mentioning any inconsistency between them. Freeman, however, in his work on judgments consistently follows the first view, and classes cases upholding the other views as in the nature of exceptions. See FREEMAN ON JUDGMENTS, § 35. Williams would regard as final a decision final as to some particular matter provided that particular matter could be regarded as a distinct and separate *lis* or controversy. But he adds that the severability is sometimes "artificially imported by method of judicial treatment." See WILLIAMS, JURISDICTION AND PRACTICE OF FEDERAL COURTS, c. 20, § 3.

Upon investigation it is found that much of the supposed authority for the two minority views will not bear critical examination. Local statutes enlarging the common-law rule are frequently found to be involved. This is the case with *Baldwin v. Foss*, 71 Ia. 389, 32 N. W. 389 (1887), cited as authority for the proposition that an order refusing to grant a new trial is final, and with *In re Graef*, 30 Minn. 358, 16 N. W. 395 (1883), cited to show that a decree appointing a receiver (but not settling the issues) is final. Some statements would seem to confine the doctrine that the determination of a separable part of an action is final to cases where the matter determined affects only non-parties to the main litigation, and is quite disconnected from the subject matter of the main litigation. Thus in *Alexander v. United States*, 201 U. S. 117 (1906), while it is held that an order to a witness to produce evidence is interlocutory, there is a *dictum* to the effect that a decision fining a witness for contempt would be final. It seems that cases applying the doctrine in this fashion can be supported on the orthodox view, as the matter decided might well be considered so severable as really to constitute a separate action. And lastly, many of the decisions supposed to support these views can be explained on the ground that further steps necessary to dispose of the case were in essence ministerial only. See note 8, *supra*. This is the case with *Forgay v. Conrad*, note 13, *supra*, *dicta* from which are universally cited in cases departing from the orthodox view.

But on either or both of the two minority views the following decisions have some-

Logically, nothing can be said for these two lines of decisions. Perhaps they may be explained as a straining to depart from the true rule in cases where it works hardship. For it does work hardship in certain cases: there are certain interlocutory decisions which, if erroneous, cause prejudice that cannot be removed by reversal on appeal from final decision.²⁰ The proper remedy would be to amend the rule²¹ so as to allow appeal from interlocutory decisions in those cases. But courts could not do that, so they seem to have reached the same result by applying final in senses quite foreign to the true sense of the rule. Some courts must have realized that they were doing this, for one finds such telltale expressions as "final for purposes of appeal"²² — a sort of constructive finality. And once these other senses are admitted at all, it then becomes necessary to draw fine distinctions to limit their application. The natural result of such a process has been confusion. The state of the law on this subject aptly illustrates the baneful results that follow where courts attempt to accomplish indirectly what they cannot accomplish directly.

BOOK REVIEWS

MARINE INSURANCE: ITS PRINCIPLES AND PRACTICE. By William B. Winter
New York: McGraw Hill Book Company, Incorporated. 1919. pp. 433.

In a form compact and serviceable are here set forth the substance of the author's course of lectures delivered in the School of Commerce of the New York University. Besides treating of the history and theory of this branch of insurance, Mr. Winter explains in full administrative detail the practical management of a modern insurance corporation, in which field he speaks with the authority of his own official connection with one of the largest marine insurance companies in this country. The work is not a law treatise. In a clear and ordered arrangement he outlines the historic growth of marine insurance in this country and shows how its scope has been varied to meet the multiplied requirements of present-day commerce. But even such a manual cannot entirely ignore the controverted historical question of where sea insurance began.

times been held final: decree granting alimony *pendente lite*, *Daniels v. Daniels*, 9 Col. 133, 10 Pac. 657 (1886); *contra Beatty v. Beatty*, 105 Va. 213, 53 S. E. 2 (1906); judgment dismissing an attachment, *Bruce v. Conyers*, 54 Ga. 678 (1875); *contra Cutter v. Gumberts*, 8 Ark. 449 (1848); order appointing a receiver to take possession at once, *Clark v. Raymond*, 84 Ia. 251, 50 N. W. 1068 (1892); *contra Kansas Rolling Mill Co. v. A. T. & Santa Fe Ry. Co.*, 31 Kan. 90, 1 Pac. 274 (1883); order removing or refusing to remove a cause to another court, *McMillan v. State*, 68 Md. 307 (1887); *contra Jackson v. Alabama, etc. Ry. Co.*, 58 Miss. 648 (1881).

²⁰ And the rule also works badly in the case of interlocutory decisions which call for extended accounting that is found to be mere time wasted if the decision is later reversed. This situation has frequently arisen in patent litigation. See *Richmond v. Atwood*, 52 Fed. 10 (1892).

²¹ The rule has been changed by statute in England and in many of the United States. See, for example, JUD. CODE, § 129; COMP. STAT., § 1121, allowing appeal in certain cases from interlocutory orders granting an injunction or appointing a receiver.

²² See *Brush Electric Co. v. Electric Improvement Co.*, note 16, *supra*, at p. 559. And in *Forgay v. Conrad*, note 13, *supra*, at p. 203, the court, speaking through Taney, C. J., although holding the decree final, said: "Undoubtedly it is not final in the strict technical sense of the term."

Mr. Winter rather inclines to the view of English writers like Martin, the historian of the London Lloyds, who speak chiefly of the sources in northern Europe, and treat the Hanseatic League and countries nearer Great Britain as the pioneer insurers of sea risks. But the first mention of a policy of insurance in England is found among the Admiralty records, in the case of *Broke v. Maynard*, "Select Pleas of Admiralty" (Selden Society), Vol. II, 47, in which a suit in admiralty was brought in 1547 on a policy written in Italian, but signed in English, insuring a vessel from Cadiz to London. Like the Italian origin of the word "policy," the circumstance that this insurance contract was according to a form in that language, though signed by underwriters with English names, tends to show the early prominence of Italy in this new field. The fact that insurance in Genoa had reached such a point of development that a local statute was passed prohibiting insurance of foreign vessels, and that after what may be supposed to have been a full trial of this protective measure it had to be repealed in 1408 — all demonstrate how early such insurance was organized and in successful activity in Italian seaports. Mr. Winter tells us of the legislation of Barcelona (1435-1484), which being dispersed over Europe together with the Consolato, became gradually accepted as models of insurance legislation.

But the historical introduction has also an interesting summary of marine underwriting in this country. Marine insurers, as individuals and partnerships, were operating in New York in 1759. The first incorporation was in 1792, when the Insurance Company of North America was chartered in Philadelphia. The gradual disappearance of local marine insurance corporations between 1870 and 1900 is attributed to the effects of foreign competition, with the advantage of the uniform British policy and the financial ability of the London insurers to write large amounts.

As has been noted, this is not a treatise on Insurance Law. But it has a high place in supplying to lawyers and courts the practical results of underwriting. In the preface to the first edition of his work on Insurance in 1823, Mr. Phillips gracefully recorded his great obligations to Christian Mayer, President of the Patapsco Insurance Company of Baltimore, and to George Cabot, President of the Boston Marine Insurance Company. Ever since Lord Mansfield's day the law of marine insurance through text writers and the courts has been kept in touch with the practical methods and usages of underwriting.

The work follows the popular familiar words of business and underwriting. But for that reason these terms are liable to give an erroneous impression. Mr. Winter writes (p. 144) of "collision," that it may be vessel with vessel or one vessel with an iceberg "or with some floating or stationary object." This seems to extend the term beyond its accepted legal purport. While the decisions in this country do not narrow it as closely as in England, where it is confined to the contact of two objects both of which are navigable (*Chandler v. Blogg*, [1898] 1 Q. B. 32), the term in insurance is still limited to the vessels' impact with other *floating* objects, and does not generally apply to impact with those that are stationary. (*Newtown Creek Towing Co. v. Aetna Ins. Co.*, 163 N. Y. 114, 116.)

The chief interest of the book is the topic of War Insurance, where many new and important heads are briefly mentioned. The underwriters' problems were rendered more intricate by the British exercise of the right of search, leading to efforts by neutral carriers to escape such delays by guarantees of the cargo's neutrality through export licenses at ports of shipment. Here is opened an additional field for new treatment of the law of marine insurance, connected with that of prize.

The author's comments on the effects of the war are of especial interest in his reference to Government War Insurance Bureaus. The administrative powers of the United States, as well as of Great Britain, entered into direct

competition with private insurers. This naturally required both skilled underwriting experience and delicate management, so as not to demoralize the underwriting market. It is pleasant to read from Mr. Winter, as from one who might have stood as an adverse critic, that: "The government war insurance schemes were therefore welcomed by the underwriting fraternity, and their conduct was entrusted to some of the ablest underwriters in the various countries" (p. 279). Happily, this led to a rare and exceptional outcome of governmental activity in a new field. In the United States the bureau apparently has proved profitable to the government, without injurious effects to the commercial insurer.

The author also touches on the subject of General Average, and considers the recurring suggestion that later maritime developments might perhaps do away with this intricate detail in fixing the final incidence and apportionment of losses. From a legal and theoretical standard such a dropping of the final settlement would leave the actual situation of the interest involved at very loose ends. The general average adjustment generally affects the insurers. But it applies also to all the associated interests, both insured and uninsured, in the common adventure, who have shared in the common peril or incurred sacrifices to which others should contribute. Not to have this concluding adjustment would leave the parties with rights denied satisfaction, and might lead to resort to courts instead of to this ancient remedy through adjustment by experts. But Mr. Winter also brings up a very practical consideration to reinforce the legal side of the question. This is that the law of general average has had "a salutary effect in preventing the unnecessary destruction of property through jettison, or otherwise to save vessels in positions of peril" (p. 300). Any attempt at a substitute for it seems remote and speculative under conditions of private ownership of vessels and cargoes.

In the appendix are printed various standard insurance and average forms with the text of the British Marine Insurance Act of 1906, followed by the Gambling Policies Act of 1909, with our Harter Act of 1893, and the York-Antwerp Rules of 1890. The book is well indexed. It should find place in both professional and business libraries.

HARRINGTON PUTNAM.

NEW YORK.

BUSINESS LAW, AN ELEMENTARY TREATISE. By Alfred W. Bays. New York: The Macmillan Company. 1919. pp. ix, 311. 8vo.

BUSINESS LAW, A TEXT-BOOK FOR SCHOOLS OF BUSINESS ADMINISTRATION. By Thomas Conyngton and Louis O. Bergh. New York: The Ronald Press Company. 1920. pp. xix, 431. 8vo.

Every year since the opening of the twentieth century has witnessed the production of from two to half a dozen books on business law intended for the use of business students. Though they differ widely in their power for mischief — for the little information they give the layman is certainly a dangerous thing — all of them have a certain family resemblance, which begins to be apparent in the titles and runs through the prefaces, tables of contents, mechanical features and style, down to the very end of the index. A word on some of these features as exemplified in two of the latest, and on the whole two of the best, of these texts may be suggestive to the lawyer as well as to the teacher of business law.

The title "Business Law" seems to have entirely superseded the older "*Lex Mercatoria*," of which Malynes (1622) and Bewes (1751) are the exponents, as well as the later "Mercantile Law," on which John William Smith's Compendium (1834) was the best known, and "Commercial Law" the popular title of

most of such books in the latter half of the nineteenth century. It may be stressing a point unduly to see reflected in these titles fundamental changes in the whole outlook of the authors on their subjects. But it is a fact that they are no longer dealing with the law of a particular class in the community, as they did in Holt's day, nor with a distinct part of the law on which the marks of a foreign brand are still discernible, as they did after Mansfield's death, nor even with the law governing a particular type of pursuit of constantly increasing importance, — commerce. They attempt to deal with every kind of transaction that has a place in the economic world. In other words, they attempt to summarize practically the entire field of law. At least it would be easier to enumerate the omissions, such as family law and certain phases of criminal law, than to enumerate the inclusions. Hence, all of the better written of these books begin with an apology and end by making a more or less arbitrary selection of legal rules and principles from text-books on every branch of the law. The two most recent books attempt to cover Contracts, Agency, Sales, Negotiable Instruments, Corporations, Partnership, Property. That of Conyngton and Bergh adds chapters of Insurance, Suretyship and Bankruptcy as well as twenty pages of highly explosive "forms" not sufficiently labeled with danger signs. Within each of the subjects the books differ widely in the topics chosen for elucidation. Yet if we consider the widely different histories of these books their agreement so far as it goes, in the selection of topics is quite significant. Mr. Bays' book comes from the pen of a teacher of experience who has already given us a whole series of books on the topics covered as well as the most pretentious case book on the subject that has so far appeared. (It is interesting that the case method is being widely used in the teaching of business law. Besides Mr. Bays' book, those of Reed, Pierson and Callender and Huffcut and Woodruff [Contracts] are being used.) The other book is a condensation, or rather an adaptation, of a work that appeared a few years ago as a manual for businessmen rather than a schoolbook. A glance at the scope of the other works of this type — they are all collected in *The Journal of Political Economy*, volume xxiii, 529 ff., and volume xxviii, 113 ff. — shows a gradual approximation, not without some queer deviations, to the scope of these books.

The significance of the trend of these books seems to be this: that the writers while ostensibly piecing together bits of a lawyer's library for a business man, are unconsciously doing a far more important piece of work. They are analyzing business relations and bringing together the raw material for a study of how the law affects or serves business. Such studies come tantalizingly near to furnishing a real contribution to jurisprudence, but they stop short. May we not expect some such service eventually from our graduate schools of business administration? It is only by subjecting the actual workings of business to a scientific analysis that we can hope to understand just how the law works or fails to work in life.

NATHAN ISAACS.

THOUGHTS ON THE UNION BETWEEN ENGLAND AND SCOTLAND. By A. V. Dicey and R. S. Rait. New York: The Macmillan Company.

This book is an interesting example of the light that can be thrown by legal analysis upon some of the central problems of political science. It has all the characteristic marks of Professor Dicey's work — a superb clarity, a positive instinct for the essentials, and a command of the relevant materials that is in a high degree enviable. The authors have set out to examine the causes of the success which attended the Legislative Union of 1707. It is an interesting problem. Few nations have had a history more full of rivalry and warfare than the partners to that famous compact. From the bitterness of the past, from sepa-

rate legal and religious systems there had to be built a single state, even while the distinctiveness of the two nationalities was to be preserved. The effort was successful; and it is for the most part an explanation of that success that the authors essay. They give us what is by far the most succinct account of the main features of Scottish parliamentary government before 1707. Mainly it is a government elected by the Lowland freeholders and with a relation to the administrative process that is entirely singular in English history. What rendered legislative union essential was the Revolution of 1688. Though the Scottish Parliament never became the focal point of national life — that honor was reserved for the General Assembly of the Presbyterian Church — it did, after 1688, receive an immense impetus of power. Union was necessary, from the English standpoint, for the sake of uniformity, and to avoid the difficulties the Hanoverian succession would inevitably have raised. To Scotland it was essential in the interest of commercial prosperity. The antagonism to the union was intense; and it is of interest that its root should have been a revival of Scotch nationalism. What secured the triumph was the superb statesmanship of those who drafted the measure. In law and in religion they gave the Scottish Parliament all the guarantees that pride and self-interest might desire, at the same time that they gave Englishmen certain special advantages they had long desired. The act is a revolutionary document. It created a single state from two kingdoms. It placed the government of Scotland under the power of a predominant and sovereign partner. Nor did the act work well at the outset. From 1707 until 1760 it made its way to popularity only with grave difficulty. There was political unity without moral agreement. It was not until the next half-century that the spiritual union of the two civilizations was secured.

The authors rightly point out that the act of union has had a success without adequate historical parallel. It preserved intact the essence of Scottish nationality, while it gave to Scotland the superior benefits of English administration. What will occur to the reader is the different history of the Irish Union. The authors do not mention it, though doubtless it is in their mind. If it is their inference that what has been true of Scotland could be made true of Ireland, the answer surely is that not even the period (1886-1905) of economic conciliation had any sensible influence. They might argue that the statesmanship of 1707 was absent in 1800; that Ireland should have been given the safeguards upon which Scottish wisdom insisted. But the answer surely is that the only alternative to accepting the Scottish terms was conquest, while Ireland was already conquered. Legislative union is a specific for equals. It does not efface the tragic blunders of seven hundred years.

HAROLD J. LASKI.

JOHN ARCHIBALD CAMPBELL, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 1853-1861. By Henry G. Connor, LL.D., Judge of the United States Court for the Eastern District of North Carolina. Boston and New York: Houghton Mifflin Company. 1920. pp. 310.

This is a sober, careful biography of a judge of the Supreme Court perhaps best known to-day as a concurren in the opinion of the Chief Justice in the *Dred Scott* case. But in the life of Judge Campbell was far more of the quality of drama than is to be found in the lives of most of his fellow justices, even in that troubled time — a quality, one imagines, alien alike to his wish and his temperament.

He was born in Georgia, but practiced law in Alabama, from which state he was called to the Supreme Court at the age of forty-one. To that bench he brought great learning and industry; in his opinions, his conception of the relative positions of state and federal governments is plainly discernible, but

his ideas of constitutional law were philosophic rather than partisan, and, when Lincoln was elected, he opposed the secession of his state with all his force. To prevent the breach, he acted as a negotiator between Seward and the commissioners of the Provisional Government which had been set up by the seceding states, services which proved not only unavailing but, in a personal sense at least, disastrous, for he was blamed by a large part of contemporary opinion and by later historians for the misapprehension of the South as to the alleged promise to evacuate Fort Sumter. To prove that Judge Campbell was not only innocent of any deception but was himself deceived is one of the purposes of his biographer, and Judge Campbell's own account of the negotiations certainly tends to prove the strictures of Nicolay and Hay to be undeserved. Whatever may be the final word as to that controversy, when he saw the crisis could not be averted, Judge Campbell, like so many of his fellow Southerners who had desired to maintain the Union, felt it his duty to follow his state, and accordingly resigned his position as United States Justice, taking later in its place the position of Confederate Assistant Secretary of War. Just before the end of the war he acted again as mediator, being one of the commissioners who met Lincoln in the Hampton Roads Conference. After the war and a short imprisonment, he resumed his law practice in New Orleans, and appeared often before the court in which he had sat. He was of counsel in the Slaughter-House Cases, and that he argued so vigorously against the constitutionality of the Louisiana statute was not due to the accident of a retainer fee, but to his whole-hearted readiness to support what he believed to be the new theory of our government.

Judge Connor narrates this full life with discernment and with appreciation. His discussion of the important cases in which Judge Campbell gave opinions or argued gives an excellent indication of the development of our constitutional law during the period of which he writes. A good part of the book is devoted to Judge Campbell's part in Secession and Restoration. It is perhaps a sorry solace for the disappointments of the unsuccessful statesmen of moderation to reflect that some biographer will adequately demonstrate their farsightedness to a more appreciative generation, but Judge Campbell, if he entertained that thought, was fully justified. Not, indeed, that he needed solace for his own fate; he lived and died greatly respected by his community and his profession. His personality does not seem to have been one to have commanded a warmer affection, save from his intimates. He was reserved, almost austere; tall, thin, with a stern face, remarkable for its keen eyes and formidable brows. If he did not achieve the effect of the walking cathedral to which Webster was compared, at least people were awedly aware of his presence. But he was kind and just, and even his austerity seems to have been only a defense against encroachments upon his legal meditations. His dignity was not so great but that he could cogitate while sitting upon a covered hydrant on the pavement, munching an apple, nor his reserve so unalterable but that he could take the arm of the young law clerk who came upon him in that posture and expound a point of law to him as profoundly as though the young man were a learned court. Nor does his preoccupation, no matter how intense, seem ever to have marred his courtesy.

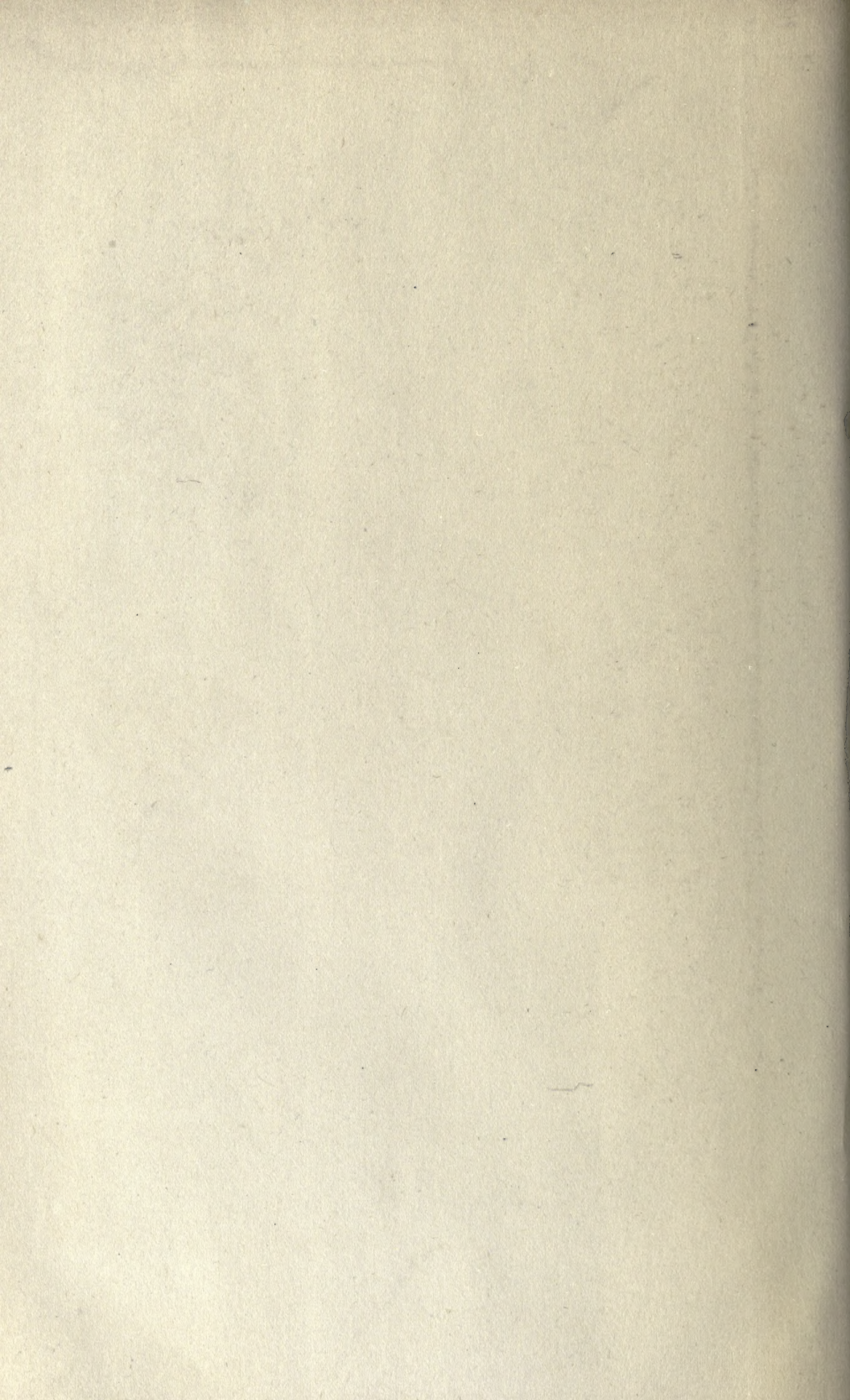
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